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March 17, 2023

VIA E-MAIL

Honorable Tricia Caliguire
Administrative Law Judge
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08649

Re: In the Matter of the Petition of New Jersey American Water; OAL Docket No. PUC 00319-2022S; BPU Docket No. W022010004

Dear Judge Caliguire:

Please accept this letter brief in response to the “notice” submitted by counsel for Petitioner on Friday, December 9 that Petitioner objects to the testimony of Kenneth J. Jones, ASA and Daniel W. Lincoln, RA on the grounds that the testimony offered by these witnesses is “irrelevant” and “will not add any probative value to the Court’s consideration of the merits of this matter.” Petitioner’s “notice” is attached hereto as Exhibit A. During the evidentiary hearing in December, you advised the parties that you would accept responses to Petitioner’s “notices” up to and including the deadline for post-hearing submissions.

Petitioner is incorrect. Petitioner does correctly cite N.J.S.A. 40:55D-19, which requires that Petitioner prove that the proposed public utility use 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.”

But the standard the Court must apply when evaluating the merits of this case does not end there. As Your Honor wrote in the Order on Intervention entered in this matter on March 21, 2022:

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“The statute authorizes the Board to exempt NJAW from the Bernardsville zoning regulations if NJAW can show that the interests protected by the zoning regulations need to be subordinated to the “broader public interest” served by the public utility. N.Y. Central R.R. v. Borough of Ridgefield, 84 N.J. Super. 85, 94 (App. Div. 1964). It is well-established that the utility, here NJAW, bears the burden of proving the need for the proposed project, the feasibility of the proposal, the consideration given to alternatives, and the suitability of the site chosen. Further,

In making its determination, the Board must consider the site, the community zoning plan and zoning ordinances, the physical characteristics of the plot, and the surrounding neighborhood. When determining reasonable necessity, the Board must consider alternative sites and their advantages and disadvantages, including their costs. [Matter of in re S. Jersey Gas Co., 447 N.J. Super. 459, 481 (App. Div. 2016) (citations omitted).]”

(Order on Intervention, p. 6-7.)

Matter of in re S. Jersey Gas Co. follows a line of cases interpreting N.J.S.A. 40:55D-19 that have consistently held that the BPU must balance the utility’s professed need for the improvement against adversely affected local interests, including zoning and planning considerations, aesthetic considerations, impacts on property values, and the like. *See, e.g., In re Application of Hackensack Water Co.*, 41 N.J. Super. 408 (App. Div. 1956); *In re Public Service Elec. & Gas Co.*, 35 N.J. 358 (1961); *In re Petitions of Public Service Elec. & Gas Co.*, 100 N.J. Super. 1 (App. Div. 1968).

In addition, in the Order on Intervention, Your Honor acknowledged and implicitly welcomed testimony on the subjects to be provided by Mr. Jones and Mr. Lincoln. It is simply beyond cavil to suggest that the BPU should not consider relevant testimony concerning the impact to the surrounding community, including the “advantages and disadvantages” of the site selected by NJAW for this substantially enlarged water tank. Here, the testimony of both Mr. (property values) and Mr. Lincoln (historic nature of property and surrounding area) directly address those impacts.

Mr. Jones’ testimony in this matter pertains to the value of the residential properties owned by Intervenor and Participant. This subject touches upon the impact of the proposed project on the “surrounding community.” *Matter of in re S. Jersey Gas Co.*, 447 N.J. Super at 481. This subject also pertains to the “suitability of the site chosen.” Order on Intervention at 6. In addition, Your Honor’s Order on Intervention acknowledged that Respondent intended to

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challenge the petition on grounds including “the negative impact of the Proposed Water Tank on neighboring property values.”

Mr. Lincoln’s testimony in this matter pertains to the historic character of the neighborhood where the proposed water tower is located, and the potential impacts of the tower on the neighborhood. Like the testimony from Mr. Jones on property devaluation, the subject of Mr. Lincoln’s testimony touches upon the impact of the proposed project on the “surrounding community.” *Matter of in re S. Jersey Gas Co.*, 447 N.J. Super at 481. This subject also pertains to the “suitability of the site chosen.” Order on Intervention at 6. In addition, Your Honor’s Order on Intervention acknowledged that Respondent planned to challenge the petition on grounds including “the inappropriateness of the Proposed Water Tank in a ‘significantly historic district.’”

Given the standards set forth in *Matter of in re S. Jersey Gas Co.* and its predecessors and successors, there is no doubt that evidence of the impacts of the proposed Fenwick Tank on adjacent property values and on the historic character of the neighborhood is relevant to the Court’s consideration of whether the site chosen by Petitioner is suitable for this particular use, and the impacts of this project on the surrounding neighborhood. This evidence is supplemented by testimony from David Greenebaum, Chairman of the Bernardsville Zoning Board of Adjustment regarding the zoning interests implicated by this proposed project and the reasons that the Zoning Board denied relief below.

Petitioner’s December 9 “notice” of its objection to the testimony of Mr. Jones and Mr. Lincoln ignores the standard set forth in *Matter of in re S. Jersey Gas Co.* and its predecessors and Your Honor’s discussion of that standard in the Order on Intervention. Petitioner’s position reflects its indifference to the impacts of its chosen course of action on the surrounding community and its disregard of sincerely held opposition by members of the local community, as reflected in the Zoning Board decision.

The Court should not countenance Petitioner’s effort to exclude relevant, probative evidence. The testimony of Mr. Jones and Mr. Lincoln should be admitted into the record.

Respectfully submitted,

/s/ David B. Amerikaner

David B. Amerikaner

DBA

cc: Service List (*see attached*)

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Duane Morris

EXHIBIT A

December 9, 2022

Via Electronic Mail

The Honorable Judge Caliguire
State of New Jersey
Office of Administrative Law
Post office Box 049
Trenton, NJ 08625-0049

Re: Petitioner's Response to Intervenor Savas' December 2, 2022 Letter Motion and notice of Petitioner's Objection to testimony from Intervenor's Witness Kenneth J. Jones, ASA.

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 OAL Docket Number. PUC 00319-2022 S BPU Docket Number. WO22010004 Our File Number. NEW248.042

Dear Judge Caliguire:

In response to Your Honor's Order to respond to the Intervenor's letter motion which was filed on December 2, 2022, the Petitioner has nothing more to add to its previously submitted letter objecting to this motion from the Intervenor.

Please accept this letter as notice that the Petitioner objects to testimony provided by Kenneth J. Jones, ASA on behalf of the Intervenor and testimony provided by Daniel W. Lincoln, RA on behalf of the Bernardsville Zoning Board and the Petitioner moves to exclude this testimony on grounds that testimony regarding property valuation and historical significance is irrelevant, would cause undue delay in the proceeding, and will not add any probative value to the Court's consideration of the merits of this matter under the statutory criteria guiding the Court's decision.

As Your Honor is well aware, the Petitioner seeks approval from this Court under N.J.S.A. 40:55D-19 which requires, at its core, that the Petitioner proves that (i) the proposed water storage tank is necessary for the service, convenience or welfare of the public; and (ii) no alternative site or sites are reasonably available to achieve an equivalent public benefit.

The pre-filed testimony from Mr. Jones related to his assertions regarding property values does not have any nexus or probative value to either prong required by the statute and, therefore, should be dismissed as irrelevant. While the Petitioner fundamentally disagrees with Mr. Jones' claims regarding the reduction of the Intervenor's home value, this testimony and any cross examination or argument to refute this claim would ultimately have no bearing on the need for the proposed water storage tank and whether there were any reasonable alternative sites for the storage tank.

In a similar manner, the pre-filed testimony from Mr. Lincoln regarding the asserted historic significance and whether State Historic Preservation Office (SHPO) Review is required also does not have any probative value under the statute. While Petitioner's expert witness has responded in its Rebuttal Testimony that SHPO Review is not required, the testimony ultimately does not have any bearing on the need for the proposed water storage tank and whether there were any reasonable alternative sites for the storage tank.

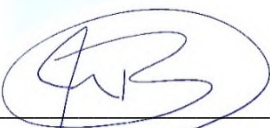
The testimony from Mr. Jones and from Mr. Lincoln will add nothing to inform the court on the merits of this case under the law. In sum, there is no probative value to Mr. Jones' testimony but such testimony will likely cause undue delay to this proceeding and will distract from the arguments on the merits according to the statute.

For these reasons, the Petitioner moves to remove Mr. Jones from the witness list in this proceeding and to not allow his prefiled testimony or Mr. Lincoln's prefiled testimony to enter the record.

Thank you for your time and attention to this letter motion.

Very truly yours,

Archer & Greiner
A Professional Corporation

By:  _____
James A. Boyd, Jr., Esq.

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' letter brief to the Honorable Tricia Caliguire 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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