

**BEFORE THE
STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
OFFICE OF ADMINISTRATIVE LAW**

**IN THE MATTER OF THE PETITION
OF NEW JERSEY AMERICAN
WATER COMPANY 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-00319-2022 S**

**INTERVENOR PAUL SAVAS' AND PARTICIPANT KAREN MARTIN'S
JOINT POST-HEARING FINDINGS OF FACT AND CONCLUSIONS OF LAW IN
OPPOSITION TO THE PETITION OF NEW JERSEY AMERICAN WATER
COMPANY FOR A DETERMINATION CONCERNING THE FENWICK WATER
TANK PURSUANT TO N.J.S.A. 40:55D-19**

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INTRODUCTION

New Jersey American Water Company (“NJAW”) asks the Board of Public Utilities (“BPU”) to overturn a well-reasoned denial of extraordinary zoning relief that NJAW sought from the Borough of Bernardsville Zoning Board of Adjustment (“Zoning Board”), and to grant it permission to construct an 83 foot water tank – the largest structure by far ever to be constructed in the Borough. The subject parcel is located in a historically significant area, with the zoning permitting a maximum height of only 35 feet. In addition to a plethora of additional zoning variances, NJAW’s proposed tank would sit on a parcel that is only four tenths of an acre in size, or 4% of the required minimum lot size of 10 acres. Because NJAW has not met its burden of proof and has not reasonably pursued alternatives that NJAW itself deemed “feasible,” the BPU should respect the local decision-making process and deny the relief sought.

NJAW brings its petition under N.J.S.A. 40:55D-19, a provision of the Municipal Land Use Law (“MLUL”). This provision empowers the BPU to exempt a public utility from compliance with local land use regulations, and to set aside adverse decisions received from local decision makers. To obtain relief, the public utility bears the burden of proving that the proposed use is sufficiently necessary for the service, convenience and welfare of the public to warrant authorization of the use by the utility in a specific location, taking into account the community zone plan and zoning ordinances and the physical characteristics of the plot and the surrounding neighborhood as well as the impact on neighboring properties. The utility must also demonstrate that no alternative sites or methods are reasonably available to address the utility’s demonstrated needs.

In the case before this Court, NJAW has failed to meet its burden. It has not shown that the proposed tank project is reasonably necessary for the service, convenience and welfare of the public served by the utility. The reasons proffered by NJAW in support of its argument,

including a loss of water supply resulting from cancellation of a former contract, and an alleged need to upsize the existing tank for system storage, fire flow, and water pressure purposes, do not withstand close scrutiny. Notwithstanding its claims to the contrary, the record shows that 1) NJAW has ample supplies of water, 2) its storage capacity in the Passaic Basin is more than adequate, 3) alternative means of providing gravity storage for fire flow purposes exist, and 4) NJAW is currently in compliance with water pressure requirements with the existing tank in place. NJAW's testimony to the contrary during the evidentiary hearing was comprised entirely of unsupported allegations and conclusory statements. Not only did NJAW fail to place into the record any modeling results, studies or analytical data, its sole witness at trial could not even identify the modeling tool allegedly used to support NJAW's non-disclosed calculations that form the technical basis of asserted need for the water tank.

Significantly, although the New Jersey courts require public utilities to produce evidence about the impact of their proposed projects on the community zoning plan and the surrounding community, NJAW completely failed to even address this requirement at trial. NJAW never produced a single witness or a single shred of evidence regarding the suitability of this enlarged tank on the tiny parcel for which it is proposed, in the historic neighborhood filled with stately homes where this parcel sits. NJAW also failed to produce any witness or an iota of evidence regarding the impact of its proposed project on property values in the area.

NJAW's failure to produce such evidence manifests a willing disregard of the statutory standard to which it is held. All evidence in this matter regarding community impact and the surrounding neighborhood was offered by Intervenor and Respondent, and it is uncontroverted. The huge water tank proposed by Petitioner would be completely out of character with its surrounding neighborhood, and completely inconsistent with the zoning scheme in Bernardsville.

At 83 feet in height, it would loom over the neighboring properties and Mendham Road, and would be too tall to be obscured with vegetation. And it would have a tangible and significant deleterious impact on the surrounding neighborhood, both by substantially lowering property values and by destroying the historic character of the neighborhood. Local property owners cannot be made to bear such a burden in the absence of a compelling showing of necessity.

N.J.S.A. 40:55D-19 requires the utility to take a hard look at alternative sites and methods, and to rule out all but the proposed project at the proposed location. NJAW failed to meet this burden too. The evidence shows that NJAW had the opportunity, several years ago, to eliminate the alleged need for a larger tank by negotiating with the Southeast Morris County Municipal Utilities Authority (“SMCMUA”) for direct purchase of water to replace the supply lost when the Morris County Municipal Utilities Authority (“MCMUA”) terminated its agreement with NJAW.

In 2018, when the termination occurred, NJAW analyzed its alternatives and found that contracting directly with SMCMUA was feasible. To that end, SMCMUA requested modeling of NJAW’s system to enable it to plan a new interconnection. Instead, NJAW cut off negotiations, determining instead to use its own resources to replace the existing tank with a substantially larger tank on the same site. This termination of negotiations with SMCMUA remains unexplained by any NJAW witness.

There were and still are other approaches to supplying the necessary water supply, pressure and fire flows. Based on information made available to her in the proceeding before the Zoning Board, Intervenor’s expert engineering witness recommended ways that NJAW could achieve its storage, pressure, and fire flow requirements for the affected area. Included was a recommendation to use an existing interconnection to a nearby storage tank that is located at a

higher elevation and is more secluded from neighboring residences. NJAW did not pursue any of these alternatives.

NJAW has utterly failed to develop the record required for the BPU to grant it relief. The utility's utter disregard of local interests, as well as the BPU's legal standards, mandates denial by this tribunal of a petition brought under N.J.S.A. 40:55D-19.

PROCEDURAL HISTORY

NJAW filed the instant petition pursuant to N.J.S.A. 40:55D-19 on January 4, 2022, following the Zoning Board's adoption of its Resolution of Memorialization denying NJAW's request for zoning relief before the Zoning Board on December 6, 2021. The BPU designated the case contested and transferred it to the Office of Administrative Law ("OAL") on January 10, 2022. Respondent Zoning Board filed its response to NJAW's petition on January 24, 2022. On February 16, 2022, Paul Savas filed a petition to intervene, and on February 23, 2022, Karen Martin filed a petition to intervene. Mr. Savas's petition was granted, and Ms. Martin's petition was treated as a petition to enter the case as a participant, and granted, by ALJ Caliguire on March 21, 2022. The evidentiary hearings were held on December 12, 13, and 14, 2022, by videoconference.

PROPOSED FINDINGS OF FACT

1. NJAW seeks the permits and approvals needed to replace an existing, 21-foot-high, 250,000 gallon water storage tank on a landlocked 0.4-acre parcel of land on Mendham Road in Bernardsville, New Jersey with a new, 83-foot-high, 750,000 gallon fluted column water storage tank on the same parcel of land.

Zoning Board of Adjustment Proceedings

2. In March 2020, NJAW filed an application with the Borough of Bernardsville for land use approvals to permit construction of a new tank in the R-1-10 Zone District, and the application was referred to the Zoning Board of Adjustment for the Borough of Bernardsville.

3. The zoning relief sought by NJAW, and required to complete the tank replacement project, included: (1) conditional use variance pursuant to N.J.S.A. 40:55D-70d(3) regarding deviations from conditional use standards; (2) height variance where a maximum of 35 feet is permitted for structures in the R-1-10 Zone District but NJAW was proposing an overall height to the railing of 83 feet; (3) lot size variance where the minimum lot size of 435,600 square feet is required in the zone district but NJAW's parcel is only 4 percent of the requirement, or 17,667 square feet; (4) impervious coverage variance; (5) front yard setback variance; (6) side yard setback variance; (7) rear yard setback variance; (8) minimum lot shape variance; (9) minimum floor area variance; (10) maximum permitted steep slopes disturbances variance; and (11) a variance for a use that does not abut a public street. Resolution of Memorialization, Borough of Bernardsville Zoning Board of Adjustment, December 6, 2021, attached as Exhibit P-2 to NJAW Petition, at p. 5.

4. The Zoning Board of Adjustment held public hearings on NJAW's application on November 16, 2020; March 1, 2021; April 5, 2021; June 21, 2021; August 2, 2021; September 20, 2021; and October 4, 2021. Id. at 1.

5. During the course of the Zoning Board hearings on NJAW's application, NJAW called numerous witnesses, including Bryan D. Slota, project manager for NJAW; Edward J. DiMond, project engineer with Bucharth Horn, Inc.; Vince Monaco, long range asset planning consultant for NJAW; Dana Wright, engineer and team lead for NJAW in Morris County; and Tiffany Morrissey, licensed land use planner. Id. at 4-8.

6. During the course of the Zoning Board hearings on NJAW's application, opponents of the project, including Paul Savas, owner of a property abutting the project site, and Karen Martin, owner of a property across the street, made appearances through counsel and cross-examined NJAW's witnesses. Id.

7. Opponents of the project presented the testimony of Bob Heffernan, real estate appraiser. Id. at 8-9.

8. At the conclusion of the Zoning Board hearing process, the Zoning Board voted unanimously to deny the zoning relief sought by NJAW in its entirety. Id. at 10-14.

9. The reasons for the Zoning Board denial of NJAW's requested relief were the following. Id. at 11-13.

10. First, the Zoning Board found that NJAW had failed to provide appropriate information to the Zoning Board regarding the termination of the then-existing water supply agreement between NJAW and the Morris County Municipal Utilities Authority ("MCMUA"), including the role that financial considerations played in the termination and failure to negotiate a new contract. Id.

11. Second, the Zoning Board found that ongoing negotiations between NJAW and MCMUA regarding water supply issues were never disclosed or clarified for the Zoning Board. Id.

12. Third, the Zoning Board found that NJAW failed to demonstrate that the proposed project could reasonably and appropriately function on the site in accordance with the standards set forth in Coventry Square v. Westwood Zoning Bd. of Adj., 138 N.J. 285 (1994), specifically failing to adequately show that the substantially larger proposed tank could function on a lot only

4% the minimum lot size for the zone district, and failing to adequately account for negative impacts to the neighborhood, zone, and Master Plan of the Borough. Id.

13. Fourth, the Zoning Board found that the proposed tank would represent the highest structure within the limits of the Borough, at 83 feet in a 35-foot height zone, and that the proposed tank would be visible in the area and approximately 100 feet higher than grade at adjoining Mendham Road. Id.

14. Fifth, the Zoning Board found that NJAW never looked at, analyzed, or modeled any other proposed sites for the proposed tank, even though NJAW admitted that 80% of the alleged benefits of the new tank would be experienced in neighboring Mendham Township and Mendham Borough, and that NJAW refused to consider alternative sites despite a clear requirement that it do so.

15. Sixth, the Zoning Board found that unrebutted testimony by a licensed real estate appraiser confirmed that neighboring properties would experience significant reductions in their fair market value, up to 20%, if the proposed tank is constructed, and that the proposed tank would represent an “Incongruous Building” under Section 12-23.11 of the Borough Ordinances, meaning that it could not be permitted by the Borough. Id.

16. Seventh, the Zoning Board found that an extensive report filed by the Historic Preservation Advisory Committee indicated that the neighborhood surrounding the proposed tank is filled with historic properties and that the prominence and visibility of the tank, if built, would violate NJAW’s responsibility to its neighbors in this historic neighborhood. Id.

17. Eighth, the Zoning Board found that the proposed use of the property is too intense for the size of the property, that there is nothing unique about the property that would

justify granting the specific relief being requested, and that the project is too incongruous with the neighborhood. Id.

18. Ninth, the Zoning Board found that NJAW's requests for zoning relief were driven by financial considerations and that NJAW failed to present adequate and clear information to the Zoning Board to justify deviations for a conditional use in the R-1-10 zone. Id.

19. The Zoning Board approved its Resolution of Memorialization at its December 6, 2021 meeting, triggering a 35 day period within which NJAW could appeal to the BPU under N.J.S.A. 40:55D-19. Id. at 14.

20. On January 4, 2022, NJAW filed a petition with the BPU pursuant to N.J.S.A. 40:55D-19 appealing the Zoning Board's decision to deny NJAW's application for approvals for the construction of the Fenwick Tank. NJAW Petition.

21. On January 10, 2022, the BPU designated the matter as a contested case and transferred it to the Office of Administrative Law for assignment to an Administrative Law Judge for hearing.

Office of Administrative Law Proceedings

22. On January 24, 2022, the Zoning Board filed its Response to Petition.

23. On February 16, 2022, Paul Savas filed a Motion for Leave to Intervene.

24. On February 23, 2022, Karen Martin filed a Motion for Leave to Intervene.

25. On March 8, 2022, NJAW filed an Opposition to Motions for Leave to Intervene.

26. On March 14, 2022 Paul Savas and Karen Martin filed separate Reply Briefs to NJAW's Opposition to Motions for Leave to Intervene.

27. On March 21, 2022, ALJ Caliguire issued an Order granting Paul Savas's motion for leave to intervene and treating Karen Martin's motion as a motion to participate pursuant to N.J.A.C. 1:1-16.5 and granting said motion.

28. ALJ Caliguire conducted an evidentiary hearing in this matter by videoconference on December 12, 13, and 14, 2022.

29. During the evidentiary hearing, NJAW presented the pre-filed and live testimony of one witness (Donald Shields), Rate Counsel presented the pre-filed and live testimony of one witness (Howard Woods), Intervenor presented the pre-filed and live testimony of two witnesses (Giselle Diaz and Kenneth Jones), and the Zoning Board presented the pre-filed and live testimony of two witnesses (Dan Lincoln and David Greenebaum).

Findings Regarding Reasonable Necessity and Alternatives

30. Donald Shields, a Vice President of Engineering at NJAW, presented pre-filed and live testimony on behalf of Petitioner NJAW.

31. Howard Woods, an independent consultant engaged as an expert witness by Rate Counsel, presented pre-filed and live testimony on behalf of Rate Counsel.

32. Giselle Diaz, the Department Head of the Water/Wastewater Department at Boswell Engineering, engaged as an expert witness by Intervenor Paul Savas and Respondent Zoning Board, presented pre-filed and live testimony on behalf of Intervenor Paul Savas.

33. Ms. Diaz is the Department Head of the Water/Wastewater Department at Boswell Engineering. Dec. 13 Tr., 9:15-19.

34. Ms. Diaz has been with Boswell Engineering for 26 years. Dec. 13 Tr., 9:22.

35. Ms. Diaz has a BE degree in Environmental Engineering and an MS degree in Construction Management, both from the Stevens Institute of Technology. Pre Filed Direct

Testimony of Giselle Diaz, dated October 21, 2022 (“Diaz Testimony”) (Exhibit I-1) at lines 10 to 11.

36. Ms. Diaz is a licensed professional engineer in the States of New Jersey and New York. Diaz Testimony at line 14.

37. Ms. Diaz has served as the Department Head of the Water/Wastewater Department at Boswell Engineering for the last seven years. Diaz Testimony at line 12.

38. Each of Mr. Shields, Mr. Woods, and Ms. Diaz presented testimony regarding the reasons NJAW seeks approvals for the Fenwick Tank enlargement project, including the purported necessity of the project or lack thereof, as well as regarding alternatives to the project that NJAW considered or should have considered.

Source of Water Supply and Loss of MCMUA Water

39. During the Zoning Board proceeding, Bryan Slota of NJAW testified that “the current water tower site is in need of approximately 1 million gallons per day for purposes of domestic water service and firefighting ability.” Resolution of Memorialization, Exhibit P-2 to NJAW P-2, at p. 4.

40. Mr. Shields testified that NJAW previously entered into a water supply agreement with the MCMUA to purchase up to one million gallons per day (“MGD”) of potable water, that this source of water served NJAW’s customers in the Borough of Bernardsville, Borough of Mendham, and Mendham Township, and that MCMUA terminated this water supply agreement by letter dated May 11, 2018. Exhibit P-1 at 10:8-11:16.

41. Ms. Diaz testified that NJAW has secured replacement sources of water for the one million gallon per day supply it lost due to the termination of its contract with the MCMUA, and these sources include the NJAW Raritan System Interconnection, the Passaic Valley Water

Commission Interconnection-Chatham Township, and the NJAW Passaic Baltusrol Wellfield-Summit. See Exhibits I-2, I-3, I-4.

42. Mr. Shields also testified that NJAW used its own sources of water to replace the water it had been purchasing from the MCMUA, including use of water from the Canoe Brook area and its Raritan System. Dec. 12 Tr., 33:2-6.

43. NJAW has adequate and reliable supplies to feed water into the Mendham low zone. Dec. 12 Tr., 85:11-18.

44. NJAW has adequate and reliable supplies of water to replace the water lost due to termination of the MCMUA water supply agreement.

Alternative of Direct Purchase of Water from SMCMUA

45. Vincent Monaco of NJAW prepared a memorandum dated July 2, 2018, with the “Subject” set forth as “Morris County Municipal Utilities Authority – Supply Replacement Recommendation” (“the July 2018 Memorandum”). Exhibit I-4.

46. Mr. Monaco did not testify in this proceeding.

47. The Memorandum describes certain “MUA Supply Options.” Exhibit I-4 (p. 6, Bates INT 1249).

48. “Option 2” proposes NJAW entering a new long term agreement with the SMCMUA to purchase water “with same or similar limits as the current agreement” with the MCMUA. Id.

49. Option 2 is noted as “feasible.” Id.

50. “Option 2a” proposes “same as Option 2, except new Clyde Potts” booster station is moved significantly downstream of current location along Woodland Road near West Main Street. Id.

51. Option 2a” is noted as “somewhat feasible.” Id.

52. NJAW did not present any witness who explained Option 2 or otherwise testified that Option 2 no longer remains “feasible.”

53. NJAW did not present any witness who explained Option 2a or otherwise testified that Option 2a no longer remains “somewhat feasible.”

54. There is no evidence in the record that NJAW attempted to or actually engaged in any meaningful effort to pursue either Options 2 or 2a subsequent to July 2, 2018.

55. NJAW did not present any witness to testify concerning negotiations it may have had with the SMCMUA concerning a new long term supply agreement to replace the purchases it had been making from the MCMUA in the 2012 Water Supply Agreement.

56. NJAW did not call as a witness any representative of the SMCMUA.

57. NJAW did not present any evidence that it pursued Options 2 or 2a subsequent to July 2, 2018.

58. There is no evidence in the record that NJAW and the SMCMUA conducted any negotiations whereby NJAW would directly purchase water from the Clyde Potts Reservoir from the SMCMUA.

59. The MCMUA issued a letter to NJAW dated May 11, 2018 (“the May 11, 2018 Letter”). Exhibit I-7.

60. The May 11, 2018 Letter raises certain technical concerns with respect to the MCMUA’s then- existing booster pump station located at Woodland Road near the Clyde Potts Reservoir. Id.

61. NJAW did not offer testimony that it attempted to resolve the technical issues set forth in the May 11, 2018 Letter, nor is there any documentary evidence in the record that NJAW endeavored to resolve the technical issues set forth in the May 11, 2018 Letter.

62. NJAW did not present cost information related to the technical issues set forth in the May 11, 2018 Letter.

63. An internal email from Frank Marascia at NJAW to Nicholas DeVecchia at NJAW, dated February 13, 2018 (Exhibit I-8, attached to Diaz Prefiled Testimony as Exhibit G), states the following:

- a. "SMCMUA is proposing to build their own pump station to transfer water to Mendham"
- b. "this would allow them to achieve property CT and provide resiliency"
- c. "SMCMUA currently has 4 mgd of firm capacity"
- d. "if growth projections suggested a need for additional water we could potentially take water from SMCMUA @ new pump station to push west and/or into the SWP"

64. NJAW did not present evidence as to costs or other reasons why the technical issues set forth in the May 11, 2018 could not, currently, be resolved, whereby NJAW would purchase water from SMCMUA (either directly or through the MCMUA) with the source of that water being the Clyde Potts Reservoir.

65. Mr. Shields testified that he was "not familiar" with the details of how the MCMUA and SMCMUA provided water to NJAW, nor how the MCMUA's water was "sourced." Dec. 12 Tr., 86:8-14.

66. Mr. Shields testified that he never inquired from NJAW's supplier, the MCMUA, as to where the water originated from. Dec. 12 Tr., 86:17-19.

67. Mr. Shields testified that the water emanating from the Clyde Potts Reservoir was a gravity feed to the NJAW system because the Reservoir operates at a higher pressure gradient than the Fenwick Tank. Dec. 12 Tr., 15:1522.

68. Mr. Shields testified that "there were some discussions about Southeast Morris and we've provided testimony indicating that Southeast Morris" could not provide water. Dec. 12 Tr., 44:7-9.

69. There is no evidence in the record that Mr. Shields personally discussed a continued purchase of water from the SMCMUA, either before or following May 11, 2018.

70. There is no documentary evidence in the record that anyone from NJAW negotiated with the SMCMUA for a direct purchase of water from the Clyde Potts Reservoir.

71. There is no evidence in the record that NJAW requested that SMCMUA sell water from the Clyde Potts Reservoir after May 11, 2018 or that SMCMUA refused to sell water to NJAW at that time.

72. Under cross-examination, Mr. Shields could not answer whether NJAW offered the MCMUA a higher fee to renew the 2012 Water Supply Agreement. Dec. 12 Tr., 62:25-63:4.

73. NJAW did enter into an agreement to purchase 250,000 gallons of water a day from the MCMUA, which is one quarter of the amount it had been purchasing under the 2012 Water Supply Agreement. Dec. 12 Tr., 32:8.

74. There is no documentary evidence in the record that the SMCMUA could not provide a reliable year round alternative to the 1.0 MGD supply formerly provided by MCMUA.

Modeling Data

75. NJAW did not present any modeling, hydraulic data, or technical analysis concerning the impact to its system on water pressure, water capacity and firefighting capacity of a potential renewal with the MCMUA or SMCMUA for water supply from the Clyde Potts Reservoir.

76. In the days after the May 11, 2018 Letter, representatives of the SMCMUA sought modeling information from NJAW so that it could locate a new pump station to serve NJAW, as follows:

- a. Exhibit I-9 (May 23, 2018 email from Laura Cummings, SMCMUA Executive Director, to Frank Marascia of NJAW: “SMCMUA needs to pursue modeling a new location for the MCMUA pump station as discussed at a previous meeting”).
- b. Exhibit I-10 (May 25, 2018 email from Jeff Elam to Frank Marascia of NJAW : “I am working on the update to the SMCMUA water model and we would appreciate info on the additional service area near Clyde Potts”).

77. Mr. Marascia of NJAW did not testify in this matter.

78. Mr. Shields testified that he did not know if NJAW ever provided its modeling to the SMCMUA so it could design a new pump station. Dec. 12 Tr., 106:11-15.

79. Mr. Shields testified that he did not believe that NJAW ever prepared a formal study to analyze whether it could move the pump station to a spot near West Main Street, as set forth in Option 2a. Dec. 12 Tr., 119:2-5.

80. Mr. Shields testified that he did not believe that NJAW ever performed an additional analysis of Option 2 after the July 2018 Memorandum. Dec. 12 Tr., 119:10-14.

81. There is no evidence in the record that NJAW provided SMCMUA with the modeling information that it sought in order to locate a new pump station to serve NJAW.

82. Mr. Shields testified that to the best of his knowledge NJAW did not enter into negotiations with either the MCMUA or the SMCMUA to move the Clyde Potts Booster Station to a spot near West Main Street. Dec. 12 Tr., 119:18-24.

83. Mr. Shields' pre-filed testimony asserts that SMCMUA could only provide 600,000 GPD of water to NJAW, but there is no documentary evidence in the record to support this assertion. Shields Pre Filed Testimony, dated September 20, 2022 (Exhibit P-1), Question 37.

84. No witness from SMCMUA testified that the SMCMUA could only provide 600,000 GPD of water to NJAW.

85. Mr. Shields, the sole witness to testify for NJAW, did not prepare exhibits P-2 and P-3. Dec. 13 Tr., 75:25-76:4 (exhibits prepared by Mr. Wright).

86. Mr. Shields could not identify the computer program that was used to prepare exhibits P-2 and P-3. Dec. 12 Tr., 76:9-10.

87. Mr. Shields could not identify the hydraulic model software used to create Exhibits P-2 and P-3. Dec. 12 Tr., 76:14-17.

88. Exhibits P-2 and P-3 were created in September 2020. Dec. 12 Tr., 77:1-4.

89. Exhibits P-2 and P-3 offer a scenario without water supply from the MCMUA, but do not take into account other system improvements made by NJAW, including upgrades to the Oak Place booster station. Dec. 12 Tr., 77:8-16.

90. The improvements to the Oak Place Booster station are almost complete. Dec. 12 Tr., 77:25-78:4.

91. Exhibits P-2 and P-3 could change if the extra pumping capacity supplied by the Oak Place booster station were taken into account. Dec. 12 Tr., 77:17-24.

92. The May 11, 2018 letter from the MCMUA to NJAW states that the MCMUA would maintain an emergency system interconnection system. Exhibit I-7, p. 2.

93. Mr. Shields did not know whether Exhibits P-2 and P-3, prepared in September 2020, took into account the potential emergency service interconnection with the MCMUA referenced in the May 11, 2018 letter. Dec. 12 Tr., 78:5-12.

94. Mr. Shields did not personally run the models that were used to produce exhibits P-2 and P-3. Dec. 12 Tr., 78:15-18.

95. Mr. Shields did not supervise the person who ran the models. Dec. 12 Tr., 78:15-18.

Tank Size/Water Storage

96. N.J.A.C. 7:19-6.7 contains the minimum requirements for the total capacity of system storage for public community water systems. Diaz Pre-Filed Testimony, Exhibit I-1, 11:202-203.

97. NJDEP Construction Permit No. WCP200005, issued by the DEP's Division of Water Supply and Geoscience, dated January 7, 2021 ("the DEP Permit"), relates to the proposed replacement of the Fenwick Tank. *Id.* at 203-206; Exhibit I-13.

98. The DEP Permit indicates that NJAW's Passaic Basin water system, of which the Mendham Low Gradient and Fenwick Tank are a part, "is classified as a System Type vii having multiple sources with interconnections and auxiliary power provided at the sources, therefore the

storage requirement ... DOES meet minimum storage requirements.” Diaz Pre-Filed Testimony, Exhibit I-1 at 206-214; Exhibit I-13 (emphasis in original).

99. NJDEP requires that storage requirements be calculated on a basin wide basis. Diaz Testimony, Exhibit I-1 at 218-222; N.J.A.C. 7:19-6.7.

100. There is no documentary evidence or regulatory citation in the record that NJDEP requires that volume storage be analyzed on a gradient by gradient basis.

101. Mr. Shields testified that current peak day demands in the Mendham Low Gradient require an inter-zone transfer of approximately 2 MGD. Shields Pre-Filed Testimony, 12:13-19.

102. NJAW did not present any documentary evidence or data to substantiate its allegation of the existing peak day demand of 2 MGD, and Mr. Shields admitted that he had no memory of submitting such evidence or data. Dec. 12 Tr., 121:21-122:1.

103. In his Pre-Filed Testimony, Mr. Shields testified that “2035 project peak demand [is] 2.5 MGD.” Shields Pre-Filed Testimony, 19:3.

104. NJAW did not present any modeling, documentary evidence or data to substantiate the alleged 25% increase in peak day demand from 2 MGD to 2.5 MGD between the present and 2035.

105. NJAW’s assertion of “peak demand” of 2 million GPD includes water both coming into the Mendham Low gradient and water going out of the Mendham Low Gradient to feed other areas. Dec. 12 Tr., 124:6-9.

106. The peak demand for the Mendham Low gradient is “around” 1 million GPD. Dec. 12 Tr., 125:8-17.

107. NJAW did not present any modeling, documentary evidence or data to show how much of the alleged peak demand of 2 MGD is required for the Mendham Low Gradient, as compared to its alleged need for that water to be able to transfer water to other gradients.

108. NJAW did not present any modeling, documentary evidence or data to show how it calculated its alleged average daily demand of 1 MGD required for the Mendham Low Gradient.

109. NJAW did not present any modeling, documentary evidence or data to show how much if its alleged average daily demand of 1 MGD is based on usage in the Mendham Low Gradient, as compared to its alleged need for that water to be able to transfer it to other gradients. Dec. 12 Tr., 170:7-25.

Gravity Storage for Fire Protection

110. N.J.A.C. 7:10-11.11(a)(2) states that “a system designed to provide for fire shall, in addition, provide gravity storage.”

111. The Horizon Tank in the Mendham High Gradient is interconnected with the Mendham Low Gradient. Diaz Pre-Filed Testimony, 13:233-243; Exhibit I-15 (“Interconnection between the Mendham High Gradient and Mendham Low Gradient exists at the Knollwood Well/Booster Station, as well as Mountain Valley Well with PRV’s (pressure reducing valves).”

112. The Horizon Tank in the Mendham High Gradient is interconnected with the Mendham Low Gradient. Exhibit I-16 (“Therefore, no cost or length of footage is associated with connecting the Horizon Tank to the Mendham Lower Gradient”).

113. The Mendham High and Mendham Low gradients are interconnected. Dec. 12 Tr., 128:13-15.

114. The Horizon Tank provides gravity storage that could be considered an additional source of storage for the Mendham Low Gradient. Diaz Pre-Filed Testimony, 13:244-251.

115. The Horizon Tank can be shared with the Mendham Low Gradient under fire flow conditions. Diaz Pre-Filed Testimony, 14:260-270; Exhibit I-17 (NJAW Response to Rate Counsel Discovery Request RCR-E-11 (“the Horizon Drive Tank in Mendham High has 1.0 MG capacity (more than adequate for the gradient), which can be shared with Mendham Low and Chester gradients under fire flow conditions”).

116. The Horizon Tank is at a higher elevation than the Fenwick Tank and can provide fire flow to the Mendham Low Gradient without having to enlarge the existing Fenwick Tank. Diaz Pre-Filed Testimony, 14:271-273.

117. The Horizon Tank in the Mendham High Gradient has 1.0 MG capacity which can be shared with the Mendham Low and Chester Gradients under fire flow conditions. Diaz Pre-Filed Testimony, 16:304-309, quoting Exhibit I-20 (NJAW Response to Rate Counsel Discovery Request RCR-E-11).

118. Mr. Shields testified that he was not aware of any instance in the last 25 years where a fire in Bernardsville was not adequately handled by the existing Fenwick Tower. Dec. 12 Tr., 70:7-12.

119. Despite its own document (Exhibit I-20) conceding that the Horizon Tank can be shared with the Mendham Low Gradient under fire flow conditions, NJAW presented no data, modeling, or technical analysis to eliminate this alternate methodology of addressing firefighting demands.

120. Despite the MCMUA's offer in its May 11, 2018 to continue an "emergency connection", NJAW presented no data, modeling, or technical analysis to eliminate this alternate methodology of addressing firefighting demands.

Water Pressure

121. N.J.A.C. 7:10-11.11(a)(2) requires that storage tanks meet the pressure requirements of N.J.A.C. 7:10-11.10(d), which in turn requires that the system provide water pressure at a minimum pressure of 20 pounds per square inch at street level.

122. NJAW's Response to Rate Counsel discovery request RCR-E-14 states clearly that "NJAW is in compliance with N.J.A.C. 7:10-11.10(d) with respect to pressure." Exhibit I-19 (Response to RCR-E-14).

123. The existing Fenwick Tank "is marginally in compliance with N.J.A.C. 7:10-11.11(a)(2)." Exhibit I-19 (Response to RCR-E-14).

124. Mr. Shields testified that if the proposed Fenwick Tank is not constructed, NJAW "may experience interruptions in water supply and may not have sufficient water pressure for the Borough's Fire Department to fight fires in those impacted areas." Shields Pre-Filed Testimony, 15:13-22.

125. NJAW did not present any modeling, hydraulic analysis or data to support its assertions that the current Fenwick Tank is not compliance with NJDEP's pressure requirements, but rather stated to the contrary, i.e., it is in compliance, in its response to RCR-E-14.

126. NJAW did not present any modeling, hydraulic analysis, or data concerning water supply or pressure using the Horizon Tank "interconnection."

127. The existing Fenwick Tank operated "marginally" with respect to fire flow when NJAW purchased water from the MCMUA. Dec. 12 Tr., 41:18-19.

128. NJAW did not present any modeling, data, documentary evidence, or data concerning fire flows. See., e.g., Dec. 12 Tr., 74:15-20.

Site and Methods Alternatives

129. Mr. Shields testified that NJAW performed an alternative analysis that included screening properties in the vicinity of the project site for elevation and ability to meet regulatory requirements for service, and found that none of the alternative locations met that standard. Dec. 13 Tr., 23:17-22, 25:10-22.

130. The only documents submitted into the evidentiary record by NJAW in support of its alternatives analysis were crude maps showing areas with ground elevations of between 730-778 feet in the vicinity of the project site, and nothing else. Exhibit PT1-D.

131. NJAW did not produce or submit a written analysis of alternative sites considered by NJAW in contemplating the proposed tank enlargement.

132. NJAW did not produce or submit a written analysis of alternative methods considered by NJAW in contemplating the proposed tank enlargement.

133. Documents produced by NJAW and entered into evidence by Intervenor indicate that NJAW considered a “methods” alternative, i.e., purchasing water directly from SMCMUA after termination of the MCMUA supply agreement, but did not pursue this alternative after initially labeling it in July 2018 as “feasible.”

134. NJAW did not enter any analysis of this “methods” alternative into evidence in this matter.

135. Ms. Diaz testified that a potentially feasible “location” alternative exists to address firefighting issues, i.e., the Horizon Tank via interconnection with the Mendham High Gradient, but that the record did not indicate that NJAW pursued this alternative.

136. NJAW did not enter any analysis of the Horizon Tank “location” alternative into evidence in this matter.

Findings Regarding Impact on the Community Zone Plan and Zoning Ordinance

137. David Greenebaum presented pre-filed and live testimony on behalf of Respondent Zoning Board. Dec. 14 Tr., *passim*.

138. Mr. Greenebaum has been a member of the Zoning Board for 17 years and has served as its chair for the last eight or nine years. Dec. 14 Tr., 9:1-8.

139. Mr. Greenebaum presided over the Zoning Board’s meetings concerning NJAW’s application from November 2020 through October 2021. Dec. 14 Tr., 9:9-17.

140. The Zoning Board’s resolution, dated December 6, 2021, properly reflects its unanimous decision to deny the zoning relief requested by NJAW. Dec. 14 Tr., 10:23-11:17; first Exhibit to Greenebaum Pre-Filed Testimony.

141. The property that is the subject of this matter contains 17,677 square feet, or 0.406 acres, in a zoning district with a minimum lot size of 10 acres. Exhibit to Greenebaum Pre-Filed Testimony, p. 2; Greenebaum Pre-Filed Testimony, p. 2.

142. The top of the proposed water tower would be approximately 100 feet higher than the grade at adjoining Mendham Road. Exhibit to Greenebaum Pre-Filed Testimony, p. 11.

143. The relief sought by NJAW in the Zoning Board proceedings included variances for: (i) maximum height (35 feet permitted; 83 feet proposed); (ii) minimum lot size (435,600 square feet permitted; 17,677 square feet proposed); (iii) minimum front yard setback (125 feet required; 24 feet proposed); (iv) minimum side yard setback (75 feet required; 20.5 feet and 23.7 feet proposed); (v) minimum rear yard setback (100 feet required; 57 feet proposed); and (vi) minimum lot shape (475 foot diameter required; 105 foot diameter proposed). Exhibit to Greenebaum Pre-Filed Testimony, p. 3.

144. In making its decision to deny the requested relief, the Zoning Board considered the fact that the proposed site was very small for a very large tower. Dec. 14 Tr., 12:6-8.

145. The proposed tower would be the tallest structure ever built in Bernardsville, and there is no structure with the same height as the proposed tower anywhere in Bernardsville. Dec. 14 Tr., 12:8-10.

146. The proposed tower would be placed into an area with estate homes, would be the most visible structure in Bernardsville, and would loom over Mendham Road. Dec. 14 Tr., 12:11-14.

147. The proposed water tower “just didn’t fit” into the site, and was “too intense [of] a use for [an] extraordinarily small site.” Dec. 14 Tr., 12:21-23.

148. The neighborhood where the proposed water tank would be located is “very bucolic,” with “very large” property sizes and “stately” homes. Dec. 14 Tr., 15:1-3.

149. The area surrounding the proposed water tower is a “prestigious area” that has been “very well taken care of by all of the property owners that have lived in that area.” Dec. 14 Tr., 15:8-10.

150. Mr. Greenebaum concluded, after reviewing photo simulations of the proposed tower, that there was no way to conceal it and there were no trees in the vicinity of the tower at a height similar to the proposed tower. Dec. 14 Tr., 15:22-16:24.

151. The Zoning Board concluded that the proposed use was “too intense of a use for the size of the property.” Exhibit to Greenebaum Pre-Filed Testimony, p. 13.

152. The Zoning Board concluded that the conditional use variance and dimensional variances were “too many for the proposed use of this site to be deemed supportable.” Exhibit to Greenebaum Pre-Filed Testimony, p. 13.

153. The Zoning Board concluded that the “site is too small and, given the neighborhood zoning, the project is too incongruous to what is being proposed.” Exhibit to Greenebaum Pre-Filed Testimony, p. 13.

154. NJAW did not present testimony or a report from a witness with expertise in local zoning and land use planning.

155. Neither NJAW nor Rate Counsel offered the testimony or documentation from any witness who contradicted or impeached the testimony of Mr. Greenebaum.

156. As such, Mr. Greenebaum’s testimony is uncontroverted.

Findings Regarding Impact on the Surrounding Community

157. Daniel Lincoln presented pre-filed and live testimony on behalf of Respondent Zoning Board. Dec. 13 Tr., 116:6-140:25.

158. Daniel Lincoln is a licensed architect in New Jersey and a resident of Bernardsville. Dec. 13 Tr., 116:19-23.

159. From 2009 until 2022, Mr. Lincoln served as Chairman of the Bernardsville Historic Preservation Advisory Committee (“HPAC”). Dec. 13 Tr., 119:21-25; Lincoln Pre Filed Testimony, p. 2, Par. 4.

160. The HPAC reviews and comments on applications to the Bernardsville Planning and Zoning Board from an historic and design contextual view. Lincoln Pre Filed Testimony, p. 3, Par. 8.

161. In his capacity as Chairman of the HPAC, Mr. Lincoln prepared a Memo dated November 13, 2020, setting forth the results of HPAC’s review of NJAW’s application to the Bernardsville Zoning Board of Adjustment. Lincoln Pre Filed Testimony, p. 3, Par. 9.

162. Mr. Lincoln testified that the current water tank is “almost invisible” on the Savas Property. Dec. 13 Tr., 129:13-14, 139:16-17.

163. Mr. Lincoln testified that the proposed water tank would have a “severe impact” on the Savas property, “architecturally” and “historically.” Dec. 13 Tr., 131:9-11.

164. Mr. Lincoln testified that the proposed water tank would be “out of place with the nature” of the neighborhood in which it is located. Dec. 13 Tr., 132:17-18.

165. Mr. Lincoln testified that the proposed water tank would be “highly visible.” Dec. 13 Tr., 132: 21-22.

166. The existing tank has a roof height of 21 feet. Memo (p. 1) dated November 13, 2020, attached to Lincoln Pre Filed Testimony.

167. The proposed tank is 74 feet high with an 8 foot railing, for a total of 83 feet, with an additional 9 foot high antenna. Id.

168. The existing and proposed water tanks do not meet any of the required property line setbacks in the relevant zone. Id.

169. The Savas property is among “the most significant historic properties in Bernardsville with late 19th Century and early 20th Century” importance. Id.

170. The HPAC recommended that “significant effort” be undertaken to protect the historic resources and unique character of Bernardsville. Id., p. 2.

171. The HPAC found that the proposed water tower “will be very visible from the road and will loom over the existing former caretaker’s cottage and gateway entrance.” Id., p. 2.

172. The HPAC found that the proposed water tower “will be very visible from the existing Savas and Liu properties.” Id.

173. NJAW did not offer testimony of a witness with expertise in historic preservation or impact on the surrounding area.

174. Neither NJAW nor Rate Counsel offered the testimony or documentation from a witness who contradicted or impeached the testimony of Mr. Lincoln.

175. As such, Mr. Lincoln's testimony was uncontroverted.

Findings Regarding Impact on Neighboring Property Values

176. Kenneth J. Jones presented pre-filed and live testimony on behalf of Intervenor Paul Savas. Dec. 13 Tr., 90:4-114:17.

177. Mr. Jones is a New Jersey State certified general real estate appraiser. Dec. 13 Tr., 90:25-91:1.

178. Mr. Jones holds an 'accredited senior appraiser designation' from the American Society of Appraisers. Dec. 13 Tr., 91:1-3.

179. Mr. Jones has been a real estate professional for 52 years. Dec. 13 Tr., 99:10-11.

180. Mr. Jones prepared an appraisal of the Savas property and an estimate of the diminution in value and potential damage to value from the construction of the proposed water tower. Dec. 13 Tr., 93:19-23.

181. Mr. Jones prepared an appraisal of the Martin property and an estimate of the diminution in value and potential damage to value from the construction of the proposed water tower. Dec. 13 Tr., 93:19-94:1.

182. The purpose of Mr. Jones' reports was to show "damage value." Dec. 13 Tr., 95:12-15.

183. The Savas and Martin homes are in a luxury market. Dec. Tr., 97:9-11.

184. The Savas home is an extraordinary, ultra-luxury home. Dec. 13 Tr., 99:14-16.

185. The neighborhood where the Savas and Martin homes is located is historic. Dec. 13 Tr., 102:15-18.

186. The Martin home was constructed in the late 1890s. Dec. 13 Tr., 102:18-21.

187. The “perception of seclusion” is critical to the value of luxury properties. Dec. 13 Tr., 97:23-98:1.

188. The proposed water tank would be viewed by the real estate market as an “eyesore.” Dec. 13 Tr., 100:18.

189. The uniqueness of the Savas home would be diminished dramatically by the proposed water tank. Dec. 13 Tr., 100:23-101:2.

190. The value of the Savas home could be damaged between 45% to 55%, and even up to 80%, by construction of the proposed water tank. Dec. 13 Tr., 101:8-13.

191. The value of the Martin home could be diminished by 40% by construction of the proposed water tank. Dec. 13 Tr., 101:14.

192. The proposed water tank would impede the existing seclusion and solitude of the neighborhood. Dec. 13 Tr., 109:15-17.

193. If the water tank is constructed, the Savas and Martin properties would acquire a reputation of being adjacent to an “eyesore.” Dec. 13 Tr., 112:3-7.

194. Buyers do not want to be associated with eyesores. Dec. 13 Tr., 112:9-10.

195. The proposed water tank would be incongruous to the whole neighborhood, sticking out like a sore thumb. *Id.*, p. 112, lines 11 to 12.

196. The value damage analysis to the Savas property concluded that construction of the proposed water tower would reduce the value of Mr. Savas’s property by 50 percent, or \$3,175,000. Exhibit I-23.

197. The value damage analysis to the Martin property at 421 Mendham Road concluded that construction of the proposed water tower would reduce the value of the Martin property by 40 percent, or \$1,720,000. Exhibit I-24.

198. NJAW did not present any testimony or report from a licensed appraiser regarding the impact of the proposed water tower on property values.

199. Neither NJAW nor Rate Counsel presented testimony or a report from any witness that contradicted or impeached the testimony of Mr. Jones.

200. As such, Mr. Jones' testimony is uncontroverted.

ARGUMENT AND CONCLUSIONS OF LAW

I. THE APPLICABLE LEGAL STANDARD

When a public utility files a petition with the BPU pursuant to N.J.S.A. 40:55D-19, *L.* 1975, c. 291, § 10, *amended by L.* 1999, c. 23, § 58, it seeks a BPU finding that the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* (“MLUL”), and any local government regulations or ordinances adopted pursuant to the MLUL, shall not be applied to the project proposed by the public utility.

N.J.S.A. 40:55D-19 reads in pertinent part as follows:

If a public utility...is aggrieved by the action of a municipal agency through said agency's exercise of its powers under this act...an appeal to the Board of Public Utilities of the State of New Jersey may be taken within 35 days after such action without appeal to the municipal governing body pursuant to...[40:55D-17] unless such public utility...so chooses....A hearing on the appeal of a public utility to the Board of Public Utilities shall be had on notice to the agency from which the appeal is taken and all parties primarily concerned, all of whom shall be afforded an opportunity to be heard. If, after such hearing, the Board of Public Utilities shall find that the present or proposed use by the public utility...is necessary for the service, convenience or welfare of the public...and that no alternative site or sites are reasonably available to achieve an equivalent public benefit, the public utility may proceed in accordance with such decision of the Board of Public Utilities, and any ordinance or regulation made under the authority of this act notwithstanding.

N.J.S.A. 40:55D-19 was enacted by the legislature in 1975 to replace its predecessor, N.J.S.A. 40:55-50, which had afforded public utilities the right to petition the BPU directly for approval of improvements or uses otherwise subject to municipal land use regulation. In re Monmouth Consolidated Water Company, 47 N.J. 251 (1966).

The former statute gave public utilities “a complete, original and independent avenue of remedy” separate and apart from applications “seeking or obtaining approval from municipal zoning or planning boards.” Matter of Monmouth, *supra*, 47 N.J. at 257, citing In re Application of Hackensack Water Co., 41 N.J. Super. 408, 415 (App. Div. 1956) and In re Public Service Electric & Gas Co., 35 N.J. 358, 372 (1961). Courts interpreting the former statute held that “[w]hen a public utility finds it necessary to use its property or structures in order to furnish services to the public it may bypass the municipal zoning authorities and petition the [BPU] directly for relief upon notice to the municipality affected.” In re App. Of Jersey Cent. Power & Light, 130 N.J. Super. 394 (App. Div. 1974), citing Peoples Trust Co. v. Hasbrouck Heights, 60 N.J. Super. 569, 574 (App. Div. 1959). Under the former statute, therefore, public utilities had no obligation to exhaust remedies before municipal zoning authorities in advance of petitioning the BPU for approval.

The legislature took specific action to return power over public utilities’ land use projects to local zoning authorities when it enacted the current version of N.J.S.A. 40:55D-19 in 1975. Under the current statute, a public utility *must* apply to the local zoning board of adjustment where a variance is required and to the local planning board where a conditional use permit is required. New Jersey Natural Gas v. Borough of Red Bank, 438 N.J. Super. 164, 181 (App. Div. 2014); In re Dept. of Envntl. Protection, 433 N.J. Super. 223, 227 (App. Div. 2013). The public

utility can now only elect to bypass the local authority when seeking approval for inter-municipal projects. Petition of South Jersey Gas Co., 447 N.J. Super. 459, 480-484 (App. Div. 2013).

The legislature enacted the current version of N.J.S.A. 40:55D-19 specifically to increase local control over public utility projects within municipal boundaries. New Jersey Natural Gas, *supra*, 438 N.J. Super. at 184, citing Cox & Koenig, *New Jersey Zoning and Land Use Administration*, § 2.

The legal standards applied by the BPU in evaluating petitions brought under N.J.S.A. 40:55D-19, and by the appellate courts in reviewing appeals from BPU decisions, rely heavily on cases decided under the predecessor statute, but with modifications required for the updated statute. The general standard still followed by the courts was established in 1961 by the Supreme Court in In re Public Service Elec. & Gas Co., *supra*:

1. The statutory phrase, “for the service, convenience and welfare of the public” refers to the whole “public” served by the utility and not the limited local group benefited by the zoning ordinance.
2. The utility must show that the proposed use is reasonably, not absolutely or indispensably, necessary for public service, convenience and welfare at some location.
3. It is the “situation,” i.e., the particular site or location..., which must be found “reasonably necessary,” so the Board must consider the community zone plan and zoning ordinance, as well as the physical characteristics of the plot involved, the surrounding neighborhood, and the effect of the proposed use thereon.
4. Alternative sites or methods and their comparative advantages and disadvantages to all interests involved, including cost, must be considered in determining such reasonable necessity.
5. The Board’s obligation is to weigh all interests and factors in the light of the entire factual picture and adjudicate the existence or non-existence of reasonable necessity therefrom. If the balance is equal, the utility is entitled to the preference, because the legislative intent is clear that the broad public interest to be served is greater than local considerations.”

35 N.J. at 376-77; see also In re Application of Hackensack Water Co., supra, 41 N.J. Super. at 423.

Therefore, in order to obtain relief under the statute, the public utility must show that the proposed use is *necessary* for the public service, convenience, and welfare of the public served by the utility. And because the statute requires that the particular site or location be “reasonably necessary,” the BPU must consider the community’s zoning plan and ordinance as well as the physical characteristics of the property involved and the effect of the proposed use on the surrounding neighborhood. Finally, the BPU must consider alternative sites and methods, as well as the advantages and disadvantages to all of the interests involved, including costs. In re Public Service Elec. & Gas Co., 35 N.J. at 376-77.

The BPU’s inquiry is “not intended by the Legislature to be simply a *pro forma* approval of management’s decision. [Citing In re Application of Hackensack Water Co., supra, 41 N.J. Super. at 419.] ... Further consideration of the matter should not be limited to the ordinary factors which govern a decision as to whether the public convenience and necessity will be served by a course of operation or conduct proposed by a utility.” In re Monmouth Consolidated Water Co., 47 N.J. 251, 259 (1966). The burden of proof rests with the public utility. I/M/O Petition of Jersey Central Power & Light Co., 2018 WL 1519039 at *67 (N.J. Adm. 2018).

II. NJAW HAS NOT MET THE LEGAL STANDARD

NJAW has failed to meet its burden. under N.J.S.A. 40:55D-19, of proving that the proposed Fenwick Tank is reasonably necessary or that the need for the proposed Fenwick Tank outweighs countervailing local interests. Further, NJAW has failed to meet its burden of showing that no alternative sites or methods are reasonably available. The case presented by NJAW in support of its petition is manifestly deficient, consisting of conclusory assertions and wholly lacking in scientific and technical foundation. Further, NJAW failed entirely to bear the

burden of presenting evidence of the proposed tank's impacts on the community zone plan and zoning ordinance, and on the surrounding neighborhood, a key requirement under the statute. It provided no such evidence. The BPU may not ignore these considerations in reviewing the petition. In re Public Service Gas & Elec. Co., 35 N.J. at 377.

The evidence presented by the Zoning Board and Intervenor demonstrates that the proposed Fenwick Tank is not "reasonably necessary" at the location chosen by NJAW, for numerous, overlapping reasons. The Zoning Board and Intervenor have also shown that alternative sites may very well exist, and that alternative methods for providing water supply, pressure and firefighting capability certainly existed in 2018 and may still exist today. And the evidence presented by the Zoning Board and Intervenor regarding the negative impacts of this proposed project on the Borough of Bernardsville, its zoning scheme, and the surrounding neighborhood is uncontroverted.

In brief, NJAW failed entirely to present the evidence and analysis required both by statute and by BPU precedent needed to justify overturning a well-reasoned decision by a local municipal authority denying extraordinary zoning relief for a monstrous public utility facility in a residential neighborhood.

A. The proposed tank is not "reasonably necessary" in this specific location.

A petitioner seeking relief under N.J.S.A. 40:55D-19 must prove that the proposed use is "reasonably, not absolutely or indispensably, necessary for public service, convenience and welfare at some location." In re Public Service Elec. & Gas Co., 35 N.J. at 377.

Through its sole witness, Mr. Shields, NJAW offered four reasons why the proposed Fenwick Tank is "reasonably necessary." First, NJAW claimed that the water tank is needed to replace water supply of about one million GPD that was lost when the MCMUA terminated the 2012 Water Supply Agreement. But as documents produced by NJAW show, and as Mr. Shields

readily admitted in testimony, NJAW has ample sources of water that are sufficient to replace the lost MCMUA supply. The lost supply of water was easily replaced. On its own, this was not evidence of any need for a new tank that is multiples of the size and height of the existing tank.

Second, NJAW claimed that the larger tank was necessary because water storage provided by the existing Fenwick Tank is insufficient in the Mendham Low Gradient. But as Ms. Diaz testified, NJDEP regulations, including N.J.A.C. 7:19-67, require that water storage be calculated on a basin wide basis. NJAW did not produce any regulation or other document showing that volume storage must be calculated on a gradient by gradient basis. And NJDEP Construction Permit No. WCP200005, issued by DEP's Division of Water Supply and Geoscience for the proposed tank replacement, indicates that NJAW's Passaic Basin water system (of which the Mendham Low Gradient and Fenwick Tank are a part) "DOES meet minimum storage requirements." See Diaz Pre-Filed Testimony, Exhibit I-1, at 11:206-12:214.

Further, NJAW stated that it calculated the size of the tank it requires based on projected 2035 peak day demand for water in the area served by the tank. For reasons that NJAW was unable to explain, it projected a 25% increase in peak day demand by 2035, though NJAW could not identify any basis for the anticipated demand growth. It defies logic to suggest that Bernardsville and Mendham, where lot sizes are measured in tens of acres, and the business load is very limited, will see 25% population growth in the service area of this tank over the next 12 years. And Mr. Shields admitted that NJAW's calculated storage requirements for Mendham Low Gradient are based on peak demands, *which include inter-zone transfers out of the Mendham Low Gradient* of some unspecified amount. In other words, NJAW calculates storage requirements based on demand, but includes transfers out of the zone in that demand calculation. If inter-zone transfers out of the Mendham Low Gradient were excluded from the calculation,

NJAW may require a much smaller Fenwick Tank for storage purposes, perhaps even as small as the tank that currently exists.

Further, as to capacity, NJAW conceded that the water from the Clyde Potts Reservoir is a gravity feed. Yet, NJAW failed to explain why the decades long status quo – use of water from the Clyde Potts Reservoir – was no longer “feasible” as its own internal memorandum from 2018 conceded. Mr. Shields, NJAW’s sole witness, provided no reasonable explanation as to why NJAW did not pursue the options that it had deemed “feasible” and “somewhat feasible.” Mr. Shields offered no rationale or explanation as to why NJAW did not even negotiate with the SMCMUA or respond to its offer to conduct modeling to resolve the technical issues associated with the Clyde Potts pump station. NJAW did not offer cost information on this issue, nor on the financial issues set forth in the May 11, 2018 termination letter from the MCMUA, either.

Third, NJAW argued that a new tank was essential to provide gravity storage for fire protection, citing N.J.A.C. 7:10-11.11(a)(2). There is no question that fire-fighting capability is essential. But, NJAW’s analysis of the potential ways to provide fire-fighting capability ignores other feasible methods, including interconnection of the Horizon Tank in the Mendham High Gradient with the Mendham Low Gradient. These two gradients are already interconnected, and upgrades to water mains connecting them have already been completed. The Horizon Tank sits at higher elevation than the Fenwick Tank and provides gravity storage for fire-fighting. NJAW documents produced in this matter indicate that the Horizon Tank can be shared with the Mendham Low Gradient under fire flow conditions. See Exhibit I-17. Yet, NJAW provided no technical data as to the feasibility of using either the Horizon Tank or the emergency interconnect offered by the MCMUA in its May 11, 2018 to resolve the alleged firefighting issues.

Finally, NJAW argued that a new tank was needed in order to provide adequate water pressure, citing N.J.A.C. 7:10-11.11(a)(2) and N.J.A.C. 7:10-11.10(d), which combine to require that the system provide water pressure at a minimum pressure of 20 pounds per square inch. But the Fenwick Tank is already in compliance with this requirement. See Exhibit I-19. NJAW also argued that if the Fenwick Tank is not upgraded, its service area may experience interruptions in water supply and may not have sufficient water pressure during fire flow conditions. Significantly, NJAW provided no documentation of the modeling or hydraulic analysis that drives this concern. The system is already in compliance in the current condition.

Proposed Conclusion of Law. NJAW failed to produce evidence supporting its assertion that the upsized Fenwick Tank is reasonably necessary.

Proposed Conclusion of Law. On balance, the evidence supplied by the parties indicates that the system in its current condition can satisfy all of the hydraulic concerns that led to the application for an upsized Fenwick Tank. The project is therefore not “reasonably necessary.”

B. The project would have a significant, negative impact on the community zone plan and surrounding neighborhood, and this evidence is uncontroverted.

When evaluating the “reasonable necessity” of a proposed public utility project under N.J.S.A 40:55D-19, the BPU must also “consider 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 the public convenience and welfare, whether other and equally serviceable sites are reasonably available for purchase or condemnation which would have less impact on the zoning scheme, and last but by no means least, whether any resulting injury to abutting or

neighboring landowners can be minimized.” I/M/O Petition of Jersey Central Power & Light, supra, 2018 WL 1519039 at 101 (citing In re Monmouth Consolidated Water Co., supra).

This inquiry cannot be disaggregated from the “reasonable necessity” analysis: “[t]o determine if a particular site is ‘reasonably necessary,’ the BPU must consider the project in regard to the community’s zoning plan, the physical characteristics of the site, and the surrounding neighborhood.” I/M/O Petition of New Jersey Natural Gas, supra, 2022 WL 2289019 at *19 (citing Public Service Elec. & Gas Co., supra, 358 N.J. at 377).

Here NJAW not only failed to meet its burden, but it thumbed its nose at the applicable standard. NJAW failed to call a single witness during the hearing who could testify regarding the zoning plan or the effect of the project on the surrounding neighborhood. NJAW did not call a planner, an appraiser, a historic resources consultant, or any other witness other than Mr. Shields, who was not even qualified as an expert. The failure by NJAW to produce an iota of evidence on a topic that is integral to the BPU’s consideration of its petition is fatal to its case.

Instead, the only evidence produced in this proceeding regarding zoning, community, and neighborhood impacts points in one direction. Witnesses called by the Zoning Board and Intervenor, including Mr. Jones, Mr. Greenebaum, and Mr. Lincoln, offered unrefuted testimony regarding the deleterious impacts of this development on Bernardsville and on the neighborhood surrounding the project site.

Mr. Greenebaum testified regarding the Zoning Board’s consideration of this matter and the impact of the project on the Bernardsville zoning scheme. Mr. Greenebaum testified that the parcel on which NJAW wishes to upsize the tank is too small for the intense proposed use, and that the proposed use would be completely out of character with its surroundings. The proposed

tank would be the highest structure in Bernardsville if it were to be built and would tower over the rest of the Borough.

NJAW required numerous, significant use and bulk variances for approval, and it failed to offer evidence at the Zoning Board or at trial of the unique shape or constraints at the property that would justify granting extensive variances from the local code. And Mr. Greenebaum testified that upon review of the information presented to it, the Zoning Board concluded that there would be no way to shield views of the proposed tank, and that the tank would significantly alter its bucolic surrounding neighborhood, filled with estate homes.

Mr. Lincoln testified regarding the historic nature of the neighborhood surrounding the project site, and concluded that construction of the new tank would have a severe impact on its surroundings. Mr. Lincoln testified that the proposed tank would be out of place in its neighborhood and could not be concealed, and that placement of the new tank in this neighborhood would have a significant deleterious effect on the historic character of the nearby homes.

Mr. Jones testified regarding the reduction of property values that would occur if the tank were to be built. His expert opinion is that construction of the tank would reduce the property value of Intervenor's property by at least 50% and would reduce the value of the Participant's property, across Mendham Road from the site, by about 40%. This projected reduction of property values is based on Mr. Jones' expert opinion as a real estate appraiser and on a analysis conducted by Mr. Jones of the impacts of public utility facilities on neighboring property values in New Jersey. The impact of a public utility facility on neighboring property values is an integral part of the analysis under N.J.S.A. 40:55D-19. See, e.g., I/M/O New Jersey Natural Gas

Co., supra, 2022 WL 2289019 at *8-9; I/M/O Petition of Jersey Central Power & Light, supra, 2018 WL 1519039 at 103. NJAW presented no evidence to counter Mr. Jones’s conclusions.

The evidence and testimony presented by Mr. Greenebaum, Mr. Lincoln, and Mr. Jones was uncontroverted, and all of it points toward a finding that the negative impacts to the surrounding community are immense. Controlling law requires that the impacts be balanced against the necessity of the project, as established with competent evidence. For the reasons set forth in Intervenor’s Motions *in Limine*, much of the evidence presented by Petitioner is unsupported by data, modeling or analysis, and not even admissible, let alone compelling. Imposing such a deleterious burden on individual property owners cannot be justified on the meager case presented here. NJAW asks this Court to apply a watered-down and essentially meaningless “reasonably necessary” standard that largely defers to a utility’s conception of its needs and prerogatives. The law requires far more scrutiny.

Proposed Conclusion of Law. NJAW’s project would have significant negative impacts on the community zoning plan and zoning ordinance and the surrounding neighborhood, and evidence of these negative impacts was uncontroverted.

Proposed Conclusion of Law. The proposed water tank is too large for the proposed site, and the site is not physically suited to accommodate a water tower of this size and height.

Proposed Conclusion of Law. The proposed water tank, if constructed, would have a significant negative impact on neighboring property values.

Proposed Conclusion of Law. The negative impacts of the proposed project on the community zoning plan and surrounding neighborhood, in combination with NJAW’s failure to demonstrate reasonable necessity of the project in this particular location, preclude overruling a local decision to deny approvals for this project.

Proposed Conclusion of Law. The testimony of Donald Shields and Howard Woods is conclusory net opinion, is lacking in foundation and empirical support, and thus is inherently unreliable. The testimony is technically deficient as a matter of evidence and insufficient as a matter of law to sustain Petitioner's burden of proof.

C. Alternative sites or methods

The standard for review of alternatives in cases brought under N.J.S.A. 40:55D-19 is forgiving for petitioners, but NJAW's effort in this case fails to clear even that low bar.

“Alternative sites or methods and their comparative advantages and disadvantages to all interests involved, including cost, must be considered in determining such reasonable necessity.” In re Public Service Elec. & Gas Co., supra, 35 N.J. at 377. Another case decided under the prior version of the statute elucidated the standard with more precision:

It is reasonable necessity for the proposed site in the light of all the facts and circumstances and balancing all interests that is the test prescribed. One of such circumstances generally is the availability of other locations, not municipally restricted, or, if so, less likely to cause injury to the neighborhood, and their comparative advantages and disadvantages with the plot for which approval is sought. Such evidence should ordinarily be tendered by the petitioner and was presented here. Another such factual circumstance, and no more than that, may well be, in certain cases, the possibility of other methods of attaining the needed improvement or addition to facilities not involving the site at all, or by a different and less objectionable kind of building or structure. No hard and fast rule may be laid down on this score. We do not think it obligatory on the utility to set up a lot of straw men and then knock them down. As part of its case in establishing basic necessity for the improvement itself apart from the location it should, however, show that the means or method proposed to meet the public need is reasonable and desirable, perhaps in relation to customary practices and methods in the industry and the company's existing methods, as well as any other pertinent factors, including any substantially greater expense of an alternative method which might be reflected in higher charges to its customers. Beyond this, the burden of demonstrating a feasible alternative method ought to devolve on the objectors, as should a showing of alternative sites beyond those brought forward by the applicant.

Application of Hackensack Water Co., *supra*, 41 N.J. Super. at 426-27. In sum, courts have required that public utility petitioners perform an analysis of feasible alternatives, including both alternative locations where the proposed use could be located and alternative methods for achieving the same benefit to the public. And the petitioner must “tender” and “present” such analysis to the BPU. But the petitioner is not required to set up and knock down “straw men.” Once the petitioner has satisfied its basic obligation to perform and present the alternatives analysis, i.e., bear its burden of proof, any objectors bear the burden of demonstrating that a feasible alternative exists.

Here, NJAW failed to carry its burden. Mr. Shields testified that NJAW screened properties in the vicinity of the project site that met ground elevation criteria, but eliminated all of those potentially feasible alternative locations without further analysis for reasons relating to zoning. NJAW submitted no written analysis of locational alternatives into evidence.

As to “methods” alternatives, NJAW performed no analysis and submitted none into evidence in this matter.

Evidence introduced by Intervenor and the Zoning Board in this matter, which is based in large part upon documents produced by NJAW in discovery, indicate that there were, indeed, feasible “site” and “methods” alternatives that NJAW had an obligation to explore further. First, NJAW personnel had prepared internal memoranda in response to the May 11, 2018 letter from the MCMUA announcing the termination of the Water Supply Agreement. These memoranda analyzed several options for responding, including one – entering into an agreement directly with SMCMUA to purchase water – that was deemed as “feasible.” NJAW had initial discussions with SMCMUA about this option, reaching a point where SMCMUA requested modeling from NJAW so that SMCMUA could determine where a new pump station would be needed as part of

the interconnection. But the record reflects that NJAW simply ceased this analysis in July 2018, and the record is devoid of an explanation as to why. Purchasing water from SMCMUA in 2018 was, at the time, a feasible alternative to constructing an enlarged Fenwick Tank. NJAW has failed to present credible evidence suggesting that purchasing water directly from SMCMUA does not remain a feasible alternative. NJAW has not met its burden to analyze this alternative in good faith.

Intervenor and the Zoning Board have introduced credible evidence that a locational alternative exists to address firefighting issues. Ms. Diaz testified that based on her review of the record, the Mendham High Gradient is interconnected with the Mendham Low Gradient, and the interconnection was upgraded by recent water main improvements in Mendham. She also testified that the Horizon Tank is a gravity storage tank in the Mendham High Gradient with a capacity of one million gallons, and with the capability of serving as emergency fire flow capacity for the Mendham Low Gradient. Ms. Diaz testified that the use of the Horizon Tank as emergency fire flow gravity storage for the Mendham Low Gradient, along with already planned infrastructure improvements elsewhere in the basin, including the Oak Place Booster Station, could provide equivalent levels of service and convenience to the public as would be achieved through replacement of the Fenwick Tank. However, as with the alternative of purchasing water from SMCMUA, NJAW failed to analyze this potentially feasible alternative in any meaningful manner. It dismissed this alternative out of hand, without presenting any detailed analysis or providing any modeling that would show the impact of using water (and water pressure) from the Horizon Tank in the exceedingly rare circumstance of a fire. The fact finder simply has no way to determine whether the alleged impact on firefighting is for one house or one thousand houses; for 5 minutes or 5 hours; for a material impact on water pressure or a completely negligible one

that could be solved by the MCMUA-offered emergency interconnection or pumping water from other areas of NJAW's interconnected system. The object failure to present actual data at trial renders NJAW's study of alternatives insufficient under the In re Public Service Elec. & Gas Co. standard, and requires denial of its petition.

Proposed Conclusion of Law. NJAW failed to perform and present the analysis of alternatives to the proposed project that is required by statute.

Proposed Conclusion of Law. There exist viable alternatives to this proposed project, including alternative sites for locating gravity storage capacity and an additional method, namely purchasing water sourced from the Clyde Potts Reservoir from the SMCMUA, that were deemed "feasible" by NJAW in preliminary analysis but never pursued.

Proposed Conclusion of Law. NJAW's failure to pursue or even fully analyze these alternatives, and its failure to present evidence regarding alternatives to this tribunal, contravene requirements under the law and preclude relief under N.J.S.A. 40:55D-19.

III. RECENT CASES

Several recent cases involving petitions brought by public utilities under N.J.S.A. 40:55D-19 or analogous statutory provisions have been decided by the BPU or by OAL judges in contested cases, and several additional recent cases have reached the Appellate Division.

In I/M/O Petition of New Jersey Natural Gas Co., 2022 WL 2289019 (N.J. Adm. May 18, 2022), the petitioner sought relief under N.J.S.A. 40:55D-19 to bypass municipal land use ordinances in Holmdel Township to build a regulator station. The court (Elia A. Pelos, ALJ) granted the petition, finding that the petitioner had satisfied all of the elements under In re Public Service Elec. & Gas Co., *supra*.

Notably, both the petitioner and objectors presented witnesses who testified regarding impacts of the proposed use on neighboring property values, and the court devoted several pages

of the opinion to this subject before concluding that the proposed use would have “little to no material impact on the value of nearby properties.” Id. at 11. In addition, the petitioner presented testimony regarding community impact and zoning issues, which was unopposed by the objectors, and the court adopted petitioner’s witness’s testimony as the finding of fact. Id. at 18. In ruling, the court specifically noted that petitioner “gave serious consideration to Holmdel’s zoning ordinance and master plan and the character of the surrounding neighborhood when selecting the site and designing the station...[t]he record also shows that the regulator’s presence should not have any adverse impact on property values in the area.” Id. at 20. These findings were integral to the court’s decision, which was in the petitioner’s favor.

This case stands in stark contrast to NJAW’s approach in this case. Here, NJAW failed to enter any evidence into the record before the BPU regarding its consideration of community impact and zoning issues in selecting its proposed project.

In another recent case involving the same company, I/M/O Petition of New Jersey Natural Gas Co., 2021 WL 1688028 (App. Div. 2021), the petitioner sought preemptive relief under N.J.S.A. 40:55D-19 for a proposed natural gas pipeline that would cross multiple municipalities, without having first applied for municipal approvals from each municipality. Opponents of the project, which included the Pinelands Preservation Alliance and the Sierra Club, participated in only a limited fashion during the hearing held by the BPU, and raised arguments in opposition to the project founded primarily in the project’s alleged inconsistency with the Pinelands Comprehensive Management Plan. Id. at 9. In an unpublished opinion, the Appellate Division affirmed the BPU’s order granting the petition. Id. at 18.

Of particular note in this case was the analysis of alternatives. The court noted that at the BPU evidentiary hearing, the petitioner:

[P]resented an expert report prepared by AECOM and testimony by Baker on alternative routes for the pipeline. The report examined five alternative routes for the first section of the pipeline and four alternate routes for the pipeline's second section...AECOM evaluated these routes using numerous quantitative factors: [including] (1) built environment...(2) natural environment...and (3) engineering variables...The report also considered qualitative factors, including: visual concerns; community concerns; special permit issues; construction/maintenance accessibility; and schedule delay risks. After weighing the importance of each of those factors, AECOM determined that the route [petitioner] selected for the [project] was the most feasible.

Id. at 16. In that case, the petitioner entered into evidence a detailed report of alternatives using both quantitative and qualitative factors, including impact on the community and construction accessibility, to justify its selection of its proposed course of action. This stands in stark contrast to NJAW in the case before this Court, which entered into evidence bare assertions regarding alternative locations considered, without any quantitative or qualitative support, and with no consideration given to community concerns.

In yet another recent case, I/M/O Petition of Ocean Wind LLC, BPU Docket No. QO22020041, the BPU adopted an order on October 5, 2022 granting Ocean Wind's petition for a determination that certain easements across Green Acres-designated properties and local government approvals from the City of Ocean City were reasonably necessary for the construction or operation of an offshore wind project, under N.J.S.A. 48:3-87.1(f). This case was decided under a completely different statutory scheme than N.J.S.A. 40:55D-19. N.J.S.A. 48:3-87.1(f), *L. 2021, c. 178*, is part of the Offshore Wind Economic Development Act of 2010, *L. 2010, c. 57* ("OWEDA"), and it grants offshore wind projects the ability to petition the BPU for preemption of local government approvals for construction or operation of an offshore wind project. The statute at issue in the Ocean Wind case requires a showing only of reasonable necessity to obtain municipal approvals, and only for offshore wind projects. There is no

requirement in the statute or related case law that the petitioner balance local interests or consider alternatives, as exists in N.J.S.A. 40:55D-19. Further, the Ocean Wind required no zoning relief, so the integrity of the City of Ocean City's zoning scheme was not at issue. And perhaps most importantly, opposition to the project was haphazard and ineffective. The City of Ocean City did not submit any testimony, exhibits, or other evidence to support the claims it raised in opposition, and no other opponents of the project were granted party status. For all of the above reasons, the Ocean Wind case is factually and legally distinguishable from the instant case involving NJAW and N.J.S.A. 40:55D-19, and, therefore, Ocean Wind should not be considered precedential or even persuasive authority here.

IV. CONCLUSION

For all of the above reasons, Intervenor respectfully requests that the Court:

1. Deny NJAW's petition for an Order exempting NJAW from the provisions of the MLUL; and
2. Reject NJAW's request that the BPU overrule the denial of NJAW's application for zoning relief by the Borough of Bernardsville Zoning Board of Adjustment.

3-17-2023

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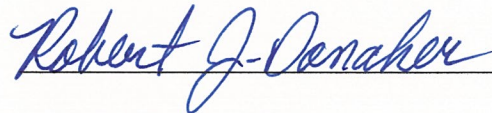
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CERTIFICATION OF SERVICE

I, Carol A. Jacoby, Paralegal at the law firm of Duane Morris LLP, certify that on March 17, 2023, I caused copies of Intervenor Paul Savas' and Participant Karen Martin's Jong Post-Hearing Findings of Fact and Conclusions of Law in Opposition to the Petition of New Jersey American Water Company for a Determination Concerning the Fenwick Water Tank Pursuant to N.J.S.A. 40:55D-19 to be served via email upon each of the parties named on the service list attached to this filing. The above statements made by me are true. I am aware that if any statement made by me is willfully false, I am subject to punishment.

Dated: March 17, 2023

 /s/ Carol A. Jacoby
Carol A. Jacoby

**IN THE MATTER OF
THE PETITION OF NEW JERSEY AMERICAN WATER COMPANY FOR A DETERMINATION
CONCERNING
THE FENWICK WATER TANK PURSUANT TO N.J.S.A. 40:55D-19
BPU DOCKET NO: W022010004
OAL DOCKET # PUC 00319-2022 S**

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