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May 15, 2023

VIA ELECTRONIC MAIL

Ms. Sherri Golden
Board Secretary
New Jersey Board of Public Utilities
44 South Clinton Ave., 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Re: In the Matter of the Petition of New Jersey American Water Company, Inc. for a Determination Concerning the Fenwick Water Tank, Pursuant to N.J.S.A. 40:55D-19, OAL Docket No. PUC 00319-22, BPU Docket No. WO22010004

Dear Secretary Golden:

On behalf of Intervenor Paul Savas and Participant Karen Martin, represented in this matter by Richard Schkolnick, Esq. and Robert Donaher, Esq., please accept for filing this letter brief containing exceptions to the Initial Decision of Administrative Law Judge Tricia Caliguire in the above-captioned docket, issued on May 1, 2023. This case raises fundamental issues as to the obligation of a public utility to consider local interests, including zoning policies, in the siting of a new public utility facility where the public utility itself has recognized that a facially feasible alternative method or location could eliminate massive detriment to the local community.

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1. The Initial Decision improperly shifts the burden of proof from Petitioner to Intervenor and Respondent.

In cases brought under N.J.S.A. 40:55D-19, a petitioner seeking relief from local zoning requirements “has the burden of proof on the need for the [public utility use], the feasibility of the company’s method, plans and actions, and the consideration given to alternatives, as well as the suitability of the site chosen for the proposed structure(s).” *I/M/O Petition of Jersey Central Power & Light Co.*, BPU Dkt. No. EO16080750, 2018 WL 1519039 at *99 (N.J. Adm. Mar. 8, 2018). It is only when the petitioner meets that burden of proof that the burden shifts to an objector to show “a feasible alternate method.” *I/M/O Petition of New Jersey Natural Gas Co.*, BPU Dkt. Nos. GO17010023, GO18222257, 2022 WL 2289019 at *20 (N.J. Adm. May 18, 2022) (citing *In re Petition of Jersey Cent. Power & Light Co.*, BPU Dkt. No. EO 1530383 at *3 (Nov. 21, 2017)). Here, Petitioner failed to meet its burden of proving the need for the use, the feasibility of the methods it proposes to use, the consideration given to alternatives, and particularly the suitability of the site chosen, because Petitioner failed to present any evidence regarding the impacts of the use on the surrounding community. Yet the ALJ shifted the burden of proof, improperly, from Petitioner to Intervenor in this case, in several ways. First, the ALJ adopted Petitioner’s argument that it was somehow incumbent upon the expert witness retained by Intervenor and Respondent Bernardsville Zoning Board of Adjustment to ask questions directly of Petitioner regarding Petitioner’s modeling of various water supply scenarios. See Initial Decision at 23. Petitioner’s model and data were, of course, under the control of Petitioner, not Intervenor’s and Respondent’s witness. As another example, the ALJ criticized unrefuted testimony offered by Intervenor’s and Respondent’s witnesses regarding the impact of

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the proposed water tank on the surrounding community and neighboring properties, and stated that Petitioner was not obligated to present evidence on these points, in contravention of controlling case law. *See I/M/O Petition of Jersey Central Power Co., supra*, 2018 1519039 at *101; *I/M/O Petition of New Jersey Natural Gas, supra*, 2022 WL 2289029 at *19. See Initial Decision at 46.

2. The Initial Decision imposes on Intervenor and Respondent a duty to perform modeling of alternative methods, when that duty lies with Petitioner.

The ALJ improperly found fault in the inability of Intervenor's and Respondent's expert witness, Giselle Diaz, to perform independent modeling of alternative methods, including using the Horizon Drive Tank to meet many of the specifications claimed by Petitioner as justification for the enlarged Fenwick Tank. The ALJ failed to acknowledge that it was Petitioner's burden to model alternative methods, *see I/M/O Petition of Jersey Central Power Co., supra*, 2018 1519039 at *99, and that Ms. Diaz had no method of gaining access to Petitioner's internal modeling software that would permit her to perform the modeling required. See Initial Decision at 12.

3. The Initial Decision ignores Petitioner's failure to provide evidence of the relative costs of various alternatives in concluding that Petitioner chose the lowest-cost alternative.

Much of the Initial Decision rests upon a presumption that various alternatives to the proposed tank enlargement considered by Petitioner imposed added costs as compared with the tank enlargement. But Petitioner did not present evidence of the magnitude or relative scale of these costs, and the ALJ failed to hold Petitioner responsible for presenting evidence of costs as an element of the analysis of whether the proposed tank is reasonably necessary when compared

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with alternatives. See, e.g., Initial Decision at 19, 30. Consideration of an application under N.J.S.A. 40:55D-19 must include “[a]lternative sites or methods and their comparative advantages and disadvantages to all interests involved, **including cost.**” *In re Public Service Elec. & Gas Co.*, 35 N.J. 358, 377 (1961) (emphasis added).

4. **The Initial Decision disregards the requirements of *In re Public Service Elec. & Gas Co.*, 35 N.J. 358 (1961) and *In re Application of Hackensack Water Co.*, 41 N.J. Super. 408 (App. Div. 1956), among other cases, which require balancing of the utility’s interests against factors that include the impact of the proposed utility use on the surrounding community.**

Case law interpreting N.J.S.A. 40:55D-19 is consistent in holding that the impacts of a proposed utility use on the surrounding community must be balanced against the utility’s interests and those of the public served by the utility. *In re Public Service Elec. & Gas Co.*, *supra*, 35 N.J. at 376-77. The only evidence presented in this case regarding impacts of the proposed tank enlargement on the community of Bernardsville and neighboring properties was presented by Intervenor and Respondent, through witnesses Diaz, Lincoln, and Greenebaum. Petitioner failed to present any evidence on these points. And yet the ALJ criticized the evidence presented by Intervenor and Respondent and gave Petitioner the benefit of the doubt on these points, without any factual evidence in the record to substantiate her conclusions. See Initial Decision at 46.

5. **The ALJ failed to hold Petitioner to account for failing to present a legally sufficient case in chief.**

As outlined in Intervenor’s and Participant’s Joint Post-Hearing Findings of Fact and Conclusions of Law, Petitioner failed to present a legally sufficient case in support of its petition under N.J.S.A. 40:55D-19. As set forth in *In re Public Serv. Elec. & Gas Co.*, *supra*, the Board

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must consider evidence of “the physical characteristics of the plot involved and the surrounding neighborhood, and the effect of the proposed use thereon” as well as “[a]lternative sites or methods and their comparative advantages and disadvantages to all interests involved, including cost.” 35 N.J. at 377. Here, Petitioner failed to analyze alternative methods and locations, failed to present any evidence of the impacts of the project on the surrounding community, and failed to offer evidence comparing costs with benefits, or any evidence at all regarding costs. The case presented by Petitioner was legally deficient and does not support the granting of relief under N.J.S.A. 40:55D-19. The ALJ erred in granting that relief.

6. The ALJ erred in finding that the Fenwick Tank enlargement project is reasonably necessary in the location where it is proposed.

As outlined in Intervenor’s and Participant’s Joint Post-Hearing Findings of Fact and Conclusions of Law, Petitioner ignored feasible alternatives, including alternative methods and locations, to the proposed project, or failed to fully analyze the alternatives. It was therefore impossible for Petitioner to prove that the proposed project is reasonably necessary in the location where it is proposed. On the contrary, Intervenor and Respondent showed that Petitioner had numerous alternatives that it could have pursued that would have reduced impacts on the surrounding community. The ALJ erred in finding otherwise. Most importantly, Petitioner identified a feasible alternative method – purchasing water directly from the Southeast Morris County Municipal Utilities Authority to offset the loss of supply from the Morris County Municipal Utilities Authority – but never pursued this alternative, which would have avoided the massive impact to the community in the vicinity of the Fenwick Tank. See Intervenor Paul Savas’ and Participant Karen Martin’s Joint Post-Hearing Findings of Fact and Conclusions of

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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, Mar. 17, 2023.

7. The ALJ erred in finding that that there are no alternatives to the proposed tank enlargement.

As outlined in Intervenor's and Participant's Joint Post-Hearing Findings of Fact and Conclusions of Law, there were feasible alternatives to the proposed project. These included using the Horizon Drive Tank as the elevated storage and firefighting source for the Mendham Low Gradient, purchasing water directly from the Southeast Morris County Municipal Utilities Authority. These alternatives were not fully explored by Petitioner, but were summarily rejected in the Initial Decision without sufficient justification.

8. The Board should reject the Initial Decision or, in the alternative, remand to the Zoning Board for proper consideration of alternatives.

For the reasons set forth above, the Board should reject the Initial Decision and deny Petitioner's application for relief under N.J.S.A. 40:55D-19. In the alternative, the Board should remand Petitioner's application for relief back to the Borough of Bernardsville Zoning Board of Adjustment for consideration of evidence omitted from Petitioner's initial presentation to the Zoning Board and its evidentiary case presented to the ALJ. *See In re Monmouth Consolidated Water Co.*, 47 N.J. 251(1966).

Very truly yours,

David Amerikaner

David Amerikaner

cc: Service List

**IMO Petition of N.J. American
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N.J.S.A. 40:55D-19
BPU: Docket No.: WO22010004
OAL Docket No. PUC 00319-22**

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