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' MOTION *IN LIMINE* TO EXCLUDE AND ADMISSIBILITY OBJECTIONS TO CERTAIN PRE-FILED TESTIMONY SUBMITTED BY PETITIONER AND RATE COUNSEL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

PRELIMINARY STATEMENT

On behalf of Intervenor Paul Savas, we bring the within Motion *in Limine* in advance of next week's scheduled hearing on Petitioner New Jersey American Water Company's ("NJAW") Petition pursuant to N.J.S.A. 40:55D-19 to overturn on appeal the Bernardsville Board of Adjustment ("Board of Adjustment") decision denying NJAW's application for variance approval of its proposed Fenwick Tank capital reconstruction project made pursuant to N.J.S.A. 40:55D-19. Intervenor seeks *in limine* and/or admissibility rulings excluding in its entirety the pre-filed direct and rebuttal testimony of Division of Rate Counsel ("Rate Counsel") "hybrid" witness Howard Woods. As offered, Mr. Woods' expert testimony constitutes an inadmissible legal opinion on the ultimate legal issue before the Board of Public Utilities ("BPU") -- whether the proposed tank reconstruction is reasonably necessary when balanced against the countervailing local interests on which the Board of Adjustment based its denial of NJAW's variance application. Based solely on his review of *Petitioner's* "initial filing and response to discovery requests in this matter," Mr. Woods proffers the bare legal conclusion that NJAW's Petition pursuant to N.J.S.A. 40:55D-19 should be granted. (Exhibit A, pp. 5, 13-14, 16-17.)

On technical issues within his field of expertise, Mr. Woods merely serves as an "echo chamber," uncritically adopting the direct testimony of NJAW expert witness Donald Shields, both as to (1) the necessity of the proposed Fenwick Tank reconstruction, and (2) no alternative site or sites for its construction being reasonably available. (Id.) (Woods Pre-Filed Direct Testimony ("Woods Direct"), pp. 5, 13-14, 16-17.) Mr. Woods' opinion testimony thus lacks any independent foundation, is at best cumulative of Mr. Shields' testimony, constitutes inadmissible net opinion and is thus challenged herein on that basis. Mr. Woods' testimony serves no legitimate purpose other than to lend an empirical veneer to Rate Counsel's expedient legal position in this proceeding in support of the Petition.

Intervenor further seeks exclusion of the opinion testimony of NJAW expert witness Donald Shields on the grounds that (1) it is beyond the scope of the Board of Adjustment proceedings on appeal and introduced in violation of the exhaustion of administrative remedies requirement, and (2) it constitutes inadmissible net opinion on both technical and legal matters.

Finally, Intervenor sets forth various admissibility objections to certain individual testimonial responses by both witnesses.

FACTUAL BACKGROUND

A. Opinion Testimony of Petitioner's Expert Witness Donald Shields

On September 20, 2022, NJAW submitted the direct expert opinion testimony of Donald Shields ("Shields Direct"), essentially comprising its case in chief on appeal. Mr. Shields was not among the multiple witnesses who appeared on behalf of NJAW's unsuccessful zoning relief application before the Bernardsville Zoning Board of Adjustment and his testimony appears designed to supplant those witnesses and rehabilitate their harmful admissions. Mr. Shields, an engineering consultant for NJAW, defines the purpose of his expert testimony on appeal as: (1) explaining the importance of water storage tanks in supplying safe, adequate and reliable service; (2) providing details of NJAW's water storage tank reinvestment program; (3) explaining why the proposed Fenwick Water Storage Tank reconstruction is necessary to provide safe, adequate and reliable water capacity and pressure for NJAW's customers in Bernardsville and neighboring municipalities Mendham Township and Mendham Borough; and (4) explaining why no alternative site or sites were found to be reasonably available to achieve an equivalent public benefit. (Id.)

Accordingly, much of Mr. Shields' pre-filed direct examination consists of informational background testimony on these general subject matters. (Shields Direct, pp. 6-9.) Mr. Shields' material opinion testimony in his pre-filed direct examination, however, is somewhat limited. He testifies that the historical source of water supply for Bernardsville and the surrounding area was

through the Morris County Municipal Utilities Authority ("MCMUA") and its Water Supply Agreement with the Southeast Morris County Municipal Utilities Authority ("SMCMUA"). (Shields Direct, p. 10.) He further testifies that NJAW and the MCMUA entered into their Water Supply Agreement ("Original Water Supply Agreement") on January 6, 2012. (Id.) According to Mr. Shields, MCMUA supplied the water to NJAW at a supplier-designated delivery point. A large part of the water supplied by MCMUA came from SMCMUA, which sold water from the Clyde Potts Reservoir to MCMUA through an interconnection NJAW constructed. (Id.).

2. Termination of the Original Water Supply Agreement

Mr. Shields testifies that the MCMUA notified NJAW of its intent to terminate the Original Water Supply Agreement by letter of May 11, 2018. (Shields Direct, p. 11) According to Mr. Shields, the notice and renewal terms of the Original Water Supply Agreement authorized the expiration of all obligations by and between the MCMUA and SMCMUA on January 6, 2022. (Id.) Mr. Shields acknowledges that NJAW did not wish to terminate the Agreement and thus would have preferred its renewal. (Id.)

Mr. Shields testifies that without the 1 MGD supply from MCMUA under the Original Water Agreement, the Tower Mountain Booster Station is the only means of transferring water within NJAW's system to the Mendham Lower Gradient and the existing Fenwick Storage Tank in Bernardsville is the sole gravity storage mechanism for the Mendham Lower Gradient. (Shields' Direct, p. 13.) He claims that the Tower Mountain Booster station alone does not have sufficient capacity to meet the Peak Day demands of the Mendham Lower Gradient without the volume and pressure of the 1 MGD water supplied by the interconnection with the MCMUA. He further testifies that without the 1 MGD of MCMUA water the existing Fenwick Storage Tank cannot be replenished from the early morning to early afternoon hours during Peak Daily Demands, and that

the lack of operable gravity storage in the Mendham Low Pressure Gradient would cause the water system to be operated out of regulatory compliance. (Id.)

While Mr. Shields testifies that following the MCMUA's notice of termination in May 2018, there were "ongoing discussions and negotiations" between NJAW and MCMUA for a new or amended contract, he fails to describe the nature and extent of those negotiations with any particularity. (Id.) He testifies that "through subsequent negotiations," NJAW entered into a January 6, 2022 amended and restated water supply agreement with MCMUA for the latter to provide up to 0.25 MGD gallons of water, volume that he says cannot meet the pressure required for the Mendham Low Gradient. (Shields Direct, p. 14.) Due to the loss of the MCMUA water, according to Mr. Shields, the existing Fenwick Tank is no longer adequate for storage, safety and reliability needs, and there is no reasonable, cost-effective alternative source of water supply to negate the need for the proposed reconstruction of the Fenwick Tank at *three times* its existing size. (Shields Direct, p. 14.) Mr. Shields testifies that in order to maintain adequate pressure and flows, the Mendham lower gradient would need to operate as a closed system off the Oak Place Booster Pumps under construction. (Shields Direct, p. 14.) He testifies that the existing Fenwick Water Storage Tank would remain isolated from the distribution system causing the Mendham Low Gradient to be at greater risk of water main breaks due to transient pressure conditions, placing customers at greater risk of service interruptions. (Id.) Mr. Shields further states that with no operable gravity storage in the Mendham Low Pressure Gradient, the water system would operate out of compliance with New Jersey Department of Environmental Protection Distribution Storage Requirements. (Shields Direct, p. 14.)

2. NJAW's Proposed Tank Reconstruction Project

Mr. Shields testifies that if NJAW is not permitted to construct the proposed new Fenwick Tank and utilize it in tandem with the Oak Place Booster Station currently under construction, the

public water supply in "areas in [Bernardsville] may experience interruptions in water supply and may not have sufficient water pressure for the Borough's Fire Department to fight fires." (Shields Direct, p. 13.)

Breaking ranks with NJAW witnesses appearing before the Board of Adjustment and NJAW's legal position in the proceedings below, Mr. Shields testifies that the proposed project site is critical not because it is the current location of the existing tank; but rather because the site has the necessary ground elevation to maintain optimum required storage volumes including for the "Fire Reserve Zone" and "Equal Storage Zone." (Shields Direct, pp. 16-17.) Mr. Shields claims that any reduction in elevation of any available alternative project site would significantly affect the necessary height of the tank. (Shields Direct, p. 17.)

Mr. Shields' testimony strongly implies, as the Petitioner's various witnesses before the Board of Adjustment admitted, that NJAW did not consider any alternative project locations. When asked directly whether it had done so, Mr. Shields replies only that NJAW "explored all options." He explains that NJAW "does not own another property at the elevation required for the new tank, and other available properties were either encumbered for Green Acres, privately owned residential properties, or required significant capital expenditures in water maintenance improvements to suffice. (Id.)

Mr. Shields fails to quantify the "significant capital expenditures" supposedly identified for any other specific properties considered for acquisition. His testimony suggests that NJAW simply assumed that alternative locations for the tank reconstruction were cost-prohibitive because, "although the proposed water storage tank is a conditionally permitted use in the Borough of Bernardsville Zoning Ordinance, a minimum of five acres is required within the zone and property prices are extremely high." (Id.) He further observes that properties in the adjacent Borough of Mendham are also located in a residential zoning district and require a minimum of

five acres in size, and that public utilities are not permitted by the Borough Zoning Ordinance. (Id.) He concludes from these unexamined premises, that "even if [NJAW] were to locate a suitable available property, the cost of acquisition would be significant and there would be a good possibility" that it would be denied necessary zoning or land use approvals. (Id.)

According to Mr. Shields, "the primary reason" NJAW did not replace the lost MCMUA water supply with water purchased directly or indirectly from the SMCMUA "centered on the availability of adequate supply," namely that the SMCMUA "could only supply 600,000 GDP through MCMUA's system to the point of delivery to NJAW." (Shields Direct, p. 20.) Mr. Shields alludes to but does not elaborate on a number of additional factors supposedly "enumerated" in the detailed information provided by NJAW through discovery. (Id.) Mr. Shields concludes his direct testimony by improperly positing the legal opinion that "the requisite standard in this matter has been satisfied for the Board of Public Utilities to approve the Petition." (Shields Direct, p. 21.)

In response to discovery requests on his pre-filed direct testimony, Mr. Shields makes a number of significant material admissions, including that NJAW failed to engage MCMUA in negotiations to extend the Original Water Supply Agreement or purchase directly from SMCMUA. (Responses to Intervenor Direct Discovery nos. 2 & 10.) When asked, referring to Question No. 23 of his Direct Testimony, to describe what steps, if any, NJAW took to address the issues raised by MCMUA in its May 11, 2018 letter that led MCMUA to refuse to renew the Original Water Supply Agreement, (Shields Direct, p. 24), Mr. Shields responds blithely:

> "The May 11, 2018 [termination] letter, which speaks for itself, provided notice of MCMUA's decision to terminate the water supply agreement." (Exhibit A, Shields Response to Pre-Filed Testimony Discovery Request, p. 1, question no. 2.)

Mr. Shields admits that NJAW's negotiations with MCMUA were limited to reaching an agreement for the SMCMUA to continue to supply a *de minimis* amount of water. (Id.) When asked to acknowledge that there would be no need for the proposed Fenwick Tank replacement

project if the Original Water Supply Agreement had been renewed in reference to questions 26-28 of Mr. Shields Direct Testimony (Shields Direct, p. 12-14), NJAW interjected that "it cannot speculate on hypothetical scenarios." (Discovery Request, p. 16.) Asked for specific documentation that it considered alternative locations for the proposed Fenwick Tank, and to substantiate his testimony that alternative locations would be cost-prohibitive and pose insurmountable zoning and planning challenges, NJAW was dismissive, stating that the relevant real estate property values and applicable zoning record are matters of public record. (Discovery Response, p. 9, questions 22-24.)

B. Opinion Testimony of Rate Counsel Hybrid Witness Howard Woods

On October 18, 2022, Rate Counsel submitted the direct testimony of self-identified hybrid witness Howard Woods in support of NJAW's Petition. Rate Counsel offers Mr. Woods as a water engineering expert engaged "to review New Jersey American Water Company, Inc.'s ("NJAW") Petition with specific attention to the following areas, which are addressed in N.J.S.A. 40:55D-19:

1. Whether or not the present or proposed use by [NJAW] of the land described in the petition is necessary for the service, convenience or welfare of the public; and

2. 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." (Exhibit A, October 18, 2022 Direct Testimony of Howard Woods, p. 3).

In his pre-filed direct testimony, based solely on his review of *Petitioner's* "initial filing and response to discovery requests in this matter", Mr. Woods proffers the bare legal conclusion that NJAW's Petition pursuant to N.J.S.A. 40:55D-19 should be granted. (Exhibit A, pp.5, 13-14, 16-17.)

Mr. Woods' engineering testimony merely echoes that of Mr. Shields in virtually all material respects. He parrots Mr. Shields' testimony that the existing tank is too low in elevation to maintain even minimum service pressures for routing water service and public fire protection

for customers in the service area that includes Mendham Borough, Mendham Township and Bernardsville. (Woods Direct, p. 5.)

Similar to NJAW's witnesses before the Board of Adjustment and as distinguished from Mr. Woods' newfound emphasis on land elevation, Mr. Woods testifies on direct that the proposed tank is necessary to maintain reliable service, convenience or welfare of the public largely because it represents the same use that has existed for six decades. The sum and substance of his testimony on the purported lack of available alternative sites for the proposed tank reconstruction is merely to lend the veneer of expert authority to Rate Counsel's advocacy of the bare legal proposition that any alternative site would result in significant new expense to ratepayers without any significant benefit without considering whether NJAW's foregone options would have benefitted ratepayers by avoiding unnecessarily expanding the ratebase with an enormous capital project. (Woods Direct, p. 5.)

1. Mr. Woods' Discovery Responses

In response to Intervenor's discovery requests to his direct testimony, Mr. Woods acknowledges that he was previously employed by NJAW, and also was engaged to perform a consulting assignment for NJAW in September and October of 2002. (Woods discovery response, p. 1, no. 1.) He admits that he performed no modeling of NJAW's system of any kind when preparing his direct testimony and forming his various technical conclusions. (Id., p. 2, no. 2.) He admits that he made no independent analysis of the feasibility of NJAW's either renewing or renegotiating its pre-existing contract with MCMUA or purchasing water directly from the SMCMUA. (Id., p. 8, no. 8.) He further admits he performed no independent calculation to derive NJAW's projected peak day demand of 2.5 MGD and that he instead relied on the 2035 projected demand presented by Mr. Shields. (Woods Direct Discovery Response no. 15.)

Mr. Woods also admits that he failed in any way to quantify the extent to which NJAW's "fire-fighting capabilities would be diminished" in the absence of the proposed tower reconstruction, as he testifies on direct. (Woods Direct, p. 14, lines 3-4, Discovery Response p. 17, no. 17.) He further admits that he failed to evaluate whether NJAW can use the capacity of the Horizon Tank for firefighting purposes to serve the Mendham Low or Mendham High gradients. He provides no support for his assertion that the Horizon Tank could not be connected to the Mendham Low Pressure Gradient without risking serious damage to the NJAW system as well as private property in the Mendham Low Gradient. (Discovery Response, p. 20, no. 20.)

Mr. Woods disagrees with Mr. Shields' response to Rate Counsel Discovery Request RCR-E-14 in which he states that the existing Fenwick Tank is marginally in compliance with the pressure requirements of N.J.A.C. 7:10-11.1(a)(2. Mr. Woods offers the net opinion that the existing tank does not comply with applicable requirements for storage, and that the purported deficiencies of the existing tank are only mitigated by the available supply from MCMUA on the north side of the Mendham Low Gradient acting in concert with the supply provided to the south of the gradient. (Discovery Response p. 22, no. 22.) He provides no support for these narrow areas of disagreement with Mr. Shields.

Mr. Woods admits that, in opining that "the acquisition would add a potentially significant cost to the project, he failed to quantify the added cost in any way. (Discovery Response p. 23, no. 23.) He candidly acknowledges that Rate Counsel's support for the petition stems from its opposition to *any* additional cost for land acquisition because it would add to the amount of rate base and subsequently increase consumer rates. (Id.) Mr. Woods testifies unequivocally to his view that "any additional cost" associated with an alternative reconstruction site "is unnecessary and imprudent" because [NJAW] already owns a parcel on which a tank has existed for 67 years." (Id., emphasis in original.)

Notwithstanding his testimony regarding the pressure and firefighting needs within the Mendham Low Gradient, he admits that that he performed no modeling, studies or analysis on the impact on pressure there if volumes in excess of 136,000 gallons are used in firefighting. (Rebuttal Response, p. 15, no. 15.) He provides absolutely no support for his assertion that only 136,000 gallons can be used from the Horizon Drive Tank, while maintaining adequate pressure within the Mendham High Gradient. (Id.) He is also not aware of any fire event or incident in the last 25 years where the existing Fenwick Tank was not adequate for fire protection services. (Rebuttal Response, p. 16, no. 16.) He provides no independent support for his assertions that the "maximum volume available for equalization and for protection in the existing tank is 43,000 gallons" and that available storage in the Horizon Tank, when used with the existing Fenwick Tank, would "not be adequate." (Rebuttal Response p. 14-15, nos. 14 & 15.) In self-referential fashion, Mr. Woods cites his own direct testimony as the authority for those rebuttal assertions. (Id.)

LEGAL ARGUMENT

I. MR. WOODS' EXPERT TESTIMONY SHOULD BE EXCLUDED IN ITS ENTIRETY AS AN IMPERMISSABLE LEGAL OPINION

Questions of law as distinct from questions of fact, are for the court alone and not appropriate objects of expert testimony. Kamiesky v. Dept. of Treasury, 451 N.J. Super. 499, 518 (App. Div. 2017; L&L Oil Service v. Div. of Tax, 340 N.J. Super. 173, 182 (App. Div. 2001). Consequently, on questions of New Jersey law, expert opinion testimony is not admissible and should be barred and disregarded. Kirkpatrick v. Hidden View Farms, 448 N.J. Super. 165, 179 (App. Div.), certify. den. 230 N.J. 412 (2017; Perez v. Rent-A-Center, Inc., 375 N.J. Super. 63, 73 (App. Div. 2005); rev'd on other grounds 186 N.J. 188 (2006); Troxclair v. Aventis, 374 N.J. Super. 374, 284-285 (App. Div. 2005); Pfaszynsky v. Atlantic Health; 440 N.J. Super. 24, 37 (App. Div. 2015), certify. Den. 227 N.J. 357 (2016).

Rate Counsel presents Mr. Woods as a water engineering expert engaged "to review NJAW's Petition" in relation to the criteria of N.J.S.A. 40:55D-19 and offer opinion testimony on "(1) whether or not the present or proposed use of the land described in the petition is necessary for the service, convenience of welfare of the public; and (2) whether or not the 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." (Woods Direct, p. 3.) Based solely on his review of "Petitioner's "initial filing and responses to discovery in this matter", Mr. Woods concludes that NJAW has satisfied the applicable statutory criteria and that the Petition should be granted. (Woods Direct, pp. 5, 13-14, 16-17.)

By Mr. Woods' own account, therefore, his direct testimony undeniably posits purported expert testimony on matters of law. The testimony thus must be summarily excluded as impermissible legal opinion. Mr. Woods' self-described legal analysis and corresponding legal conclusions should be also be barred on the additional grounds of being incompetent and inherently unreliable and of no assistance to the fact-finder. As noted, in reaching his legal conclusion that NJAW's Petition should be granted, Mr. Woods merely adopts Mr. Shields' testimony both as to the necessity of the Fenwick Tank reconstruction and that no alternative site or sites for its construction are reasonably available. (Woods Direct, p. 56, 13-14, 16-17.) He provides no analysis or support for his opinion.

Although this proceeding constitutes an appeal from a well-reasoned Board of Adjustment decision for which there was an abundance of support in the record, Mr. Woods ignores the Board decision and memorializing Resolution as well as the entire record below as if they did not exist. While Mr. Woods presumes to interpret and apply the criteria of N.J.S.A. 40:55D-19 in his pre-filed direct testimony, there is no hint therein of any appreciation for the manner in which New Jersey courts have interpreted and applied this statute in applicable and controlling precedent.

A. The Applicable Legal Standard

NJAW's appeal is brought pursuant to *N.J.S.A. 40:55D-19* (the "statute") *L.* 1975, c. 291, § 10, *amended by L.* 1999, c. 23, § 58, a statute that expressly recognizes "a municipality's ability to exercise its zoning powers in connection with development proposals by public utilities, while at the same time according the utility a special avenue for review before the BPU." Enacted in 1975, the statute evolved from 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 The Matter of Monmouth Consolidated Water Company, 47 N.J. 251 (1966). The former *N.J.S.A. 40:55-50*, provided in relevant part:

> This article ["Zoning"] or any ordinance or regulation made under authority thereof, shall not apply to existing property or to buildings or structures used or to be used by public utilities in furnishing service, if upon a petition of the public utility, the board of public utility commissioners shall after a hearing, of which the municipality affected shall have notice, decide that the present or proposed situation of the building or structure in question is reasonably necessary for the service convenience or welfare of the public

This section (the former statute) had been held to provide public utilities with "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 section adhered to the general rule of law 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. Hasbrouck Heights, 60 N.J. Super. 569, 574 (App. Div. 1959). Thus, although public utilities brought appeals to the BPU under this section (as well as the former *N.J.S.A. 40: 55-1.19*) affording

a general right of appeal to all applicants before the municipal governing body), they had no legal obligation to do so or to otherwise to exhaust their administrative remedies before the municipal land use authorities as a condition for petitioning the BPU. Matter of Monmouth, supra.

This changed in 1975 with the enactment of the existing statute, *N.J.S.A.* 40:55D-19. Under the current statute, with respect to structures and uses located in a single municipality, the public utility *must* apply to the local zoning board of adjustment where a variance is required and to the planning board where a conditional use permit is necessary. New Jersey Natural Gas v. Borough, 438 N.J. Super. 164, 181 (App. Div. 2014); In re Dept. of Envtl. Protection, 433 N.J. Super. 223, 227 (App. Div. 2013). The public utility can now only elect to bypass the municipal authority when seeking approval for inter-municipal projects, as the statute expressly provides. Petition of South Jersey Gas Co., 447 N.J. Super. 459, 480-484 (App. Div. 2013). The pertinent language of the statute provides:

> 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.

The Legislature enacted N.J.S.A. 40:55D-19 specifically to increase local control over a public utility's use of land within a municipality's borders. New Jersey National Gas, supra, 438 N.J. Super. at 184 citing Cox & Koenig, *N.J. Zoning and Land Use Administration,* § 2. The 1975 Act created new powers for municipalities in dealing with a public utility and accorded status to "all parties primarily concerned" in appeals to the BPU from adverse municipal decisions. Cox &

Koenig, *N.J. Zoning and Land Use Administration,* §46-47. The Legislature did so for the evident purpose of allowing municipalities to make decisions on the countervailing interests militating against the proposed structure or use and to afford those decisions weight in the balancing of interests undertaken by the BPU in appeals from municipal denials. Id.

The standards applied by the BPU in appeals brought under N.J.S.A. 40:55D-19 have evolved from those established by the Supreme Court in In re Public Service Electric & Gas, 35 N.J. 358 (1961) applying the predecessor statute N.J.S.A 40:55-50. Alluding to the principles and reasoning set forth by the Appellate Division in In re Hackensack Water Company, 41 N.J. Super. 408 (App. Div. 1956), the Court stated that to secure relief under the statute, the utility must show that the proposed use is *necessary* for the public service, convenience, and welfare of the public served by the utility. Id. at 377. The Court stated that because the statute requires that the particular site or location must 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. Significantly, the Court stated the BPU must consider alternative sites and methods, as well as the advantages and disadvantages to all of the interests involved including costs.

According to the Appellate Division, the BPU must weigh all of the parties' interests and only where that analysis supports the project as proposed must the utility must be given preference based on the presumption that the public ratepayer class is broader than the countervailing local or municipal public interests. In re Petition of South Jersey Gas Company, 447 N.J. Super. 459 (App. Div. 2016). The burden of proof rests with the public utility. Petition of South Jersey Gas Company, supra. The public utility must establish the necessity of the improvement apart from the location, that the means or method proposed is reasonable and desirable, and that the substantially greater expense of alternative methods or locations. Application of Jersey Central

Power & Light, 130 N.J. Super. 394 (App. Div. 1974). Only upon the utility's satisfaction of these requisite showings does the burden then shift to the objectors to show a feasible alternative method or location. Id.

In the absence of a showing of absolute necessity, the BPU must balance the established need for the improvement against the adversely affected local interests. In re Petitions of Public Service Electric & Gas, 100 N.J. Super 1 (App. Div. 1960). The BPU must take into account not only the engineering and economic aspects of the project, but also zoning and planning considerations, including those of aesthetic character. Id.

The most factually analogous reported decision is the Appellate Division's noted decision in In re Hackensack Water Company, supra, where the predecessor statute was first judicially interpreted. As here, the case involved the proposed construction of a water tank larger than a pre-existing tank on the same location. The Appellate Division upheld the decision approving the construction under the more availing legal criteria of the preexisting statute and within the procedural context of the BPU's former original jurisdiction. Unlike here, moreover, the need for the larger tank was uncontroverted and the applicant's showings in this respect were substantial. The need for the tank was driven by dramatic increases in the municipal populations served by the water utility. 41 N.J. Super. at 417.

According to the Court, the countervailing local interests were purely aesthetic, were not well defined by the municipality or any objectors and did not rise to the level of any significant reduction on surrounding property values. Id. While the proposed construction was in a residential zone, it consisted of modest one and two family houses in Carlstadt, which the Court noted was a densely developed municipality "built to the saturation point" and surrounded by other similar municipalities. In re Hackensack Water Company, supra 41 N.J. Super. at 415.

The Court suggested that the result in the case may have been different had it involved a more exclusively residential neighborhood. The Court identified proposed construction of an imposing utility structure in a town's finest neighborhood as the quintessential example of an application that should be denied:

> The board's obligation is to weigh all the interests, even though when they are found to be equal or nearly so the utility is entitled to the preference. There are many cases that may be imagined where the result will be in favor of the local interest. Take, for example, a telephone company required to construct a new exchange building and business office to serve the increasing needs of an expanding area. A site is selected on a vacant lot in the middle of the town's finest residential area. The particular location is not necessary for technical or operational reasons. Surely it would seem in such an instance that the local interest should prevail. (Emphasis added) 41 N.J. Super. at 425.

With respect to the public utility's burden to demonstrate the lack of reasonable alternatives, the Court stated:

> The proper connotation is that of reasonable necessity under all the particular circumstances. The addition of the adverb "reasonably" in *R.S.* 40:55-50 does little but emphasize that absoluteness or indispensability is not to be required…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. Id.

The Appellate Division in Hackensack Water Company based its formulation of the legal standard applicable to BPU determinations on the express language of the original statute, specifically the phrase "reasonably necessary." Id. Therefore, elimination of the adverb "reasonably necessary" in the current statute cannot be presumed to be superfluous under basic principles of statutory construction. The BPU's original jurisdiction and the utility's right to bypass the local zoning or planning board and directly petition the BPU was also removed from the current statute, as noted, for the specific purpose of empowering municipal boards.

Thus, the BPU cannot ignore, as do Petitioner's witness Shields and Rate Counsel's witness Woods, that the decision of the municipal zoning board is accorded great weight. Nor can it ignore

that not only must local zoning issues be considered and balanced against the utility's asserted needs, but the utility must demonstrate that the asserted needs cannot reasonably be met in some other way.

B. Mr. Woods' Legal Opinion Ignores the Law

The law thus requires a balancing between the necessity of the proposed utility structure and its impact on surrounding property values and character of the local community with a proper respect for the jurisdiction and reasoned and legitimate findings of the municipal zoning and land use authority. Here, the Board found that 1) New Jersey American Water Company failed to meet the variance requirements and 2) the requested relief could not be granted without substantial detriment to the local public good and without substantially impairing the intent and purpose of the zoning plan, the zoning ordinance and the Master Plan. The Board found specifically that the proposed tower would negatively impact "some of the most significant historic properties in Bernardsville with late 19th century and early twentieth century importance" and "currently eligible to be listed on the New Jersey Register of Historic Places." Based on undisputed appraisal testimony, the Board found that the tower would have a significant negative impact on surrounding real estate values and thus was an "incongruous building prohibited under Section 12-23.11 of the Borough Ordinance because it is "so markedly incongruous with the character of the neighborhood as to materially affect the value of adjacent or nearby property." (Resolution, p. 12, par. 1(g)).

NJAW's burden before the Board, and now in this appeal, is to demonstrate that its need for the proposed tower reconstruction outweighs the previously established detrimental impacts. As reflected in the Board Resolution and relevant transcripts, American Water thwarted and evaded the Board's legitimate inquiry into the necessity of the proposed tower reconstruction and utterly failed to submit the requisite support.

Among the evidence of the failure of proof below, Bryan Slota, NJAW's project manager for the proposed tower reconstruction, was unsure why the MCMUA terminated its contract with NJAW, and did not know what alternative locations were reviewed and analyzed. (Board Resolution, p. 4, par. 9.) Vincent Monaco, NJAW's long-range asset planning consultant, testified that the company's preference was to renew the preexisting contract with the MCMUA, and that the non-renewal was driven by cost, something the company has since tried to walk back. (Resolution, p. 5, par. 11.) Mr. Monaco prevaricated in response to questions about the possibility of renewal with the MCMUA at a higher price, citing unsupported regulatory considerations such as the inability to obtain BPU approval of disparate pricing. (April 15, 2021 Transcript 4:4-27:25, 36:2-46:25, June 21, 2021 Transcript 94:10-97:25, 102:1-108:25, 111:1-25, 123:1-127:25.) Yet it is clear from the record below that a renewal of the Original Agreement or the direct purchase of water from SMCMUA was never negotiated or even explored, leading to the conclusion that NJAW did not want to renew and preferred to add a new plant to its rate base. Dana Wright acknowledged that American Water only briefly looked at alternative sites, and that there were no reports, analysis or modeling of any site. Furthermore, counsel for NJAW indicated to the Board that the applicant "would not develop or produce a list of alternative sites" actually considered, suggesting that there were none to identify. (Resolution, p. 6, par. 11.)

The Zoning Board's utility-related findings included that NJAW (1) failed to provide requested information to the Board on its dealings with the MCMUA; (2) failed to disclose information regarding its negotiations with the MCMUA despite numerous requests; (3) failed to explore or consider alternative sites; (4) selected the proposed site solely because they owned it and because of the existence of an existing tower one-third the size of that proposed; (5) failed to provide the Board with requested information concerning alternative sites; and (6) failed to disclose or even discuss that the proposed tower reconstruction was driven solely by financial

considerations the applicant the Board was unable to evaluate. (Resolution, p. 11, Reasons for Denial nos. 1(a),(b),(f),(g),(i).) These conclusions were not only substantially supported in the record below but also well founded and unavoidable given the paucity of NJAW's evidentiary showing and its evasion of meaningful Board inquiry into utility-related issues bearing upon the actual necessity of the tank reconstruction proposal.

Mr. Woods takes none of this into account in his myopic and one-sided focus on NJAW's Petition, discovery responses and the technical engineering aspects of Mr. Shields' testimony on which he almost exclusively bases his parallel technical findings. As an expert legal opinion on the ultimate issue before the Court, one that studiously avoids applicable law, Mr. Woods' testimony obviously is incompetent and of no use to the finder of fact. Because the technical aspects of his testimony are unsupported by independent investigation and analysis and are merely adoptive of those of Mr. Shields and therefore cumulative, Mr. Woods' testimony should be barred in its entirety.

II. MR. SHIELDS' TESTIMONY SHOULD BE EXCLUDED AS BEYOND THE SCOPE OF THE PROCEEDINGS BELOW AND AS A VIOLATION OF THE REQUIREMENT THAT PETITIONER EXHAUST ITS ADMINISTRATIVE REMEDIES

The Legislature enacted *N.J.S.A.* 40:55D-19 specifically to increase local control over a public utility's use of land within a municipality's borders. New Jersey National Gas, supra, 438 N.J. Super. at 184. Public utilities thus submit to municipal authority not only by applying to zoning and planning boards for approval, but also by presenting to those boards their entire case for the necessity of the proposed structures or uses. New Jersey Natural Gas Co. v. Borough of Red Bank & Red Bank River Center Improvement District, 438 N.J. Super. 164 (App. Div. 2014) This exhaustion of administrative remedies requirement was held to be jurisdictional in Arcadia Disposal Inc. v. Tp. of Frankfurt, (OAL Dkt. No. PUC 5545-90), a December 1990 Office of Administrative Law Decision.

NJAW's case on appeal consists exclusively of Mr. Shields' testimony. No fact witnesses from the company itself appear on NJAW's witness list. Mr. Shields, however, did not testify in the proceedings before the Board of Adjustment. NJAW instead presented the testimony of multiple engineers in its employ. Brian Slota, a licensed engineer and the project manager, testified that the tank reconstruction project was driven by the loss of the MCMUA water supply due to the termination of the Original Water Supply Agreement. He testified essentially that building a new tank on the same location of the existing tank was appropriate and would have minimal impacts because a tank is already there. He was unsure of whether any other locations were considered. (Resolution, p. 4, p. 9.) Vincent Monaco testified that NJAW did not want to terminate the agreement with NJAW and that NJAW was still negotiating for an extension to the agreement. He admitted that the cost and not the unavailability of water was the critical factor in the negotiations. (Resolution, p. 5, par. 10.) Dana Wright, the team leader, testified that while NJAW looked briefly at other sites, there were no reports prepared or modeling or analysis undertaken of any other site. He testified that the reason the proposed site was chosen was because there was a tank already in place and the applicant owns the site. (Resolution, p. 5, par. 11.)

None of these witnesses appear on the NJAW witness list. Instead, NJAW now distills its case on appeal through new expert testimony from an unsullied witness evidently to remedy the clear deficiencies of the case presented to the Board of Adjustment. If the preserved local authority under the statute has any meaning, public utilities cannot be permitted to present testimony on appeal well beyond the scope of the challenged municipal proceeding. Public utilities will simply thwart legitimate inquiry by municipal zoning and land use boards, as NJAW did here, with the expectation that they can bypass municipal review of the alleged necessity of proposed utility structures and present a more fulsome case to the BPU. Because that cannot be countenanced, the Court should exclude Mr. Shields' testimony in its entirety as clearly beyond the scope of the

proceedings on appeal and a violation of the requirement that public utilities must exhaust administrative remedies before municipal zoning and land use authorities.

III. BOTH EXPERT OPINIONS SHOULD BE EXCLUDED UNDER N.J.R.E. 703.3 AS INADMISSIBLE NET OPINION

An expert's bare conclusions, unsupported by factual evidence or data are inadmissible under N.J.R.E. 703.3 as "net opinion." State v. Townsend, 186 N.J. 473, 494-495 (2006). The rule requires the expert to give the why and wherefore of his or her opinion, rather than mere conclusion. Rosenberg v. Tovarath, 352 N.J. Super. 385, 401 (App. Div) quoting Jiminez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div.), cert. den. 145 N.J. 374 (1996). Mr. Woods' expert testimony should be barred in its entirety as net opinion lacking in the requisite empirical and evidentiary support.

Mr. Woods' testimony bases his findings and legal conclusion almost exclusively on the expert testimony of Mr. Shields. Mr. Woods candidly acknowledges that he performed no modeling or any independent analysis on any kind on the technical issues addressed in his testimony. A party offering scientific evidence about highly technical areas such as water engineering must show that its conclusions are based on proper technique, methodology or procedure. State v. Marcus, 294 N.J. Super. 267, 275 (App. Div. 1996), certify. den. 157 N.J. 543 (1998). An expert who fails to perform modeling or some other form of independent analysis on highly technical subject matter of the nature involved in this proceeding should be precluded from offering testimony. Bahrle v. Exxon Corp., 279 N.J. Super 5, 28-31 (App. Div. 1995), Dawson v. Bunker Hill Plaza Associates, 289 N.J. Super. 309, 324-325 (1996).

Mr. Shields' testimony is deficient in the same manner. He failed to perform the modeling and formal analysis necessary to substantiate his opinion testimony. His testimony does not even lay the foundation for his own knowledge and conclusions or their underlying technical basis. His conclusions on technical matters amount largely to mere assertions. Mr. Shields does not even

address much less rule out available alternatives to the project, including the renewal of the Original Water Supply Agreement, the purchase of water directly from SMCMUA or the construction of a smaller and less imposing structure. Mr. Shields' testimony is clearly inadequate to establish that the construction of a tower of the dimensions proposed is necessary from a technical engineering standpoint. His testimony on NJAW's purported investigation into alternative locations is self-evidently deficient both as a matter of law and as a matter of evidence.

IV. ADMISSIBILITY CHALLENGES TO INDIVIDUAL TESTIMONIAL RESPONSES

Intervenor submits the following specific admissibility challenges to Mr. Shields' and Mr. Woods' expert testimony:

Shields Direct

Q. 23 (p.11) The question and answer lack proper foundation. The reference to unilateral termination implies that MCMUA was unwilling to review the original Water Supply Agreement under any circumstances and that renewal was non-negotiable. There is no foundation for Mr. Shields' knowledge to testify on such matters and his response is a blanket assertion.

Q. 24-25 (p.12) Mr. Shields' responses lack a proper foundation. The basis of Mr. Shields' knowledge is not established nor is the evidentiary foundation of his conclusions, which amount to net opinion.

Q. 26 (p. 12) The question and response similarly lack foundation and amount to net opinion.

Q. 27 (p. 13) The question and answer lack foundation and the response is a completely unsubstantiated cursory assertion for which there is no evidentiary support.

Q. 28 (p. 14) The question and response lack proper foundation and constitute net opinion. The basis for Mr. Shields' knowledge is not established and the empirical and evidentiary foundation for his conclusions are not provided. His testimony on alleged non-compliance with NJDEP Distribution Storage requirements is inadmissible both as net opinion and as impermissible legal opinion.

Q. 30 (p. 15) The response lacks proper foundation and constitutes net opinion. The response assumes that water from water from MCMUA cannot be replaced, which is something that is not established. The response does not provide any empirical or evidentiary substantiation for the conclusions drawn.

Q. 32 (p. 17) The question and response lack proper foundation and constitute net opinion including as to the required minimum height.

Q. 33 (p. 33) The response lacks proper foundation and is completely unsubstantiated net opinion, particularly as to acquisition costs.

Q. 34 (p. 18) The response lacks foundation, the testimony regarding infrastructure costs is not substantiated and the basis for the witness's knowledge is not established.

Q. 35 (p. 18-19) The question and response lack proper foundation and the response is unsubstantiated. The testimony regarding regulatory compliance constitutes inadmissible net opinion and impermissible legal opinion.

Q. 36 (p. 19) The response lacks proper foundation and is unsubstantiated net opinion.

Q. 37 (p. 23) The response lacks proper foundation and is unsubstantiated net opinion.

Q. 38 (p. 21) The question and response lack foundation. The question calls for and the answer provides an impermissible legal opinion. The response also constitutes an impermissible net opinion, particularly in relation to the applicable legal standards for petition approval as set forth in this submission.

Woods Direct

Q. 6 (p. 3) The response confirms that Mr. Woods has been engaged to review and offer opinion on the legal merits of NJAW's petition.

Q. 7-9 (p. 3-4) The response indicates that in evaluating and offering legal opinion on the merits of the petition, Mr. Woods has reviewed only NJAW's submission and supplemental testimony and has not reviewed or considered the record before the Board of Adjustment or the Board of Adjustment decision.

Q. 10 (p. 5) The question and response respectively seek and elicit an inadmissible opinion on matters of law. The response also is inadmissible as lacking in proper foundation and as net opinion. (See Point I)

Q. 16 (p. 9) The response lacks proper foundation and constitutes inadmissible net opinion.

Q. 20 (p. 11) The question and response lack proper foundation. The response also constitutes impermissible legal opinion.

Q 21 (p. 11) The question and response lack proper foundation. The response also constitutes impermissible legal opinion.

Q. 22 (p. 11-12) The question and response lack proper foundation. The response also constitutes impermissible legal opinion.

Q. 23 (p. 12) The question and response lack proper foundation and constitute inadmissible net opinion.

Q. 24 (p. 12) The question and response lack proper foundation and constitute inadmissible net opinion.

Q. 26 (p.13) The question and response lack proper foundation.

Q. 29 (p. 13) The question and response lack proper foundation. The response constitutes inadmissible net opinion and impermissible opinion on a matter of law.

Q. 30 (p. 14) The question and response lack proper foundation. The response constitutes inadmissible net opinion and impermissible opinion on a matter of law.

Q. 31 (p. 15) The question and response are improper for the same reasons as Q. 29, and for lack of proper foundation. The response is also speculative.

Q. 32 (p. 16) The question and response lack proper foundation and seek and provide impermissible testimony on a matter of law. The response also constitutes inadmissible net opinion.

Q. 33, No. 33 The question and response ask the witness for legal opinion on the ultimate issue in this case to the extent of asking the witness to step into the shoes of the trial judge. The response also constitutes inadmissible net opinion.

Shields' Rebuttal

Q. 4 (p. 2) The response offers opinion testimony on regulatory compliance which is a matter of law.

Q. 6 (p. 5) The response lacks proper foundation and constitutes net opinion.

Q. 7 (p. 6) The response lacks proper foundation and constitutes net opinion.

Q. 8 (p. 7) The response lacks proper foundation and constitutes net opinion.

Q. 11 (p. 9) The response lacks proper foundation and offers opinion on a matter of law.

Q. 12 (p. 10) The response lacks proper foundation and offers opinion on a matter of law.

Q. 18 (p. 14) The response lacks proper foundation and is speculative in rejecting alternatives to the proposed project for reasons it fails to substantiate.

Woods Rebuttal

Q. 5(p. 1-2) The response lacks proper foundation and is unsubstantiated.

Q. 6-9 (p. 2-3) Should be excluded for reasons set forth in Intervenor's December 2, 2022 Letter Motion.

Q. 13 (p. 4) The response lacks proper foundation and is speculative.

Q. 15 (p. 5-6) The response lacks proper foundation and constitutes net opinion.

Q. 17-20 (p. 6-7) The questions and responses lack proper foundation. The responses constitute inadmissible net opinion.

Q. 21 (p. 7) The response lacks proper foundation and constitutes net opinion.

Q. 22 (p. 7-8) The response lacks independent foundation as it is adoptive of Mr. Shields' testimony and constitutes inadmissible net opinion.

Q. 23 (p. 8) The response lacks proper foundation and constitutes inadmissible net opinion.

Q. 24 (p. 8) The response lacks proper foundation and constitutes inadmissible legal opinion.

Q. 25 (p. 9) The question seeks to elicit and the response provides impermissible legal opinion on the ultimate issue in the case in a manner that places the witness in the shoes of the trial Judge.