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May 22, 2023

**Via Electronic Filing Only**

Ms. Sherri Golden,  
 Board Secretary  
 New Jersey Board of Public Utilities  
 44 South Clinton Avenue, 9<sup>th</sup> Floor  
 P.O. Box 350  
 Trenton, New Jersey 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**

Ms. Golden:

Please accept for filing the New Jersey Division of Rate Counsel’s (“Rate Counsel”) reply exceptions to the exceptions to the Initial Decision issued by Administrative Law Judge (“ALJ”) Tricia Caliguire on May 1, 2023 (“Initial Decision”), which were submitted by counsel for Intervenor Paul Savas and Participant Karen Martin (collectively, the “Intervenor”) on May 15, 2023 (“exceptions”). Rate Counsel requests acknowledgment of this electronic filing for its records. For the reasons discussed below, Rate Counsel opposes the exceptions as inconsistent with the law, contrary to the Initial Decision and against the public interest.

**Argument**

As properly explained in the Initial Decision, the burden of proof under N.J.S.A. 40:55D-19 rests on New Jersey American Water Co. (“Petitioner” or “NJAWC”) only until Petitioner satisfies the test contained in the statute, and after that it shifts to parties opposing Petitioner’s course of action. Intervenor actually acknowledges this in the exceptions, stating that: “It is only

when the petitioner meets the burden of proof that the burden shifts to an objector to show a 'feasible alternative method.'"<sup>1</sup> ALJ Tricia Caliguire explained that:

It is well established that NJAW has the burden of proof on the need for the Proposed Water Tank, 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.

Initial Decision at 38.

ALJ Caliguire also held that, "NJAW has the burden of proving that the deviation from the local municipal zoning regulations is sufficiently necessary." Initial Decision at p. 41. After this finding, she reviewed whether the Company had met its burden of proof. N.J.S.A. 40:55D-19; see Initial Decision at pp. 41-46. In making her determination that the Company met its burden of proof, ALJ Caliguire balanced all of the interests under the statute and relevant case-law, which she correctly identified as: the regulatory requirements, economic issues, planning considerations, aesthetic character, local concerns, and broader general public interests. Initial Decision at p. 41. Importantly, she cited In re Monmouth Consolidated Water Co., 47 N.J. 251, 259-60 (1966), a New Jersey Supreme Court case holding that local considerations, while part of her decision, should not be controlling. ID at p. 40.

Once the Company met its burden of proof that the proposed tank is needed, its method is feasible, and that it considered alternatives and the suitability of the site chosen, the burden then shifted to opposing parties to explain why the Company was wrong. ALJ Caliguire correctly explained that this shift in burden was set by the first New Jersey case to interpret N.J.S.A. 40:55D-19's predecessor, N.J.R.S. 40:55-50 in which the court set out guidelines followed by

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<sup>1</sup> Exception at p. 2, citing I/M/O Petition of New Jersey Natural Gas Co., BPU Dkt. Nos. Go17010023, GO18222257, 2022 WL 2289019 at \*20 (May 18, 2022) (citing In re Petition of Jersey Cent. Power & Light Co., BPU Dkt. No. EO15030383 at \*3 (Nov. 21, 2017)). (Rate Counsel believes the Jersey Central Power & Light citation may be incorrect).

this state's courts ever since. In re Hackensack Water Co., 41 N.J. Super. 408 (App. Div. 1956).

ALJ Caliguire quotes an applicable portion of that decision:

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... 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.

Initial Decision at 48-9, emphasis added, citing In re Hackensack at pp. 426-27.

It is undisputed that, once ALJ Caliguire properly found that the Company met its burden of proof, the burden shifted to Intervenor to show that alternatives were available. Despite Intervenor's claims, the burden of proof did not improperly shift to the Intervenor.

Intervenor also argues that the ALJ imposed a duty on Petitioner to perform modeling of alternative methods. Yet this is not true. There is nothing in the statute that imposes a duty on NJAWC to perform modeling in order to meet its burden of proof. Intervenor's argument is nothing but a red herring. To the extent Intervenor sought to use modeling to demonstrate its burden, Intervenor was free to do so, but Intervenor cannot impose additional burdens on NJAWC to meet its burden.

Intervenor also argues that the Initial Decision disregards case law requiring balancing of the utility's interests with factors including the impact of the proposed use on the surrounding community. Yet this is not so. ALJ Caliguire considered this exact issue in her Initial Decision:

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 public convenience and welfare, whether...The

board should weigh all of these factors and while no controlling weight should be given to purely local considerations, they should not be ignored.

Initial Decision at 40.

ALJ Caliguire then concluded that “[t]he NJBPU, and therefore this forum as well, is required to balance the regulatory requirements, economic issues, planning considerations, aesthetic character, local concerns, and broader general public interests in order to determine if the Company’s proposal meets the statutory requirements.” Initial Decision at 41. Contrary to Intervenor’s argument, ALJ Caliguire considered the impact of the proposed use on the surrounding community:

“[t]he issue for the NJBPU is not whether the Proposed Water Tank is consistent with the Bernardsville zoning plan (it is not), or whether it is similar in architectural style to other structures in the neighborhood, but whether NJAW tried in good faith to find another site ‘reasonably available to achieve equivalent public benefit with less adverse impact on the environment, community and local zoning.’<sup>2</sup>

Initial Decision at 46 (emphasis in original).

Similarly, ALJ Caliguire analyzed whether “no alternative site or sites [were] reasonably available to achieve an equivalent public benefit.” N.J.S.A. 40:55D-19. Donald Shields testified that NJAWC explored options for alternative sites, but found none. (DCS17)<sup>3</sup>. The public benefit provided by an enlarged tank at the same location, comes in the form of water storage to meet peak demands, fire protection and adequate water pressure (DCS46). Any alternative site or sites must provide these same public benefits, and NJAWC has shown that no such site exists.

Mr. Shields testified that other properties at the necessary elevation are either encumbered by Green Acres, privately owned residential properties, or require significant capital

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<sup>2</sup> The Initial Decision does not provide a citation for this quote.

<sup>3</sup> Initial Testimony of Donald Shields, dated September 20, 2022. Donald Shields’ Direct Testimony is abbreviated DCS followed by a page number.

expenditures in water main improvements to be useable. Mr. Shields testified that NJAWC looked at the adjacent borough of Mendham, but that the local Zoning Board could deny NJAWC's petition and that the acquisition cost of purchasing a property in that borough would be significant (DCS17). In sum, petitioner examined its own properties as well as external properties. Petitioner found its own properties could not meet the stated need and that external properties came with large acquisition costs and a high level of uncertainty. These additional costs would ultimately be passed on to ratepayers.

ALJ Caliguire examined all of this evidence and reached the conclusion that "no alternative site or sites are reasonably available to achieve an equivalent public benefit." N.J.S.A. 40:55D-19. Intervenor's exceptions appear to ignore this aspect of the Initial Decision. In fact, ALJ Caliguire made a specific finding that:

3. NJAW owns the Site but did give consideration, albeit after the Zoning Board denial of the variance application, to *forty-six alternative sites*. For credible reasons, including the reasonable expectation that similar opposition to the Proposed Water Tank would be mounted by neighbors of the forty-six identified properties and by the local zoning and planning boards, NJAW identified the Site as the most suitable location for the Proposed Water Tank.

Initial Decision at 36 (emphasis added).

ALJ Caliguire also noted the reasons mentioned by NJAWC as to why the forty-six other sites were unacceptable. ALJ Caliguire summarized seven different reasons why other sites would not work, such as the fact that NJAWC does not own any of the other parcels and would have to pay substantial sums to acquire them; none of the other sites are near existing transmission mains, so those substantial costs must be added to the total; new rights of way may need to be required; some of the sites are single family homes and there is no guarantee that those owners would want to sell; and several other reasons. Initial Decision at 45-46. For all

these reasons, Intervenor is mistaken in claiming that the ALJ erred in finding that the Fenwick Tank project is reasonably necessary to be built in the proposed location.


**Conclusion**

For all of these reasons, the ALJ's determination that Petitioner's request for relief under N.J.S.A. 40:55D-19 should be upheld, and Intervenor's exceptions to the Initial Decision should be rejected in their entirety.

Respectfully submitted,

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By:

  
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