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May 11, 2023

Via Electronic Filing Only

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

**Re: I/M/O Petition of N.J. American Water Co., Inc. For A Determination
Concerning Fenwick Water Tank Pursuant to N.J.S.A. 40:55D-19
BPU Docket No. WO22010004
OAL Docket No. PUC 00319-22**

Dear Secretary Golden:

Please accept for filing the New Jersey Division of Rate Counsel's ("Rate Counsel") exception to Administrative Law Judge ("ALJ") Tricia Caliguire's Initial Decision in the above-referenced docket, issued on May 1, 2023.¹ Rate Counsel requests that the New Jersey Board of Public Utilities ("BPU") now consider the issue of whether portions of expert witness Howard Woods' rebuttal testimony should have been barred from the proceeding, pursuant to the Board's January 11, 2023 Order in this matter, and attaches its Brief requesting interlocutory review to support its position.² Rate Counsel relies on its December 19th brief in support of its request that the Board reverse Judge Caliguire's Order barring portions of Mr. Woods' testimony.

¹ Initial Decision, I/M/O Petition of N.J. American Water Co., Inc. For A Determination Concerning Fenwick Water Tank Pursuant to N.J.S.A. 40:55D-19, BPU Docket No. WO22010004, OAL Docket No. PUC 00319-22 (1 May 2023) ("Initial Decision").

² Brief, I/M/O Petition of N.J. American Water Co., Inc. For A Determination Concerning Fenwick Water Tank Pursuant to N.J.S.A. 40:55D-19, BPU Docket No. WO22010004, OAL Docket No. PUC 00319-22 (19 Dec. 2022).

In the Initial Decision, ALJ Caliguire notes that Rate Counsel filed a request for interlocutory review of an order barring Mr. Woods’ rebuttal testimony with the BPU on December 19, 2022.³ (Copy of the Letter Order dated December 14, 2022 is attached). The Initial Decision further states that the BPU denied this request on January 11, 2023, and explains that “the matters alleged by the parties in connection with that request will not be considered in this initial decision but will be included in the file as transmitted.”⁴ In denying Rate Counsel’s request for interlocutory review, the BPU stated that it deemed it “unnecessary to review the merits of the ALJ’s ruling at this stage of the proceeding.”⁵ Importantly, the BPU explained that it could review a later Initial Decision by the ALJ and that the record was preserved for the BPU to review “any evidence ruling which may be presented by the parties by way of exception to the ALJ’s initial decision.”⁶

Rate Counsel now seeks review of the ALJ’s Letter Order granting the motion of intervenor Paul Savas to bar the rebuttal testimony of Howard Woods numbered (2) and titled “Source of Supply.” Pursuant to the Board’s January 11 Order, this request is timely and appropriate. For the reasons set forth in Rate Counsel’s December 19th brief, Rate Counsel urges the Board to reverse Judge Caliguire’s Order barring portions of Mr. Woods’ testimony from the record.

Respectfully Submitted,

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Director, Division of Rate Counsel

By: Emily F. Smithman
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³ Initial Decision at p. 4.

⁴ Id.

⁵ Order Denying Interlocutory Review, I/M/O Petition of N.J. American Water Co., Inc. For A Determination Concerning Fenwick Water Tank Pursuant to N.J.S.A. 40:55D-19, BPU Docket No. WO22010004, OAL Docket No. PUC 00319-22 (11 Jan. 2023) (“Order Denying Interlocutory Review”) at p. 5.

⁶ Id. at p. 5.



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December 19, 2022

Via electronic delivery

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**Re: I/M/O the Petition of New Jersey American Water Co., Inc. For a Determination
Concerning Fenwick Water Tank Pursuant to N.J.S.A. 40:55D-19
BPU Docket No.: WO22010004
OAL Docket No.: PUC 00319-22**

Dear President Fiordaliso:

Please accept this request for interlocutory review under N.J.A.C. 1:1-14.10 on behalf of the Division of Rate Counsel (“Rate Counsel”) in the above matter. Rate Counsel requests interlocutory review of ALJ Caliguire’s December 12, 2022 order to bar portions of Rate Counsel expert witness Howard Woods’ testimony from the record. ALJ Caliguire determined that the portion of Mr. Wood’s rebuttal testimony pertaining to source of supply should be omitted from the record. ALJ Caliguire also found that omitting this part of the testimony would not prejudice Rate Counsel. For all of the reasons set forth below, the Board should reverse ALJ Caliguire’s order and permit all of Mr. Woods’ rebuttal testimony to be made part of the record.

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

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

1. Necessitate undue consumption of time; or
2. Create substantial danger of undue prejudice or confusion.

Our Supreme Court has ruled that in an administrative hearing, all relevant evidence is admissible. Delguidice v. New Jersey Racing Commission, 100 N.J. 79 (1985). Under the Uniform Administrative Procedure Rules, “relevant evidence” means “evidence having any tendency in reason to prove any material fact” and “material fact” means a “fact legally consequential to a determination of an issue in the case”. N.J.A.C. 1:1-2.1. In the instant proceeding, all the data Mr. Woods reviewed, and his analysis of the impact of SMCMUA’s source of supply issues on the Company’s available storage, is relevant to the Board’s consideration of reasonable alternatives to the proposed Fenwick tank.

ALJ Caliguire determined that the portion of Mr. Woods’ rebuttal testimony pertaining to source of supply should be omitted from the record because Rate Counsel allegedly did not disclose the extent of Mr. Woods’ working relationship with the Southeast Morris County Municipal Utilities Authority (“SMCMUA”) prior to filing Mr. Woods’ rebuttal testimony. This simply is not true. All of the parties had access to Mr. Woods’ resume prior to that testimony being filed. That resume was attached to the direct testimony and disclosed that Mr. Woods had performed work for the SMCMUA. Mr. Woods’ resume clearly listed SMCMUA as a representative client, and identified a cost of service allocation study as one of the matters Mr. Woods worked on for SMCMUA. It should be clear that any such study would require a review of water resources available to SMCMUA and available for sale to other systems. Most importantly, Intervenor Paul Savas had the ability to serve discovery on Mr. Woods and in fact served extensive interrogatories regarding Mr. Woods’ testimony. There simply was no surprise, Mr. Woods’ prior experience was fully disclosed and to the extent any party wished to learn more about Mr. Woods’ prior engagement with SMCMUA, that party had ample opportunity to inquire.

Rate Counsel filed Mr. Woods’ direct testimony before Intervenor filed his direct testimony. While Rate Counsel endeavors to address all issues in a matter, it would be impossible for Rate Counsel to anticipate all of the issues other parties’ might raise in their testimony. Indeed, the entire point of rebuttal is to respond to issues raised in the other parties’ direct that were not addressed in Rate Counsel’s direct testimony. Judge Caliguire’s ruling places an impossible and unfair standard on Rate Counsel, requiring that Rate Counsel be aware of all issues raised by any party in their direct testimony before that testimony is filed. Simply, this is not possible, and would defeat the entire purpose and meaning of rebuttal testimony.

Interlocutory review is also in the interest of justice because omitting Mr. Woods’ testimony will infringe on his ability to successfully rebut Intervenor Paul Savas’ expert testimony from Giselle Diaz. Intervenor Savas took the position that NJAWC can buy water directly from the SMCMUA and therefore avoid the need to construct the new Fenwick tank. If interlocutory review is not granted, Rate Counsel will be prejudiced by not being able to respond to this issue of source of supply introduced into the record by Intervenor Savas in its direct testimony, filed after Rate Counsel filed its direct testimony.

Indeed, Rate Counsel could not know what issues another party may raise outside the scope of the statutorily identified issues. Source of supply is not identified by the statute at issue in this matter as one of the prongs for a trier of fact to consider under N.J.S.A. 40:55D-19, the statute pursuant to which New Jersey American Water filed the petition in this matter. Under the

statute, the two prongs the Company must demonstrate are: (1) that the proposed tank is reasonably necessary for the service, convenience, or welfare of the public; and (2) that no alternative site(s) are reasonably available to achieve an equivalent public benefit. N.J.S.A. 40:55D-19. In fact, source of supply was only brought into this proceeding when Intervenor Savas filed testimony relating it to the second prong of the statute, which is the availability of reasonable alternatives. The relation of source of supply to reasonable alternatives is a factual issue introduced by one party, and Rate Counsel will be prejudiced if it cannot rebut this factual determination with its own expert testimony.

Moreover, N.J.R.E. 702 specifies the general requirement to admit opinion testimony from an expert witness and makes clear that Mr. Woods' testimony on source of supply would be useful to both ALJ Caliguire and the Board. N.J.R.E. 702 states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence *or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. N.J.R.E. 702 (emphasis added).

The Rules of Evidence speak to when expert witnesses can rely on facts. Specifically, "N.J.R.E. 703 provides a special latitude for expert witnesses to rely upon facts or data which are not in evidence when they are formulating and rendering their opinions, so long as the facts or data are of a type 'reasonably relied upon' by experts in the same field." N.J.R.E. 703. Mr. Woods is a licensed Professional Engineer, and all of the facts to which he cites are in furtherance of his professional engineering opinion that SMCMUA is not in a position to provide water to NJAWC at this time. These facts are of the type "reasonably relied upon" by other experts with his same qualifications. Id.

Mr. Woods has worked for the SMCMUA for several years and the facts he testified to were gleaned from his personal knowledge providing consulting services to them. The case law and the rules of evidence are clear: an expert witness may testify to facts, and it is within the purview of the fact finder to evaluate the persuasiveness of those facts. See Nicholas v. Mynster, 213 N.J. 463, 478 (2013) ("Generally, an expert witness's qualifications are governed by the New Jersey Rules of Evidence. Expert testimony is permitted to 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" (quoting N.J.R.E. 702)). This matter is being tried before an ALJ, who clearly has the expertise to weigh the testimony of competing experts and make a determination. Not permitting one side to provide its position is prejudicial and unnecessary.

Mr. Savas also requests the ability to do additional discovery on Mr. Woods. Rate Counsel objects to this request as unduly burdensome on Rate Counsel and contrary to the goal of moving this case along. Mr. Savas has already served two rounds of discovery on Mr. Woods: one following the filing of Direct testimony, and one following the filing of Rebuttal testimony. Both rounds have been answered in full. Mr. Savas' claim that he was surprised by Mr. Woods undisclosed prior engagement by SMCUA is patently false and deliberately misleading. Indeed, Mr. Woods' resume, which was filed with his Direct testimony, included the fact that he has worked for the SMCMUA. Since learning that information, Mr. Savas has had the opportunity

to ask two rounds of discovery. Mr. Savas' counsel also had the opportunity to cross-examine Mr. Woods at the evidentiary hearings. There is no need for yet a fourth opportunity to question Mr. Woods, and this request by Mr. Savas should be denied.

It appears that the true issue here is that Mr. Savas disagrees with Mr. Woods' testimony. Counsel had the ability to cross-examine Mr. Woods on any topic to which he testified. Once the hearing was done, Mr. Savas can make arguments in post hearing submissions regarding relevance or weight that ought to be provided to Mr. Woods' testimony. Indeed, most of the argument in support of his motion before the ALJ was more germane to a post hearing brief. Mr. Savas has had an opportunity to probe Mr. Woods' testimony. Counsel will still have a post hearing brief. There was no basis to strike Mr. Woods' testimony.

For all of these reasons, ALJ Caliguire's order should be reversed and Mr. Woods' testimony should be admitted in its entirety.

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TRICIA M. CALIGUIRE
ADMINISTRATIVE LAW JUDGE

LETTER ORDER

To: Attached Service List by Electronic Mail

Re: **I/M/O New Jersey American Water, Fenwick Water Tank**

OAL Dkt. No. PUC 00319-22 / Agency Dkt. No. WO22010004

Dear Counsel:

On December 17, 2021, the Zoning Board of Adjustment (Zoning Board) of the Borough of Bernardsville, Somerset County (Borough), respondent herein, adopted a resolution denying the application of New Jersey-American Water Company, Inc. (NJAW, Company) to replace an existing water storage tank with a newly constructed, larger water tank at 426 Mendham Road, Block 5, Lot 5, in the Borough (Proposed Water Tank). On January 4, 2022, NJAW filed a petition with the New Jersey Board of Public Utilities (NJBPU, Board) for a determination that the Proposed Water Tank is necessary for the service, convenience and/or welfare of the public in the Company's service area and requested the Board issue an order that the zoning, site plan review, and all other Municipal Land Use Ordinances or Regulations promulgated under the auspices of Title 40 of the New Jersey Statutes and the Land Use Act of the State of New Jersey shall not apply to the Proposed Water Tank pursuant to N.J.S.A. 40:55D-19 (Petition).

By notice to the parties dated August 12, 2022, the hearing in this matter was scheduled to begin on December 12, 2022. On December 2, 2022, Intervenor Paul Savas (Savas) filed an informal motion seeking an order precluding or barring certain portions of the rebuttal testimony of Rate Counsel witness Howard Woods (Woods), specifically that portion numbered (2) and subtitled “Source of Supply.” Alternately, intervenor sought an adjournment of the evidentiary hearing, to permit time for additional discovery. The alternate relief was denied during a telephone conference with all parties on December 7, 2022.¹

Rate Counsel responded to intervenor’s motion on December 9, 2022. Petitioner responded on December 5 and 9, 2022. Prior to the commencement of the hearing, on the record, I issued an order granting that portion of intervenor’s motion seeking to bar Woods’ rebuttal testimony titled “Source of Supply.” Rate Counsel stated its intention to seek interlocutory review from the Board and requested that I issue the order in writing so as to assist in such review.

Summary of the Motion

In his direct testimony, Woods gave his expert opinion (on the matters described below) based on: his review of the Petition; responses to discovery requests; supplemental testimony of NJAW’s witness; N.J.S.A. 40:55D-19; and applicable regulations of the New Jersey Department of Environmental Protection (NJDEP) and of the Board. (R-1, Woods’ Direct Testimony.) Woods stated that he reviewed these materials to determine:

Whether or not the present or proposed use by the Company of the land described in the Petition is necessary for the service, convenience or welfare of the public; and

Whether or not the present or proposed use of the land is necessary to maintain reliable service for the general public and that no alternative site or sites are reasonably available to achieve an equivalent public benefit.

¹ Intervenor did not seek interlocutory review of this ruling, but it is understood that if the Board overrules my order herein, the Board may also consider intervenor’s request for additional discovery.

[R-1 at p. 3, lines 7–13.]

Intervenor objects to the introduction of Woods’ rebuttal testimony, submitted November 21, 2022, in which he describes a consulting relationship of approximately eight years with the Southeast Morris County Municipal Utilities Authority (SMC MUA) and makes certain statements based on that experience. Further, Woods testified regarding how new NJDEP drinking water regulations impacted the business decision of the SMC MUA not to sell water directly or indirectly to the Company. This testimony of Woods contradicts testimony of intervenor’s witness Giselle Diaz that, generally, a reasonable alternative to the Proposed Water Tank is the purchase by the Company of water from the SMC MUA.

Positions of the Parties²

Intervenor contends that Rate Counsel is attempting to use Woods both as an expert and as a fact witness with respect to personal knowledge he gleaned as a result of his experience working for SMC MUA.³ During the discovery process, however, intervenor attempted to obtain information and documents from the Company and the SMC MUA regarding the negotiations over, and internal deliberations of the SMC MUA regarding, the potential sale of water to the Company, matters as to which Woods was not disclosed to have knowledge prior to submission of his rebuttal testimony. Those attempts at discovery were no secret; they were in fact the subject of an earlier motion by intervenor to conduct depositions (which was denied).

Rate Counsel responds that the New Jersey Rules of Evidence permit an expert witness to rely on facts within his personal knowledge if such facts are those which are “reasonably relied upon” by other experts in this field. The point of rebuttal testimony, which intervenor seeks here to exclude, is to address statements made by other witnesses which would not have been known at the time the first witness’ direct testimony was given. Finally, intervenor cannot be surprised that Woods would have

² In the interest of time, as the hearing in this expedited matter has concluded, the parties’ positions are briefly summarized here. The briefs filed by the parties will be transmitted to the Board.

³ Intervenor’s speculation that NJAW colluded with Rate Counsel to get this testimony introduced was disregarded as there was no evidence of such efforts.

such information as his relationship with the SMC MUA was disclosed in the resume attached to his direct testimony.

As stated above, the alternate request of intervenor to adjourn the hearing and to permit additional discovery was **DENIED**. The motion of intervenor to bar a portion of the rebuttal testimony of Woods was **GRANTED** for the following reasons:

In administrative proceedings, one of the purposes of the extensive discovery permitted by the rules is to prevent surprises. Based on Woods' direct testimony, it is reasonable to conclude that intervenor had no basis to know that Woods had inside knowledge of the SMC MUA's decision not to sell water to the Company. Rate Counsel argues otherwise by reference to Woods' extensive resume, which does include a description of work he did for SMC MUA. But it is not reasonable to presume that Woods' statement that he conducted "a cost of service allocation study" that resulted in moving the various service classes to full-cost pricing is another way of saying that he helped investigate the feasibility of modifying the SMC MUA utility system including the pump station serving the reservoir so that SMC MUA might sell water to NJAW.

Rate Counsel may introduce the information that Woods provides on rebuttal through another witness at the hearing. While the parties agreed to use pre-filed direct and rebuttal testimony, the judge has the discretion whether to admit such testimony. N.J.A.C. 1:14-15.1(a). Further, the absence of pre-filed testimony from a potential witness does not limit the judge's discretion in permitting such witness or witnesses to appear at the hearing. N.J.A.C. 1:14-15.1(b); see also N.J.A.C. 1:1-14.6(i), (n), (p). (Note here that one of the reasons intervenor's motion to depose SMC MUA Executive Director Laura Cummings was denied was that intervenor could subpoena her to appear at the hearing.)

Prejudice to Rate Counsel will not result from excluding this portion of Woods' rebuttal testimony. At least one other witness, who is an employee of the Company, could have been asked whether the company was able to reach agreement with other utilities to purchase water at a reasonable price and whether such supply, if available, would have eliminated the need for the Proposed Water Tank. This witness of the

Company, Donald Shields, also testified as to the issue of whether SMC MUA was a potential source of supply. The Company must show that it considered alternatives to the proposed project, not that the companies who might have served as a source of supply had good reasons to decline that opportunity.

I **ORDER** that the motion of intervenor Paul Savas to bar the rebuttal testimony of Howard Woods numbered (2) and titled "Source of Supply," is **GRANTED**.

This Order may be reviewed by the **BOARD OF PUBLIC UTILITIES**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

December 14, 2022

DATE



TRICIA M. CALIGUIRE, ALJ

TMC/nn

c: Clerk OAL-Trenton

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**IMO Petition of N.J. American
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BPU: Docket No.: WO22010004
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