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March 16, 2023

VIA HARD COPY & ELECTRONIC DELIVERY
Hon. Patricia Caliguire, ALJ
Quakerbridge Plaza, Building 9
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Re: I/M/O the Petition of New Jersey American Water 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 00319-22

Dear ALJ Caliguire:

Please accept for filing this letter brief in lieu of a more formal brief from the Division of Rate Counsel ("Rate Counsel") in the above referenced matter. Copies of this letter brief are being filed with each person on the service list by electronic mail only. One copy of the brief will be sent to your office via overnight mail. Thank you very much for your attention to this matter.

Procedural History and Statement of Facts

New Jersey-American Water Company, Inc. ("Petitioner," "NJAW," or the "Company") appealed a municipal decision regarding the re-construction and enlargement of a water tank to the Board of Public Utilities ("BPU" or "Board") on January 4, 2022. (Petition p.1)[1]. NJAW provides utility service to approximately 3,000 customers located in Bernardsville, Mendham

[1] The Petition is abbreviated "Petition" followed by the page number.

Township, and Mendham Borough. (DCS p.9) (HJW p. 6). The tank is located on a property off of Mendham Road in the Borough of Bernardsville. The lot size is 17,667 square feet. The property is owned by the Company and is included in the Company's rate base. (HJW p. 8). The matter originated with a water supply purchase contract between NJAW and the Morris County Municipal Utility Authority ("MCMUA") that was terminated by MCMUA on January 6, 2022. (Petition p.8). Even with the de minimis quantity of water MCMUA agreed to transfer to NJAW after termination of the agreement, the termination resulted in a capacity deficit of approximately 1.0 MGD. (Petition p. 8; DCS[2] p. 12). This deficit affects customers in NJAW's Mendham Low Gradient by threatening the Company's ability to provide safe, adequate, and proper service, including fire service, to those customers. (DCS p. 12, p. 19).

Through its Asset Planning process, NJAW adopted a strategy that would allow it to continue ensuring safe, adequate, and proper service to customers in the Mendham Low Gradient following termination of the agreement with MCMUA. (Petition p. 18). The strategy included three components: new underground pipes; a new booster station at Oak Place; and the enlargement of the Fenwick Water Storage Tank. (Petition p. 18). The Fenwick Tank has the necessary ground elevation to maintain the necessary storage volume at the pressure needed for the highest customer served. (Petition p. 11). The Company determined that there were no other reasonable alternative sites for the tank. (Petition p. 23).

On March 10, 2020, NJAW filed an application with the Bernardsville Zoning Board requesting various approvals related to the Fenwick Tank and the Oak Place project. (Petition p. 25). The Bernardsville Zoning Board held hearings on the application from March 1, 2021 through October 4, 2021 and ultimately approved requests related to the Oak Place booster

[2] Donald Shields' September 20, 2022 initial testimony of is abbreviated DCS followed by a reference to the page number.

station project but denied requests related to the Fenwick Tank. (Petition p. 27). Pursuant to N.J.S.A. 40:55D-19, the Company appealed the Fenwick Tank denial to the Board on January 4, 2022. (Petition p. 29). The petition sought a determination that the Fenwick Tank is necessary for the service, convenience, or welfare of the public, that no alternative site is reasonably available to achieve an equivalent public benefit, and an order that Borough zoning, site plan, and/or land use ordinances and regulations will not apply to the proposed construction project. (Petition p. 19). The petition was transmitted to the Office of Administrative Law ("OAL") as a contested case and assigned to Administrative Law Judge ("ALJ") Patricia Caliguire.

The parties in this matter are: Petitioner NJAW; Respondent Borough of Bernardsville Zoning Board of Adjustment; Board Staff; the Division of Rate Counsel; Intervenor Paul Savas; and Participant Karen Martin. Savas and Martin filed Motions to Intervene on February 17th and 23rd respectively, both of which the Company opposed on March 7, 2022. On March 21, 2022, ALJ Caliguire admitted Savas as an Intervenor and Martin as a Participant, finding Savas adequately represented Martin's interests. The parties executed a Non-Disclosure Agreement ("NDA") and all except Participant Martin engaged in discovery. NJAW filed initial testimony on September 20, 2022. The Division of Rate Counsel filed initial testimony on October 18. Intervenor Savas and the Borough of Bernardsville Zoning Board of adjustment filed initial testimony on October 21. NJAW, Rate Counsel, and Intervenor Savas filed rebuttal testimony on November 21, 2022. Hearings before ALJ Caliguire took place during the week of December 12, 2022.

Argument

Point I

Petitioner Has Proven By a Preponderance of the Evidence That the Proposed Use of the New Water Tank by NJAW Is Reasonably Necessary for the Service, Convenience or Welfare of the Public.

NJAW filed its petition pursuant to N.J.S.A. 40:55D-19, which allows a public utility to take an appeal to the BPU from a decision by a municipality. N.J.S.A. 40:55D-19 provides a two prong test which a public utility must satisfy in order to be successful. Specifically, a public utility must show that:

> a. the present or proposed use by the public utility…is necessary for the service, convenience or welfare of the public; and
>
> b. that no alternative site or sites are reasonably available to achieve an equivalent public benefit.
>
> N.J.S.A. 40:55D-19.

The New Jersey Supreme Court, in In Re: Public Service Electric & Gas Co., 35 N.J. 368 (1961), set forth the applicable legal standards:

a. The phrase "For the service, convenience and welfare of the public" refers to the whole public served by the utility and not the limited group that benefits from the local zoning ordinance;

b. The proposed use must be reasonably, not absolutely or indispensably, necessary for the service, convenience, and welfare of the public;

c. The particular site or location must be found to be "reasonably necessary" and so the Board must consider the community zoning plan, the physical characteristics of the site, and the surrounding neighborhood;

d. Alternative sites and their comparative advantages and disadvantages, including cost, must be considered in determining reasonable necessity; and

e. The Board must weigh all interests and factors in light of all the facts, giving the utility preference if the balance is equal. The legislative intent is clear that *the broad public interest is greater than local considerations.* (emphasis added).

In making its determination under these standards, the Board is required to weigh all interests. In the event interests are equal, the petitioner should be entitled to a preference because the legislative intent is clear that the broad public interest to be served is greater than local considerations. See, e.g., In Re: Monmouth Consolidated Water Co., 47 N.J. 251, 258 (1966); In re: Public Service Electric & Gas Co., supra, 35 N.J. at 377.

The issue at stake in this matter is a sixty-seven year old water tank that NJAW wishes to tear down and replace with a new tank. (HJW[3] p. 5). The tank's age, however, is not the reason for the desired construction. Rather the impetus is a contract between NJAW and the Morris County MUA ("MCMUA") to purchase water that the MCMUA made a unilateral decision to terminate. (DCS p. 11).

A water tank provides water storage, and the primary purpose of water storage is to meet peak demands when the most water is drawn from the system, such as firefighting and times of high customer use. (DCS p. 4). Water tanks also provide water pressure, which is necessary for adequate flows. Water treatment plants are not designed to meet instantaneous demands of customers. (DCS p. 5). Water storage tanks are needed to meet peak demands, and act like a battery for water systems, storing water during non-peak usage time periods, that is then returned to the system during peak usage periods. Id. Water tanks also provide a back-up supply of water

[3] Howard J. Woods, Jr.'s October 18, 2022 Initial Testimony is abbreviated as HJW, followed by a reference to the page number.

during events such as a main break. As Mr. Shields testified, "[w]ithout adequate storage, periods of low pressure and boil orders due to low pressure conditions would be common, interruptions of service would be much more frequent, and treatment plants would have to be constructed much larger to meet these peak demands." (DCS p. 6).[4] For all of these reasons – as enunciated by the testimonies of Mr. Shields and Mr. Woods – a new tank in its existing location is necessary for the "service, convenience or welfare of the public." N.J.S.A. 40:55D-19. The broad public interest in maintaining adequate water for peak demands, fire protection, and adequate pressure outweighs local considerations regarding the appearance of an enlarged tank. See, e.g., In Re: Monmouth Consolidated Water Co., 47 N.J. 251 (1966); In re: Public Service Electric & Gas Co., supra, 35 N.J. at 377.

The Company's main goal in managing its water supply is to produce the water it provides to customers from surface and ground water. (DCS p. 9). However there can be times when this production is inadequate to meet the needs of a particular area. The MCMUA was able to help NJAW meet this demand through a water supply agreement with the Southeast Morris County MUA ("SMCMUA"). NJAW and MCMUA entered into a renewable five year agreement dated January 6, 2012. (DCS p. 10). On May 11, 2018, the MCMUA notified NJAW of its intent to terminate the water supply agreement on January 6, 2022. (DCS p. 11). NJAW did not wish to terminate the agreement; however, it had no choice since MCMUA had the authority to unilaterally end the agreement. Id.

Without the MCMUA supply, the existing Tower Mountain booster station was the only means of transferring water to the Mendham Low gradient. Additionally, the existing Fenwick tank is the only gravity storage useful to the Mendham Low gradient. (DCS p. 13). Without the

[4] These expanded treatment plants would have a significant impact on rates.

volume and pressure of the water previously supplied by the MCMUA, the Tower Mountain booster station does not have sufficient capacity to meet the peak day demands of the Mendham Low gradient. Id. Given the loss of the MCMUA supply, NJAW needed to solve this problem in order to provide safe, adequate and proper service to its ratepayers in the Bernardsville and Mendham areas. The public interest, safety, and convenience represented by this problem outweigh any local considerations related to the appearance of a larger tank.

There are additional reasons to replace the existing Fenwick tank with a larger, more modern tank, further demonstrating NJAW's ability to meet the requirements of N.J.S.A. 40:55D-19. The existing Fenwick tank is too small to comply with current regulatory requirements for gravity distribution storage. (HJW p. 5). Also, the water surface elevation in the current tank is at too low an elevation to maintain minimum service pressures for routine water service and public fire protection for customers in this area. Id.

As Mr. Shields testified, under the current setup, NJAW cannot provide safe, adequate and proper service in the Mendham Low Gradient. According to Mr. Shields, "[t]he existing tank is no longer adequate for storage, safety and reliability needs, and there is no reasonable, cost-effective source of water supply to negate the need for reconstructing the Fenwick Water Storage Tank." (DCS p. 14). In order to maintain adequate pressures and flows, the Mendham Low Gradient would need to operate as a closed system, working off the Oak Place booster pumps with no pressure equalization storage or pressure relief. (DCS p. 14). In that instance, the existing Fenwick Tank would be at greater risk of water main breaks due to isolation, and due to increased and more frequent transient pressure conditions. Id. Perhaps most importantly, without operable gravity storage, the system will be out of compliance with DEP's Distribution

Storage Requirements. Id. All of these reasons explain why replacement of the existing tank is necessary for the service, convenience or welfare of the public under N.J.S.A. 40:55D-19.

The proposed new tank will be a better version of the existing tank. As Mr. Woods testified, the proposed tank will provide adequate volume for flow equalization and pressure moderation during normal operating conditions, and will provide adequate gravity storage for fire protection. (HJW p. 13- HJW p. 14). In determining the proper size of the tank, Mr. Woods explained that NJAW followed normal procedure, noting that "[t]he equalization volume was determined to equal 20% of the projected peak day demand...and the fire protection reserve was calculated using ISO guidelines for fire protection requirements in the service area." (HJW p. 13, citing Shields Testimony Exhibit PT-1). Mr. Woods testified that without the proposed tank, there would be no fire protection reserve available during power outages and firefighting ability would decrease in situations where the full pumping capacity is unavailable at NJAW's pumping stations. (HJW p. 14). Finally, without the proposed tank, adequate pressure can only be maintained through uninterrupted operation of the pumping systems. Id.

Furthermore, the proposed tank will meet the minimum extended stress volume required by DEP rules. (HJW p. 14). The proposed tank will also provide adequate equalization volume for peak customer demands. Id. Without the proposed tank, adequate pressure will only be maintained through uninterrupted operation of the system's pumps, which is not a desirable situation. Id.

In order to provide safe, adequate and proper service to customers, NJAW has decided that three changes are necessary:

- Installation of new underground pipelines for increased flow capability;
- Replacement of the Oak Place booster station, which is currently underway;

- Replacement of the Fenwick tank

Replacement of the Fenwick tank, in particular, will provide gravity storage, equalization volume storage for peak demands, and adequate pressure for fire flows. (DCS p. 15). Based on the Company's credible testimony, all three are necessary for the service, convenience or welfare of the public under N.J.S.A. 40:55D-19. Without these three improvements, the Company will be unable to provide safe, adequate and proper service to ratepayers in the Bernardsville and Mendham areas. This Court should find that building a new Fenwick storage tank is necessary for the service, convenience or welfare of NJAW's ratepayers in Bernardsville and Mendham. The Company's Petition seeking relief to build a new Fenwick tank should be granted pursuant to N.J.S.A. 40:55D-19.

Point II

Contrary to Ms. Diaz's[5] Testimony, There is Evidence in the Record to Support the Assertion that Service Will be Inadequate Without the new Fenwick Tank Following the Loss of the MCMUA Supply.

As Mr. Woods testified, not only does DEP have concerns that the system has adequate storage overall, but DEP is also concerned that customers isolated in individual pressure zones have adequate storage for peak hour equalization, fire protection, and emergencies. (HJW Rebuttal 4)[6]. Specifically, existing storage in the Mendham Low Gradient is inadequate. Id. This storage is one of the reasons that DEP issued the permit to construct the new Fenwick Tank. Id.

The Mendham low gradient is a hydraulically isolated portion of NJAW's water distribution network. (HJW Rebuttal 5). Pressure within this geographic area is determined by

[5] Giselle Diaz is the expert engineering witness who participated on behalf of Intervenor Paul Savas.

[6] The rebuttal testimony of Mr. Woods is abbreviated (Rebuttal) followed by the page number.

the water surface elevation in the Fenwick Tank, and also by pump stations and supply sources. The water mains in this area are physically isolated from other NJAW water mains. Id. Elevation determines the maximum pressure any customer will enjoy. The current Fenwick Tank has an elevation when full of 772 feet above sea level, and the new Fenwick Tank will have an elevation when full of 818 feet above sea level. Id.

Contrary to Intervenor's witness Giselle Diaz's assertions, there is evidence in the record to support the assertion that service will be inadequate without the new Fenwick Tank following the loss of the MCMUA supply. Exhibit A to Mr. Shields' initial testimony shows that fire protection in Bernardsville would be inadequate and that pressures during summer months would not satisfy minimum DEP requirements in the area near the existing tank. (DCS, Exhibit A and HJW Rebuttal pp. 7-8). Nor can NJAW rely on the existing Horizon Drive Tank, which although it has a storage volume of one million gallons, only 136,000 is useful. The other 864,000 gallons are not useful because they cannot be used without causing service problems in the Mendham High Gradient. (HJW Rebuttal p. 8).

Finally, it would not be a prudent business decision to replace the Horizon Drive Tank instead of the Fenwick Tank. The land elevation at the Horizon Drive Tank is simply too high to avoid excessive pressure within the Mendham Low gradient. If storage was located in the Mendham High Gradient, where the Horizon Drive Tank is located, any excess supply for peak hour equalization would need to be pumped an extra 164 feet in elevation just to reach the higher elevation of this hypothetical replacement tank. Id. This excess energy required to lift the water to this higher elevation would be wasted energy because it would be dissipated through pressure control valves to safely return the water to the Mendham Low gradient. This makes no sense and represents an additional, ongoing operating expense that ratepayers would be forced to bear.

Additionally, the current pumping system used to transfer water to the Horizon Drive Tank would need to be modified to handle the additional water volumes. This also would be an unnecessary capital expense that cannot be justified. Id.

For all of these reasons, there is evidence in the record to support the claim that service will be inadequate after the loss of the MCMUA supply unless the new Fenwick Tank is built. Any claim by Ms. Diaz to the contrary should be rejected.

Point III

Petitioner Has Shown That No Alternative Site Or Sites Are Reasonably Available To Achieve An Equivalent Public Benefit.

As Donald Shields testified, NJAW explored options for alternative sites that are reasonably available to achieve an equivalent public benefit, but found none. (DCS17). The public benefit provided by the existing Fenwick tank, and an enlarged tank at the same location, comes in the form of water storage to meet peak demands, fire protection, and adequate water pressure. (DCS pp. 46). Any alternative site or sites must provide these same public benefits, and petitioner has shown that no such site exists.

In fact, Mr. Shields explains that NJAW explored "all options." Other properties at the necessary elevation are either encumbered by Green Acres, privately owned residential properties, or require significant capital expenditures in water main improvements to be usable. (DSC p. 17). Mr. Shields explains that the cost of investment in new infrastructure that would be needed to distribute water from any alternative tank site into the existing water distribution system would be approximately $1,000,000 for every 1500 feet of 16" main. (DCS p. 18). Mr. Shields testifies that NJAW looked at the adjacent borough of Mendham, but that the local Zoning Board could deny the company's petition and that the acquisition cost of purchasing a

property in that borough would be significant. (DSC p. 17). In short, petitioner examined its own properties as well as external properties and found that external properties came with large acquisition costs and a high level of uncertainty. Those additional costs would ultimately be passed on to ratepayers.

In addition to imposing unnecessary costs to ratepayers, using an alternative site is also daunting from an engineering perspective. Mr. Shields testifies that NJAW currently has infrastructure in place that permits the proposed tank to be connected to the system as soon as it is built. (DCS p. 18). Building a tank at a different location would not permit this same ease of connection.

Lastly, in his rebuttal testimony Mr. Shields affirms that NJAWC has shown that no alternative sites are reasonably available to achieve a similar public benefit. Mr. Shields testifies that NJAW provided a list of addresses with adequate elevations for the tank, all of which the company reviewed. (DCS Rebuttal pp. 15-16)[7]. Mr. Shields reiterates that most of these properties were in residential areas or encumbered with Green Acre restrictions, and that the municipal applications would likely be met with considerable public opposition and potentially denied. (DCS Rebuttal p. 16). Mr. Shields stated, and Rate Counsel agrees, that the imposition of significant design, engineering, and permitting costs for hypothetical projects that are likely to be denied does not lend itself to a reasonably available location. (DCS Rebuttal p. 16). The legislative intent is clear that the broad public interest to be served is greater than local considerations. In Re: Monmouth Consolidated Water Co, supra, 47 N.J. at 258. The broad public interest of avoiding both the costs and the uncertainty that comes with these locations outweighs intervenor's local interest in not having an enlarged tank in his "backyard."

[7] Mr. Shields' rebuttal testimony is cited as DCS followed by a page number.

Conclusion

For all of these reasons, Rate Counsel urges ALJ Caliguire to grant the relief requested in NJAW's petition.

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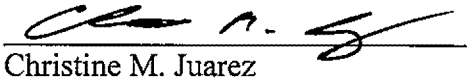
By: 
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NEW JERSEY AMERICAN WATER FOR A DETERMINATION CONCERNING THE FENWICK WATER TANK PURSUANT TO N.J.S.A. 40:55D-19

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