



Agenda Date: 8/21/13  
Agenda Item: 5B

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
44 South Clinton Avenue, 9<sup>th</sup> Floor  
Post Office Box 350  
Trenton, New Jersey 08625-0350  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

WATER

IN THE MATTER OF THE PETITION OF THE	)	ORDER ADOPTING
BOROUGH OF WOODLAND PARK (FORMERLY	)	INITIAL DECISION
KNOWN AS THE BOROUGH OF WEST PATERSON)	)	
SEEKING A DECLARATION WITH RESPECT TO ITS	)	
RIGHTS AND OBLIGATIONS AS TO NEW JERSEY	)	BPU DKT. NO. WO09020148
AMERICAN-WATER COMPANY, INC.	)	OAL DKT. NO. PUC 07146-09

**Parties of Record:**

**Andrew Bayer, Esq.- Gluck, Walrath LLP for Petitioner, Borough of Woodland Park**  
**Stacy Mitchell, Esq.- Cozen & O'Connor for Respondent, New Jersey American Water Company**  
**Stefanie A. Brand, Director-Division of Rate Counsel**  
**Hesser G. McBride, Jr., Esq.- Wilentz, Goldman, & Spitzer for Intervener, New Jersey Utility Association**

**BY THE BOARD:**

The issue before the New Jersey Board of Public Utilities ("Board" or "BPU") is whether to accept, modify, or reject an Initial Decision of Administrative Law Judge Walter M. Braswell ("ALJ Braswell"), which denied the Borough of Woodland Park's ("the Borough" or "Petitioner") petition to construct a parallel water system to New Jersey American-Water Company's ("NJAWC" or "Company") existing water system for the purpose of competing directly with NJAWC and also sought a declaration regarding the validity of NJAWC's franchise. The Board will affirm the Initial Decision based on the reasons set forth by ALJ Braswell and as otherwise detailed below.

**PROCEDURAL HISTORY**

Petitioner is a municipal corporation organized and existing under the laws of the State of New Jersey, which owns and operates a municipal water system that purveys water to approximately 2,397 customers within the Borough. NJAWC is a regulated public utility corporation involved in providing water service throughout its defined territory in New Jersey, including 917 customers within the Borough. The New Jersey Utility Association ("NJUA") is a statewide trade association for investor-owned utilities. NJUA was granted permission to intervene in this matter on August 3, 2011. Other parties involved in this proceeding are the Staff of the Board of Public Utilities ("Staff"), and the New Jersey Division of Rate Counsel ("Rate Counsel").

NJAWC's predecessor, Little Falls Water, was incorporated on November 3, 1902, for the purpose of providing water service to individuals and businesses located in Little Falls. On April 6, 1903, Little Falls adopted an ordinance granting Little Falls Water the authority to provide its public and private residents water. Subsequently, on May 5, 1903, Little Falls adopted an ordinance granting Little Falls Water the authority to construct a water works. The Ordinance was entitled: "An Ordinance, Granting Permission to [the Water Company], its successors and assigns, to construct a water works and supply water to [Little Falls] for public and private uses in said Township for fifty years," ("1903 Ordinance").

Around March 1914, the Borough of West Paterson (currently known as the Borough of Woodland Park) was carved out of Little Falls. In 1953, the Borough adopted another Ordinance granting renewal of NJAWC's franchise rights to construct water works. The Petitioner operates a municipal water utility providing water services to certain residents of Woodland Park not part of NJAWC's franchise area. Currently, throughout the Borough there is a price disparity between the price of water services offered by NJAWC and the Petitioner.

In or around 2007, the Borough filed a complaint in the Superior Court of New Jersey, Passaic County, challenging the validity of NJAWC's franchise. By Order and Opinion dated February 27, 2007, the Honorable Burrell I. Humphreys, on a Motion for Summary Judgment, declined to exercise jurisdiction over the matter. Judge Humphreys dismissed the action and ordered the matter be transferred to the Board for determination on February 27, 2007.

On February 19, 2009, the Borough filed a Petition with the BPU which sought an order that:

1. The Borough may lawfully compete with NJAWC by reasonably offering and purveying public water service to any resident, business and entity within the Borough.
2. In the alternative, that NJAWC is barred from asserting franchise rights in the Borough in perpetuity emanating from the 1903 Certificate of Incorporation of one of its predecessors in interest, the Little Falls Water Company, which limited the entity's term of existence to one hundred years.
3. In the alternative, that NJAWC (and NJAWC's predecessor in interest) did not incorporate under the Water Company Act of 1876 with the consent of the Borough.
4. In the alternative, that NJAWC is barred from asserting any exclusive franchise rights after May, 2003 to lay construct, maintain, and replace when necessary water mains, water pipes, and connection therewith and all appurtenances and appliances thereto belonging in the streets [a]venues, parks parkways [sic], highways or other public places in the Borough" as result of its application of 1953.

In support of its petition to compete, the Borough sought to demonstrate that it could:

1) construct a parallel water system using existing Public Works employees; 2) construct a fully operational system within two years; and 3) offer water services to its customers at a rate below NJAWC's existing rates.

The proceeding was transferred to the Office of Administrative Law ("OAL") on June 1, 2009, as a contested case. Judge Braswell issued a Prehearing Order on April 11, 2011. Pursuant to the Prehearing Order, the Petitioner filed its direct testimony and declared that it be granted the authority to provide water service to approximately 900 customers within the Borough that were currently using NJAWC's water services. Subsequently, by order, NJUA was granted permission to intervene in this matter on August 3, 2011.

On October, 21, 2011, NJAWC and NJUA filed the direct testimony of their witnesses.

On November 17, 2011, NJAWC filed a motion for Partial Summary Decision seeking that:

1) the expiration of the initial certificate of Little Falls Water did not terminate NJAWC's franchise; and 2) the expiration of the 1953 municipal consent to use the streets of the Borough did not terminate NJAWC's franchise to serve the Borough. Subsequently, the Borough submitted its Cross-Motion for Summary Decision, arguing that the franchise granted in 1903 expired in 2003 and that NJAWC had no legal right to continue to provide water services in the Borough. On February 6, 2012, ALJ Braswell granted NJAWC's motion for Partial Summary Decision. ALJ Braswell decided that pursuant to the Decisions rendered in In re Petition of South Lakewood Water Co., 61 N.J. 230, 238-240 (1972) and Township of Dover v. United Water Toms River, Dkt. No. WC97080581, OAL Docket No. PUC 353-00S (July 6, 2005), the incorporation consent granting NJAWC's predecessor the right to purvey water and consenting to its incorporation created NJAWC's franchise, the expiration of the Little Fall's Water Certificate did not terminate NJAWC's franchise, and the expiration of the use of the Streets Ordinance did not terminate NJAWC's franchise to provide water service in the Borough.

Hearings started in December 2011, and concluded in November 2012. The Borough presented as witnesses: former Mayor Pasquale Lepore, Borough Engineer Donald J. Norbut, Borough Water Superintendent George Galbraith, Borough Chief Financial Officer Frederick J. Tomplins, consultant James Deblock, and regarding financial matters, expert Dennis Enright. NJUA presented as its only witness Pauline Ahern, a public utility cost capital expert. NJAWC presented the following witnesses: Michael A. Sgro, general counsel and secretary of NJAWC; Suzanne Chiavari, P.E.; Frank X. Simpson, Director of Rates; Henry Ludswigsen, CPA and Richard A. Verdi, financial analyst.

Initial Briefs were filed on March 15, 2013, by Petitioner, NJAWC, NJUA and Rate Counsel. Petitioner also filed on the same day a Statement of Material Facts.

Petitioner's statement of material facts included: an expert appraisal of 3.5 million dollars for the construction costs of the parallel water system based on the cost of NJAWC's current system, an estimate of the customer rate which would be \$125.77, almost \$15 less than the current NJAWC rate, and a final estimate that the length of time to finish the project would be two years. Furthermore, Petitioner argues in its Initial Brief that the BPU lacks jurisdiction to regulate the actions of the Borough and that NJAWC has failed to demonstrate any reasonable likelihood of harm to the rate paying public.

NJAWC argues in its Initial Brief that the BPU has exclusive jurisdiction over the parties because the Legislature granted the BPU broad authority over these types of specialized issues. Furthermore, NJAWC argues that since N.J.S.A. 48:2-14 states:

No privilege or franchise granted after May first, one thousand nine hundred and eleven, to any public utility by a political subdivision of this state shall be valid until approved by the board. Such approval shall be given when, after hearing, the board determines that the privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests. In granting its approval the board may impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require[.]

This conferred to the BPU exclusive authority over all franchises granted to public utilities and conversely exclusive jurisdiction to hear challenges to a public utility's franchise, including those at issue in this proceeding. Additionally, NJAWC argues that it maintains its current franchise; the doctrine of equitable estoppel precludes the Borough from competing with NJAWC; the Borough's construction plan is speculative and unsupportable; the granting of the Borough's system would have an adverse and irreparable impact on ratepayers across the state; and the Borough has the option of condemnation over the disputed water pipeline property.

Rate Counsel's Initial Brief opposes the construction of the Borough's parallel water system because it would result in waste of NJAWC's existing system thereby adversely affecting the public interest. Rate Counsel also submits that the Borough's proposed construction is not economically feasible.

NJUA's Initial Brief also opposes the construction of the Borough's parallel water system, because it contends that if the Borough's construction is permitted it will result in an injustice to NJAWC, and therefore it is appropriate to invoke the doctrine of equitable estoppel to halt the Borough's construction plans. Furthermore, NJUA believes that the Borough's proposal is equivalent to the arbitrary revocation of NJAWC's franchise. Lastly, NJUA argues that permitting the Borough's proposal will have an adverse effect on ratepayers, increase investor risk, and increase the costs of capital.

Subsequently, Staff filed its Initial Brief on March 28, 2013. Staff argues that the Board has jurisdiction over this dispute because the Legislature has granted, in broad sweeping terms, general supervision over public utilities to the Board, and because N.J.S.A. 48:2-14 confers upon it authority over franchise disputes. Furthermore, the Borough has failed to demonstrate it could build a duplicate system or that its estimated construction costs are reliable. Lastly, Staff argues that the construction of a duplicate system would be wasteful and impractical.

Reply Briefs were filed on April 8, 2013, by Petitioner, NJAWC, and NJUA. Reply Briefs on behalf of Rate Counsel and Staff were filed on April 16, 2013.

Petitioner's Reply Brief states that the BPU lacked jurisdiction over the Borough's proposed actions because this dispute is about a municipality's actions and the New Jersey Supreme Court stated the BPU does not have authority to "regulate municipal action wholly within its border". Furthermore, the Petitioner argues that the type of competition the Borough intends to

perform has been previously granted. Next, Petitioner argues NJAWC has failed to establish that the remedy of equitable estoppel is appropriate since that remedy is rarely evoked on a municipality. Lastly, Petitioner states it has sufficiently demonstrated it can deliver lower rates for its potential customers.

NJAWC argues in its Reply Brief that the BPU has exclusive jurisdiction over this dispute because N.J.S.A. 48:2-13 provides, "the Board shall have general supervision and regulation of and jurisdiction and control over public utilities as hereinafter in this section defined and their property, property rights, equipment, facilities and franchises so far as may be necessary to carry out the provisions of this Title." This provision, NJAWC argues, has been broadly interpreted and has previously conferred authority to the BPU in several proceedings. While NJAWC does concede that the Borough is not a public utility defined in N.J.S.A. 48:2-13, the Borough gave municipal consent to NJAWC to provide water service "which is directly within the purview of the Board's discretion and at issue in this proceeding. Additionally, the BPU's authority over this matter has been recognized earlier in this very proceeding when Judge Humphreys ordered that the matter be transferred to the BPU for resolution. Next, NJAWC argues that any burden of proof lies with the Borough; the Borough's proposal is not viable; the Borough's expert financial expert Mr. Enright is not qualified to proffer testimony; the analogies the Borough derives from the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. ("EDECA") are erroneous; and any comparison between NJAWC's rates and the Borough's is meaningless due to the variances of the two systems.

Similarly, NJUA argues in its Reply Brief that N.J.S.A. 48:2-13 provides the Board with jurisdiction over this dispute. Next, NJUA argues that Petitioner's contention that the duplicate water system will not adversely affect ratepayers is erroneous. NJUA indicates that the Petitioner grossly underestimates the cost of the construction by close to 15 million dollars, which would result in higher rates for NJAWC's customers and any potential customers who would choose the water service offered by the Borough.

Rate Counsel argues that the BPU has proper jurisdiction over this matter because once a municipality has consented to a franchise and it has been approved by the BPU, it then cannot be arbitrarily revoked. Although, the Borough does not technically propose revocation, the granting of its parallel water system would diminish NJAWC's water system "incrementally with each customer the Borough were to compete for." Furthermore, Rate Counsel argues that the Borough's estimate of the cost of labor did not include the full cost estimate and therefore if granted the construction costs of the parallel water system will result in an adverse effect on ratepayers and NJAWC's existing system. Lastly, Rate Counsel argues that the Borough improperly compares its proposal to compete with electric and gas deregulation, because those competitive services occur at the generation and supply levels, whereas if this system is granted there will be no competition at the supply level.

Staff argues in its Reply Brief that the Borough's interpretation of case law and relevant statutes fails to appreciate the jurisdiction of the Board in this dispute. Staff indicates that the cases the Petitioner uses to detract from the BPU's authority are not analogous to the current proceeding and that the Legislature has granted authority to the BPU in N.J.S.A. 48:2-13 and N.J.S.A. 48:2-14 over this type of matter.

In his May 31, 2013, Initial Decision ALJ Braswell found that the cost to construct a duplicate system would approach 18 million dollars; the Borough inaccurately estimated the amount of linear feet of water main pipe it would need to construct the system; it would take a minimum of five years to complete the construction; granting of the system would be impractical, inefficient,

and wasteful; and furthermore it would encourage investors to transfer their capital to other geographic regions. ALJ Braswell concluded that the BPU had exclusive jurisdiction over the parties and subject matter of the dispute because N.J.S.A. 48:2-14 grants the Board authority over franchise disputes that involve public convenience and public interests. Additionally, exclusive jurisdiction over these types of disputes has been given to the Board in analogous proceedings and earlier in this very proceeding when Judge Humphrey's dismissed the Superior Court action and ordered that the matter be transferred to the Board for determination. No party sought to appeal Judge Humphries order or ruling.

ALJ Braswell adopted the reasoning outlined in his Partial Summary Decision and concluded that NJAWC maintains an existing, valid, and perpetual franchise. Lastly, ALJ Braswell determined that the doctrine of equitable estoppel precludes the Borough, as a matter of law, from competing with NJAWC because the Company has spent and will spend a substantial amount of money on its water system and granting of the Borough's duplicate water system would result in an injustice.

On June 18, 2013, Petitioner filed Exceptions to the Initial Decision. Petitioner's Exceptions argue that the ALJ favored the utility and ignored the Borough. On June 25, 2013, NJAWC filed Reply Exceptions in favor of the Initial Decision. In so doing NJAWC argues that Petitioner's Exceptions do not identify any factual or legal error made by ALJ Braswell. On June 26, 2013, Rate Counsel submitted its reply to the Borough's Exceptions. Rate Counsel's reply supports the Initial Decision, and recommends that the Initial Decision be adopted by the Board in its entirety.

### **DISCUSSION AND FINDINGS**

The Board first notes that Exceptions were filed by Woodland Park, wherein it objected to the "entire initial decision" and stated that the ALJ "virtually ignored every factual and legal argument submitted by the Borough". Woodland Park then requested that the Board review certain enumerated documents submitted in the proceeding below, which the Borough attached and relied upon as its Exceptions. Such Exceptions fail to delineate the specific findings of fact, conclusions of law or dispositions with which it takes issue, as required by N.J.A.C. 1:1-18.4(b). Reply Exceptions were also filed by NJAWC and Rate Counsel who urged the Board to adopt the Initial Decision. Similarly, these Exceptions did not address any specific issue regarding the Initial Decision. Nonetheless, the Board has reviewed the Exceptions and Reply Exceptions submitted in this case.

After review of the Initial Decision and the entirety of the record in this matter, including the testimony, evidence and briefs of all parties, the Board **HEREBY FINDS** that ALJ Braswell correctly concluded that NJAWC holds a valid franchise and properly denied the Borough's petition to construct a parallel water system. The ALJ's findings were reasonable and fully supported by competent evidence, accordingly, the Board **HEREBY AFFIRMS** the Initial Decision.

As stated above, on May 31, 2013, ALJ Braswell issued an Initial Decision. ALJ Braswell found that the BPU has exclusive jurisdiction over the parties and subject matter of the dispute. ALJ Braswell accurately concluded that the Board had jurisdiction on this issue. The New Jersey Legislature recognized the importance of the Board's specialized knowledge and expressly conferred statutory authority to the BPU to grant and supervise franchises when drafting N.J.S.A. 48:2-13 and 48:2-14. Furthermore, courts have previously held that the BPU's authority over utilities, like that of regulatory agencies generally, "extends beyond powers

expressly granted by statute to include incidental powers that the agency needs to fulfill its statutory mandate." A. A. Mastrangelo, Inc. v. Commissioner of Dept. of Env'tl. Protection, 90 N.J. 666, 683-84 (1982). Beyond express authority, the Board has additional inherent authority, including the authority to revoke a utility franchise in extreme cases. In re Valley Road Sewerage Co., 154 N.J. 224, 239 (1998).

Both N.J.S.A. 48:2-13 and N.J.S.A. 48:2-14 give exclusive jurisdiction to the Board over this dispute. N.J.S.A. 48:2-13 confers exclusive jurisdiction to the Board over this dispute because construction of the Borough's parallel water system interferes directly with NJAWC's franchise and the Board is charged with the general supervision of a public utility's franchise. If Petitioner is allowed to construct its parallel water system, it would not only substantially interfere with NJAWC's current franchise and water system but perhaps with franchises over the entire State. As NJAWC's financial expert, Richard A. Verdi, stated:

Allowing the Borough to compete directly with NJAWC by constructing parallel infrastructure within the Borough of Woodland Park will place real concern on the perception of investors especially if perceived that the same result could be achieved in other municipalities and could be the beginning of a meaningful, unfavorable trend where regulators would grant municipalities the right to compete with water utilities despite the [investor owned utility] possessing a franchise that the municipality granted.

Additionally, N.J.S.A. 48:2-14 grants the Board authority to approve all franchises to a public utility and the exclusive jurisdiction to hear challenges to that franchise, including the one in this proceeding. Furthermore, the BPU has had jurisdiction over previous municipal franchise disputes. See Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418 (1969) (wherein the BPU decided a franchise dispute concerning whether a township's franchise became operative without BPU approval).

Lastly, the Board's exclusive jurisdiction over this proceeding was recognized earlier in this very action when the Petitioner inappropriately filed its action in New Jersey Superior Court. The Honorable Burrell I. Humphreys found that:

This matter should be heard in its entirety by the [B]oard. Put simply, a municipality is attempting to take over the provision of water service in areas in which a private water company has been for years providing such service with water mains which it or its predecessor installed and maintained.

The issues are important. The provision of water service through the state involves complex and sensitive issues which lie outside the conventional experience of judges. The determination of the issue in this case may have statewide ramification in a highly regulated industry serving the public. A court determination of these issues would run counter to the statutory scheme granting "sweeping powers" by the Legislature to the B[oard]. The B[oard] is plainly the proper forum to determine the far reaching issues in this case.

Accordingly, the Board **HEREBY AFFIRMS** the ALJ's decision that the BPU has jurisdiction over this dispute.

Pursuant to the April 6, 1903 Ordinance, ALJ Braswell accurately concluded that NJAWC still maintains a valid existing franchise to serve the Borough and still maintains a municipal consent to utilize the streets even though the fifty year limitation has passed. See Township of Brick v. American Water Company, Dkt. No. OCN-C-118-02 (holding that fifty-year limitation of a public utilities ordinance to use the streets, where a valid perpetual franchise to operate existed, did not limit the franchise and instead "should be read as a public policy provision requiring the municipality and franchise to confer with regard to any change in needs or regulations."); Township of Dover v. United Water Toms River, BPU Dkt. No. WC97080581, OAL Dkt. No. PUC-353-00S, 2005 N.J. PUC Lexis 43 (adopting the analysis issued in Township of Brick and finding that a 50-year limit to lay pipes set no time limit on the water company's ability to purvey water.). Accordingly, the Board **HEREBY AFFIRMS** the ALJ's decision that NJAWC has an existing, valid, and perpetual franchise.

In regards to the equitable estoppel issue, the Board adopts ALJ Braswell's conclusion on this issue. While estoppel "is rarely invoked against a governmental entity," Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999), the doctrine "may be invoked against a municipality where the interests of justice, morality, and common fairness clearly dictate that course." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000).

Most recently, the Board applied the doctrine of equitable estoppel to the City of Perth Amboy which was attempting to interfere with Middlesex Water Company providing service to Chevron U.S.A. Inc. Middlesex Water Co. v. City of Perth Amboy, 97 N.J.A.R.2d(BRC) 22, 1997 N.J. AGEN LEXIS 421, 2. The ALJ in that matter found on remand that Middlesex Water Company had detrimentally relied upon an act of Perth Amboy which constituted an injustice. "The ALJ further concluded that through the time that Middlesex Water engaged in the construction necessary to serve Chevron and during its years of subsequent service, Perth Amboy never communicated any objection to Middlesex's operations." Furthermore, the Board found that in the context of 20 years of silence on the part of Perth Amboy, equitable relief was appropriate.

NJAWC has been providing water service to the Borough for over 100 years and has made significant investments to its water system in the Borough including mains, meters, hydrants, interconnections, and general operation and maintenance costs. Furthermore, NJAWC has spent approximately 1 million dollars from the years 1950 to 1973 and 1981 to 2011 for system improvements and upgrades. Lastly, NJAWC already has plans for a new construction project this year. These types of investments coupled with the Borough's nondisclosure of its intent to compete make the application of the equitable estoppel doctrine appropriate in preventing the construction of the Borough's parallel water system. Accordingly, the Board **HEREBY AFFIRMS** the ALJ's decision that equitable estoppel is an appropriate remedy to preclude the Borough from competing with NJAWC's existing water service.

In exercising its jurisdiction, the Board has previously enjoined municipal action, where such action is contrary to the law and would harm a public utility. In In the Matter of the Petition of Seabrook Water Corporation, BPU Docket No. WC02060340, April 20, 2004, during the course of a dispute involving Seabrook Water Company, the Township of Seabrook began to directly bill customers of Seabrook Water Company for bulk water services provided by the Township of Seabrook to the water company. In granting a motion for emergent relief the Board found that township violated the Board's statutory authority and ordered the township to cease and desist



its illegal actions. See In the Matter of the Petition of Seabrook Water Corporation, BPU Docket No. WC02060340, April 20, 2004 at p. 5-6.

Pursuant to N.J.S.A. 48:2-23, the Board must ensure that water utilities provide "safe, adequate and proper service." The Board's authority and obligation, exercised in Middlesex, to protect a utility's ability to provide such service has long been recognized. In Fornarotto v. Bd. of Public Util. Comm'rs, the Court recognized that the Board's duty extends to "protect from unreasonable and destructive competition [the] existing facilities which are actually serving the public, so that the public may continue to have the benefit of such service". Fornarotto v. Bd. of Public Util. Comm'rs, 105 N.J.L. 28, 36 (Sup. Ct. 1928) Cf. In re Application of Greenville Bus Co., 17 N.J. 131, 145 (1954) (holding that the Board could find it in the public convenience and to protect the public interest to permit additional bus lines to provide service to an area). Additionally, in Junction Water Co. v. Riddle, a case cited by Petitioner in arguing that a parallel system was appropriate, the Court stated that "if there were more than one [provider] authorized to give the same service in the same locality, neither could supply adequate or satisfactory service ... as neither could operate with profit if the business of the community were divided." Junction Water Co. v. Riddle, 108 N.J. Eq. 523, 528 (N.J. Super. Ct. 1931). The Court went on to discuss the Board's authority, stating that "it is intended also for the protection of the investing public, the value and stability of whose securities might be seriously affected by unnecessary competition where adequate service at reasonable rates is already being furnished by the operating utility." Id at 529.

For the reasons set forth in ALJ Braswell's Initial Decision as well as those facts delineated in the record, the Board agrees that having two parallel water systems in Woodland Park would result in increased costs to customers; logistical complications; duplication of supply capacity and increased maintenance costs; increased costs to consumers and potential water-quality problems. The Board further agrees with ALJ Braswell's findings that the Borough underestimated the cost and time necessary to construct a parallel water system. As such, the alleged savings to consumers who switched (even assuming that every potential customer switched systems), would be illusory.

Additionally, building a parallel water system would result in the loss in revenue and value of NJAWC assets in Woodland Park. The investment of a utility in assets assumes the ongoing use of the facilities for their useful life. There is no information in the record that the assets of NJAWC in Woodland Park have reached the end of their useful life. As noted in the Initial Decision, were these assets sold by NJAWC to another private utility, or were they purchased by the Borough, they would be sold at fair market value. Any losses resulting from a parallel system would be borne by NJAWC ratepayers across the State. Additionally, based on the design and implementation plan from the Borough the costs of building the proposed parallel system would be borne by all persons in the Borough, not just those customers to be served.

In its last rate case, the Board reviewed the rates currently charged by NJAWC to its customers and determined them to be reasonable and in the public interest. In the Matter of the Petition of New Jersey American Water Company, Inc. For Approval of Increased Tariff Rates and Charges For Water and Wastewater Service, Change in Depreciation Rates And Other Tariff Modifications, BPU Docket No. WR11070460, May 1, 2012. In so doing, the Board must balance the needs of the ratepayer to receive safe, adequate and proper service at reasonable rates, while allowing the utility the opportunity to earn a fair rate of return. See FPC v. Hope Natural Gas, 320 U.S. 591 (1944); N.J.S.A. 48:2-21 and N.J.S.A. 48:3-1.

Having reviewed the record in this matter, including ALJ Braswell's Initial Decision, the Board **HEREBY FINDS**, under the facts and circumstances of this case, the Initial Decision to be reasonable, in the public interest and in accordance with law. Therefore, the Board **HEREBY ADOPTS** the Initial Decision, attached hereto, including all attachments and schedules, as its own, incorporating it by reference into this Order as if fully set forth herein.


These findings are based on the facts and circumstances of the above matter as set forth in the pending petition. If in a future petition, Woodland Park seeks a revocation of the franchise or any agreement is reached between the parties regarding the sale of utility assets, the Board would examine such facts and circumstances to determine the appropriateness in a future proceeding. Any such petition would be subject to a review as required by law.

This Order shall be effective on August 30, 2013.

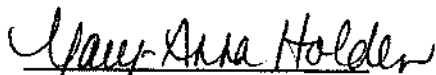
DATED: 8/21/13

BOARD OF PUBLIC UTILITIES  
BY:

  
ROBERT M. HANNA  
PRESIDENT

  
JEANNE M. FOX  
COMMISSIONER

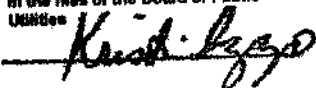
  
JOSEPH L. FIORDALISO  
COMMISSIONER

  
MARY-ANNA HOLDEN  
COMMISSIONER

  
DIANNE SOLOMON  
COMMISSIONER

ATTEST:   
KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within  
document is a true copy of the original  
in the files of the Board of Public  
Utilities



**In the Matter of the Petition of the Borough of Woodland Park  
(Formerly known as the Borough of West Paterson) Seeking a Declaration with  
Respect to its Rights and Obligations as to New Jersey American Water Company  
OAL Initial Decision-Board Ruling**

**BPU Docket No.: WO09020148  
OAL Docket No.: PUC 07146-09**

**SERVICE LIST**

<p><b><u>PETITIONER-BOROUGH OF WOODLAND PARK</u></b></p> <p>Andrew Bayer, Esq. Gluck Walrath, LLP 428 River View Plaza Trenton, NJ 08611</p> <p><b><u>NJAWC</u></b></p> <p>Michael A. Sgro, Esq. New Jersey American Water Company, Inc. 1025 Laurel Oak Road Voorhees, NJ 08043</p> <p>Stacy Mitchell, Esq. Cozen O'Connor 457 Haddonfield Road Cherry Hill, NJ 08002</p> <p><b><u>RATE COUNSEL</u></b></p> <p>Stefanie A. Brand, Esq., Director Debra F. Robinson, Esq. Division of Rate Counsel 140 East Front Street, 4<sup>th</sup> Floor Post Office Box 003 Trenton, NJ 08625-0003</p>	<p><b><u>INTERVENOR-NEW JERSEY UTILITY ASSOCIATION</u></b></p> <p>Hesser G. McBride, Jr., Esq. Wilentz Goldman &amp; Spitzer 90 Woodbridge Center Drive, Suite 900 Post Office Box 10 Woodbridge, NJ 07095-0958</p> <p><b><u>DIVISION OF LAW</u></b></p> <p>Geoff Gersten, Esq. Alex Moreau, Esq. Carolyn McIntosh, Esq. Dept. of Law &amp; Public Safety Division of Law 124 Halsey Street Post Office Box 45029 Newark, NJ 07101-45029</p> <p><b><u>NJBPU</u></b></p> <p>Maria Moran, Director Mike Kammer Ken Welch Board of Public Utilities Division of Water 44 South Clinton Avenue, 9<sup>th</sup> Floor Post Office Box 350 Trenton, NJ 08625-0350</p>
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6/10/13  
2013 JUN 10 AM 11 49

**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

WJ 2.0  
CASE MANAGEMENT

INITIAL DECISION

OAL DKT. NO. PUC 07146-09

AGENCY DKT. NO. WO09020148

IN THE MATTER OF THE PETITION OF THE BOROUGH  
OF WOODLAND PARK (FORMERLY KNOWN AS THE  
BOROUGH OF WEST PATERSON) SEEKING A  
DECLARATION WITH RESPECT TO ITS RIGHTS AND  
OBLIGATIONS AS TO NEW JERSEY-AMERICAN WATER  
COMPANY, INC.

RECEIVED

JUN 06 2013

BOARD OF PUBLIC UTILITIES  
MAIL ROOM

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**Andrew Bayer**, Esq., counsel for the petitioner, the Borough of Woodland Park  
(Gluck Walrath, attorneys)

**Ira G. Megdal**, Esq. and **Stacy Mitchell**, Esq., counsel for respondent, New  
Jersey-American Water Company, Inc. (Cozen O'Connor, attorneys)

**Carolyn McIntosh**, Deputy Attorney General and **Alex Moreau**, Deputy Attorney  
General, for the Staff of the Board of Public Utilities (Jeffrey S. Chiesa,  
Attorney General of New Jersey)

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Deputy Rate Counsel, for the Director, Division of Rate Counsel (Stefanie  
A. Brand, Esq., Director)

**Hesser G. McBride, Jr., Esq.**, counsel for intervenor, the New Jersey Utilities Association (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: April 16, 2013

Decided: May 31, 2013

BEFORE **WALTER M. BRASWELL**, ALJ/t/a:

### **BACKGROUND**

The parties to this proceeding are as follows:

Petitioner, the Borough of Woodland Park (formerly known as the Borough of West Paterson) (petitioner or the Borough) is a municipal corporation organized and existing under the laws of the State of New Jersey. Petitioner owns and operates a municipal water system and purveys water to approximately 2,397 customers within the Borough.

New Jersey-American Water Company, Inc. (NJAWC or the Company) is a regulated public utility corporation engaged in the production, treatment, and distribution of water within its defined service territory within the State of New Jersey.

Intervenor, the New Jersey Utility Association (NJUA) is a statewide trade association for investor-owned utilities whose members provide water, wastewater, electric, natural gas, and telecommunications services to New Jersey residents and businesses. NJUA comprises sixteen member utility companies that deliver services to more than nine million residential customer accounts and nearly 2.3 million non-residential customer accounts throughout New Jersey. The other parties that participated in this proceeding were the Board of Public Utilities' Staff (Board Staff) and the New Jersey Division of Rate Counsel (Rate Counsel).

NJAWC has provided water service to properties in a portion of the Borough from the inception of its franchise in 1903 to the present day. NJAWC's predecessor, Little Falls Water, was incorporated on November 3, 1902, under the Water Company Act of

1876 for the purpose of providing water service to individuals and businesses located in the Township of Little Falls (Little Falls or the Township). Thereafter, on April 6, 1903, the Township Committee of Little Falls adopted a one-page resolution consenting to the incorporation of Little Falls Water (the 1903 Resolution).

On May 5, 1903, the Township Committee of Little Falls adopted an Ordinance entitled, "An Ordinance, Granting Permission to [the Water Company], its successors and assigns, to construct a water works and supply water to [Little Falls] for public and private uses in said Township for the term of fifty years," (the 1903 Ordinance).

In or about March 1914, the Borough of West Paterson, (now known as the Borough of Woodland Park) was carved out of Little Falls.

In 1953 the Borough adopted an additional Ordinance related to the provision of water service within the Borough (the 1953 Ordinance) by the New Jersey Water Service Company.

Little Falls Water and its various successors, up to and including NJAWC, have provided water services to a portion of the properties in the Borough since 1903. Specifically, NJAWC serves 917 customers within the Borough, while the Borough provides service to approximately 2,397 customers. Passaic Valley Water Service provides services to the few remaining residents and businesses.

### PROCEDURAL HISTORY AND STATEMENT OF THE CASE

By Order and Opinion dated February 27, 2007, the Honorable Burrell I. Humphreys, on a Motion for Summary Judgment, declined to exercise jurisdiction over the matter. Judge Humphreys dismissed the action and ordered the matter be transferred to the Board of Public Utilities (Board) for determination. In February 2009, the Borough filed a Petition with the Board.

Through such Petition, the Borough sought an order from the Board declaring that :

1. The Borough may lawfully compete with NJAWC by reasonably offering and purveying public water service to any resident, business and entity within the Borough;
2. In the alternative, that NJAWC is barred from asserting franchise rights in the Borough in perpetuity emanating from the 1903 Certificate of Incorporation of one of its predecessors in interest, the Little Falls Water Company, which limited the entity's term of existence to one hundred years;
3. In the alternative, that NJAWC (and NJAWC's predecessor in interest) did not incorporate under the Water Company Act of 1876 with the consent of the Borough;
4. In the alternative, that NJAWC is barred from asserting any exclusive franchise rights after May 2003 "to lay construct, maintain and replace when necessary water mains, water pipes and connections therewith and all appurtenances and appliances thereto belonging in the streets, [a]venues, parks parkways [sic], highways or other public places in the Borough" as result of its application of 1953;

The proceeding was transferred to the office of Administrative Law (OAL) on June 1, 2009, as a contested case and assigned to the undersigned. I issued a Prehearing Order on April 11, 2011.

Pursuant to the Prehearing Order, in June 2011, the Borough filed its direct testimony with the Board. Thereafter, by Order dated August 3, 2011, NJUA was granted permission to intervene in this matter. On October 21, 2011, NJAWC filed the direct testimony of its witnesses with the Board. The NJUA filed its direct testimony on the same day. Neither Rate Counsel nor Board Staff filed any direct testimony. Hearings commenced in December 2011 and concluded in November 2012. Initial Briefs were filed on March 15, 2013, by petitioner, respondent NJUA, and Rate Counsel. Staff's Initial Brief was filed on March 28, 2013. Reply Briefs were filed on April 8, 2013 by petitioner, respondent, and NJUA. Reply Briefs of Rate Counsel and Staff were filed on April 16, 2013. The Borough presented the following witnesses: former Mayor Pasquale LePore, Borough Engineer Donald J. Norbut, Borough Water

Superintendent George Galbraith, Borough Chief Financial Officer Frederick J. Tompkins, consultant James DeBlock, and regarding financial matters expert Dennis Enright.

NJUA presented its sole witness, public utility cost of capital expert Pauline Ahern followed by NJAWC's presentation of its case. NJAWC presented the following witnesses: Michael A. Sgro, general counsel and secretary of NJAWC; Suzanne Chiavari, P.E.; Frank X. Simpson, Director of Rates; Henry Ludwigsen, CPA and Richard A. Verdi, financial analyst.

On November 17, 2011, NJAWC filed a motion for Partial Summary Decision requesting that: 1) the expiration of the initial certificate of incorporation of NJAWC's predecessor entity did not terminate NJAWC's franchise to serve the Borough; and 2) the expiration of the 1953 municipal consent to utilize the streets of the Borough did not terminate NJAWC's franchise to serve the Borough.

The Borough filed a cross-motion seeking a determination that NJAWC's franchise to provide water service in the Borough had lapsed and that NJAWC had no legal right to continue to provide water service in the Borough.

On February 6, 2012, I issued a decision granting NJAWC's Partial Summary Decision Motion, denying the Borough's cross-motion and finding that NJAWC possesses a valid franchise to provide water service in the Borough.

As a result of the above-referenced ruling on the partial Summary Decision Motion, the sole issue remaining in this matter is whether the Borough can construct, in NJAWC's franchise territory, a water system parallel to NJAWC's system for the purpose of competing directly with NJAWC to serve customers currently served by NJAWC.

In support of its petition to compete with NJAWC in the Company's service territory, the Borough sought to demonstrate in this proceeding that it could: 1) construct a duplicate system utilizing the Borough's existing Public Works laborers; 2)



construct a fully operational system and begin providing service within a two-year time frame; and 3) after bonding the cost of construction, offer water service to its customers and those of NJAWC for less than NJAWC's existing rates.

The Borough's representative testified that the only reason it filed this action is because certain residents served by NJAWC pay higher rates for water service than residents served by the Borough's water department. The average rate for service paid by a NJAWC customer using 2,100 cubic feet (cf) of water per quarter is \$102.17 compared to NJAWC's rate of \$125.35. If the Borough extends its water system to compete with NJAWC, it estimates that its rates for service will be at least \$5 less per quarter than NJAWC's average rates.

#### **FINDINGS OF FACT**

As discussed below, I **FIND** that the Borough's assumptions regarding its cost to extend its system into NJAWC's franchise area are significantly understated. As a result, if the Borough is permitted to extend its system, the rates to be paid by the Borough's customers are likely to be significantly higher than those charged by NJAWC. In actuality, if the Borough were to construct a duplicate system, rates in the Borough would exceed those of NJAWC. Use of the duplicate system would result in a quarterly bill of \$201.50 for 2,100 cubic feet of water, and the total cost to construct a duplicate system would approach \$18 million.

The current water service rates charged by the Borough do not take into account all of the costs incurred by the Borough to provide water service. The Borough acknowledged that it does not maintain a formal cost-allocation plan for the water department. If such a plan was maintained, it would identify indirect costs associated with the operation of the water utility. Many of these indirect costs are charged to the general fund of the Borough. As a result, water service provided by the Borough is subsidized by taxpayers and the current rates do not reflect the Borough's actual costs to provide water service. By way of example, only two Borough Water Department laborer salaries are allocated to the Borough's Water Department; no building occupancy costs, including janitorial, heat, light, or insurance are allocated to the Water

Department; vehicles purchased for the Water Department are paid for from the Borough general fund; and no vehicle garage expenses are charged to the Water Department.

A formal cost-allocation plan would separate indirect costs associated with the operation of the water utility. Instead, many of these potential additional costs are charged to the current fund of the Borough and represent a general tax-revenue subsidy from all Borough residents to just the Borough's water customers. To the extent that any allocations are made, it is done informally. None of the Borough's employees keep time records to indicate whether a task performed is associated with the Water Department or the Borough, generally.

The Borough based its concept of constructing a duplicate, parallel system on a single main-extension project completed by the Borough in 2001 (the 2001 Project). From the 2001 Project, which is the only main-extension project in the Borough Water Department's history, the Borough extrapolated the construction design, estimated cost and timeframe to build a duplicate, parallel water system in NJAWC's service territory.

Specifically, the 2001 Project involved 7,350 linear feet of water main pipe originally designed to serve approximately 14 residential customers.

Although in designing a water system, an engineer will typically evaluate customer usage, the number of customers to be served, the type of customer (i.e., residential vs. commercial), topography, soil conditions, hydraulic modeling, etc.), the Borough derived its cost only by estimating the number of linear feet needed to build a duplicate system from an existing map. The Borough assumed that the main extension would require 40,300 linear feet of main pipe needed to duplicate NJAWC's system. The actual water main pipe used by NJAWC to serve the franchise area is 49,388 feet; almost two miles more than the Borough's "take-off" design estimate.

Based upon its 40,300 foot distance estimate, the Borough estimated it would cost approximately \$2.7 million to build a duplicate, parallel water system in the Borough. The estimate relied upon a cost assumption of \$65.64 per linear foot of main,

derived by extrapolating a \$47 per linear foot cost assumption from the 2001 Project plus a 3% per year inflation factor. I **FIND** that the Borough has significantly underestimated its construction costs. The Borough's cost estimate did not take into account or make any adjustments for the number of hydrants, services, valves, or connection facilities that will actually be needed in the new system. The Borough's construction cost estimates assumed forty fire hydrants rather than the sixty-eight hydrants currently serving the area. Similarly, it understates the number of valves needed to construct the new system (i.e., the Borough accounted for only 126 valves while NJAWC system has 278 valves).

The Borough estimates that utilizing four to five of the Borough's existing employees (that are currently occupied performing other work functions on a full-time basis) for labor will enable the Borough to take two (2) years to complete the construction of a duplicate water system in NJAWC's service area. This estimate was derived by the Borough's Water Superintendent Mr. George Galbraith by extrapolating from the 2001 Project and assuming that its existing employees could undertake all of the labor functions without any additional cost to the Borough—even though the full-time job responsibilities currently performed by their employees will still need to be performed. His determination was based on a belief that the Borough could construct about 100 linear feet per day using four or five Borough laborers for a total of 400 working days. However, Mr. Galbraith's estimate is not based on any detailed analysis. Because it intends to reallocate four to five employees to dedicate their work to constructing the extension, the Borough anticipates that some routine maintenance will have to be let go, and seasonal employees would need to be retained to complete the day-to-day operations of the Public Works Department.

A water system should not be constructed by inexperienced personnel in between cutting grass or carrying out other responsibilities. Ms. Suzanne Chiavari testified that she would not feel comfortable using inexperienced employees who shift duties. In fact, NJAWC uses licensed contractors for its water main construction. The contractors who are hired vet their employees for safety, submit performance numbers to OSHA, and employ a contractor safety program.

The data from the 2001 Project revealed that the Borough averaged less than 70 feet of pipe installation per day. I **FIND** that using the Borough's own extrapolating methodology to account for a 49,000 linear foot system, and adjusting for weekends, holidays, and the winter season when asphalt is not available for road resurfacing, assuming there was a dedicated crew in place, it would take the Borough a minimum of 5 years to construct a duplicate system.

On behalf of NJAWC, Suzanne Chiavari testified that the cost to construct a system to provide service through NJAWC's service territory in the Borough would be approximately \$18 million. Ms. Chiavari is an engineer experienced in the design and construction of water main systems. Ms. Chiavari further testified that the Borough's estimate failed to account for numerous costs that are incurred in connection with the construction of a water system.

If the Borough were to construct a parallel, duplicate system to that existing system in the Borough, this would be a novel situation in New Jersey. I **FIND** that based on the facts specific to this case, having two water companies compete on the same street or in the same area is impractical, inefficient, and wasteful. It could result in: 1) increased costs to customers of both water systems; 2) logistical underground complications (given the presence of numerous other utilities such as gas, electric, sanitary and storm sewer, cable and telephone lines); 3) increased response time in the event of a water leak; and 4) duplication of supply capacity and increased maintenance costs.

Water systems operate in a different manner and under different regulations than all other public utilities. Water utilities provide an essential public health service and must meet health-based standards from the supply to the customer's tap. To provide this essential service, water utilities build and maintain facilities for water supply, treatment, pumping, distribution, and metering of water. Moreover, the New Jersey Department of Environmental Protection (NJDEP) requires that each water utility maintain adequate capacity for customers within its service territory. If two utilities serve the same area, the need for supply capacity will be duplicated and the cost of maintaining supplies for the total area would increase.

I **FIND** that if the Borough was permitted and did in fact construct a duplicate system, NJAWC will still be required to provide safe, adequate, and proper service within the Borough. If most of NJAWC's customers switched to the Borough's competing system, NJAWC will still be required to maintain the existing water system, collect water-quality samples, have crews available to fix leaks and breaks, staff and read meters, and submit all the necessary operational and financial reporting to the State and Federal government.

I further **FIND** that water-quality problems will likely rise as the flow through the water mains is reduced below its original intended use. The Borough's pipes will need to be sized for domestic and fire flow capabilities to serve the entire street or neighborhood in the event that all NJAWC's customers switched. If only a portion of customers switched, then both utilities' mains would be oversized for domestic use. This could result in water-quality issues because the water turnover in the mains would be slower. As a result, more flushing would be required to maintain the proper levels of disinfection. If all of NJAWC's customers switched to the Borough's duplicate system, the Company would have to decide whether to retire all of its assets and physically cut and cap mains, remove meters and fire hydrants, and reroute the existing connections within NJAWC's system. This could result in the early retirement of functioning assets that would otherwise provide service for decades to come.

Since the inception, NJAWC has made the necessary capital investment in its system to ensure that its customers are provided with safe, adequate, and proper service.

As a going concern, these investments will continue to have value for as long as the system is in service. If NJAWC were to sell the system to another utility, the system would be sold for its fair market value. That value is significantly diminished if the Borough builds a duplicate system and NJAWC is forced to retire these functioning assets now, prior to the end of their useful life. As acknowledged by the Borough's witnesses, if the Borough constructs a new system parallel to NJAWC's system, the value of NJAWC's system will be substantially impaired. Further, costs of NJAWC's

ratepayers would increase to offset NJAWC's reduced revenue. Additionally, NJAWC's rates would likely increase due to the increased cost of capital resulting from the new competitive risk resulting from the Borough's entry into NJAWC's franchise service territory.

As testified to by NJUA public utility cost of capital expert Pauline Ahern, in the traditional ratemaking paradigm, the fair rate of return is typically equivalent to the cost of capital. Fundamentally, investors allocate capital to those investor-owned utilities that posse a favorable cost of capital, a competitive return on capital, or return on equity, and that operate in states with an encouraging regulatory climate. This is because investors are generally considered to be risk adverse and require a higher return form an investment which is considered more risky. The higher the perception of risk by investors, the greater the required return, or cost of capital. Investors are steered away from investing in utilities that retain an inferior cost of capital, a depressed cost of capital/cost of equity, or that operate in states with a discouraging regulatory climate. **I FIND** that if investor clients are unable to receive suitable returns or if risk rises in New Jersey, investors will be advised to transfer capital to other geographic areas that can provide greater returns and/or lower risk.

The Borough's witness, Mr. Enright, based his financial findings on only two sources, NJAWC's parent company, American Water's Annual Report and Moody's Rating Methodology. Mr. Enright admittedly did not consult with potential investors or perform any qualitative analysis to support his conclusions. Neither one of these reports discusses the type of risk associated with a municipality laying a duplicate, parallel main to an existing investor-owned utility in its franchise area, and essentially taking the utilities investment. Mr. Enright was not aware of any situations in which a municipal water provider has installed a water main parallel to an existing water provider in order to compete for retail customers served by the existing water provider.

**I FIND** that the impairment of NJAWC's franchise rights and the loss of revenues that it currently receives from its customers would negatively impact the financial stability and strength of NJAWC. As a regulated public utility in New Jersey, NJAWC

invests significant capital in its systems and has a reasonable expectation of earning a reasonable return on that investment.

### LEGAL ARGUMENT

#### A. THE BOARD OF PUBLIC UTILITIES HAS EXCLUSIVE JURISDICTION OVER THE PARTIES AND SUBJECT MATTER OF THE DISPUTE

The New Jersey Legislature created the Board as an agency of the State of New Jersey through which public utilities are regulated and through which issues of concern and disputes between public utilities, their customers, and the municipalities in which they provide service can be adjudicated. With respect to Title 48 of the New Jersey Statutes, the New Jersey Supreme Court has held that the New Jersey Legislature recognized "that public interest in proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the State." In re Public Serv. Elec. & Gas Co., 35 N.J. 358, 371 (1961); see also Ringleb v. Parsippany-Troy Hills Twp., 59 N.J. 348, 353 (1971); Petition of Hackensack Water Co., 196 N.J. Super. 162, 168-69 (App. Div. 1984); and County of Bergen v. Dep't of Public Utilities, 117 N.J. Super. 304, 312 (1971). The Legislature concluded that issues regarding the regulation of public utilities are not common knowledge and that judges and juries do not have the necessary expertise to adjudicate decisions of a specialized, technical nature involved in public utility regulation. Consequently, the courts have held that judges must give deference to administrative agencies' interpretations of their regulations and statutes because agencies have the "specialized expertise" and "superior knowledge" regarding the technical issues involved with the agencies' regulations and statutes that courts do not have. In re License Issued to Zahl, 186 N.J. 341, 353 (2006) (citations omitted); Saint Peter's University Hosp. v. Lacy, 185 N.J. 1, 13 (2005) (citations omitted).

The Board is therefore entrusted with the authority and duty to resolve disputes between a regulated utility and a municipality that consents to the provision of service by such regulated entity. See Middlesex Water Co. v. City of Perth Amboy, Board Dkt.

No. WE93100423, OAL Dkt. No. PUC 5609-95 (Decision and Order July 30 1997) (finding that "since the Board must make findings with respect to the existence of municipal consent to a utility's operations, it necessarily has the authority to issue orders enforcing such findings which are binding on all parties" including the municipality that granted the consent). This is directly applicable to this proceeding.

Pursuant to N.J.S.A. 48:2-14, "no privilege or franchise granted after May first, one thousand nine hundred and eleven, to any public utility by a political subdivision of this state shall be valid until approved by the board." N.J.S.A. 48:2-14. Moreover, the Board is authorized to approve a franchise request when it has determined that the franchise is "necessary and proper for the public convenience and properly conserves the public interests." Ibid. Thus, the Board has the exclusive authority to approve all franchises granted to public utilities. Likewise, the board has exclusive jurisdiction to hear challenges to a public utility's franchise, including those at issue in this proceeding.

The Board also "has an inherent obligation of a primary and fundamental nature to protect the public interest in the matter of service by utilities, not only in relation to the customer, but also from the standpoint of the impact of the method of service on other segments of the public as well, and it must always be affirmatively alert to discharge that responsibility." Public Serv. Elec. & Gas Co., supra, 35 N.J. at 381. Any decision rendered in this case has potential state-wide ramifications not only for NJAWC and its customers, but also for other privately owned utility companies and their customers. Only the Board has the ability to assess the impact of an adverse decision on utility customers state-wide.

The Board's exclusive jurisdiction over this proceeding was most recently recognized when the Borough inappropriately filed its action first in the New Jersey Superior Court. In his Order granting NJAWC's Motion for Summary Judgment and transferring the matter to the Board, the Honorable Burrell I. Humphreys found that:

Permitting the Borough to lay its water mains in the same area would duplicate [NJAWC]'s investment. Whether to permit such a seemingly wasteful practice in the provision of important public service involves the expertise and discretion



of the agency regulating and supervising the provision of these services.

This matter should be heard in its entirety by the [B]oard. Put simply, a municipality is attempting to take over the provision of water service in areas in which a private water company has been for years providing such service with water mains which it or its predecessor installed and maintained.

The issues are important. The provision of water service through the state involves complex and sensitive issues which lie outside the conventional experience of judges. The determination of the issue in this case may have statewide ramifications in a highly regulated industry serving the public. A court determination of these issues would run counter to the statutory scheme granting "sweeping powers" by the Legislature to the B[oard]. The B[oard] is plainly the proper forum to determine the far reaching issues in this case.

I Hold that based upon the foregoing, this matter is properly before the Board having exclusive jurisdiction over the parties and subject matter of the dispute.

**B. NJAWC MAINTAINS AN EXISTING, VALID AND PERPETUAL FRANCHISE TO PROVIDE SERVICE TO ITS EXISTING CUSTOMERS WITHIN THE BOROUGH**

By way of Order on Motion for Partial summary Decision entered earlier in this proceeding, I found that NJAWC holds a valid, perpetual franchise to serve its existing customers within the Borough. Specifically, I found that the consent granting NJAWC's predecessor the right to purvey water and consenting to its incorporation for an unlimited term constituted the "franchise" by which NJAWC had and continues to provide service. Moreover, I found that: (1) the expiration of the initial certificate of incorporation of NJAWC's predecessor did not terminate NJAWC's franchise to serve the Borough; and (2) the expiration of the municipal consent to utilize the streets of the Borough did not void NJAWC's franchise. By virtue of said Order and as a matter of law, pursuant to In re Petition of South Lakewood Water Company, 61 N.J. 230 (1972); Township of Brick v. New Jersey-American Water Company, Dkt. No. OCN-C-118-02; and Township of Dover v. United Water Toms River, BPU Dkt. No. WC97080581, OAL

Dkt. No. PUC-353-00S (July 6, 2005), NJAWC holds an existing, valid and perpetual franchise to serve its customers within the Borough.

**C. THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES THE BOROUGH AS A MATTER OF LAW FROM COMPETING WITH NJAWC IN ITS EXISTING SERVICE TERRITORY WITHIN THE BOROUGH**

Equitable estoppel embodies the doctrine that one shall not be permitted to repudiate an act done or position assumed where that course would work an injustice to another who, having the right to do so, detrimentally relied thereon. Marley v. Borough of Palmyra, 193 N.J. Super. 271, (1983) (quoting Hill v. Middletown Bd. of Educ., 183 N.J. Super. 36, 40 (App. Div. 1982)). The elements to establish an estoppel include: (1) the other party engaged in conduct, or made a representation, "intentionally or under such circumstances that was both natural and probably that it would induce action"; and (2) the party claiming estoppel relied on the conduct or representation, and in so doing "acted so as to change its position to its detriment." Miller v. Miller, 97 N.J. 154, 163 (1984).

While estoppel "is rarely invoked against a governmental entity," Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999), a "municipality is not totally exempt from the principles of fair dealing, and when dealing with the public, it must turn square corners." Williams Scotsman v. Garfield Bd. of Educ., 379 N.J. Super. 51, 62 (2005) (quoting Gruber v. Mayor and Twp. Comm. of Raritan Twp., 73 N.J. Super. 120, 126 (App. Div.), aff'd, 39 N.J. 1 (1962) and W.V. Pangborne & Co. v. N.J. DOT, 116 N.J. 543, 561 (1989)). The doctrine "may be invoked against a municipality where the interests of justice, morality and common fairness clearly dictate that course. Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middleton, 162 N.J. 361, 367 (2000) (citations omitted). Moreover, the New Jersey Supreme Court has held that courts should examine equitable considerations when assessing governmental conduct and that the "reliance factor," in particular, should be taken into account by the court. Skulski v. Nolan, 68 N.J. 179, 198-99 (1975).

Most recently, in Middlesex Water Co., *supra*, the Board applied the doctrine of equitable estoppel to the City of Perth Amboy which was seeking to preclude Middlesex Water from providing service to Chevron U.S.A. Inc. (Chevron). Initially, all of Chevron's water-service requirements were served by the City's municipal water utility. In the mid-1970's, Chevron decided to expand its refinery and manufacturing facility in Perth Amboy. Perth Amboy asked Middlesex Water at that time to evaluate whether it could provide water service directly to Chevron. Thereafter, the Perth Amboy Board of Adjustment approved the necessary zoning variances for the proposed expansion by way of Resolution on December 11, 1973. As a condition of the approval, Chevron was obligated to obtain all of its water needs from Middlesex Water, with limited exceptions. On December 18, 1973, the Perth Amboy City Council issued a Resolution affirming the variances on the condition that Chevron obtain its water service from Middlesex or some other water company other than the City of Perth Amboy. Middlesex Water thereafter commenced providing service to Chevron. Twenty years later, in 1993, the Perth Amboy City Council issued a resolution rescinding the previous requirement that Chevron obtain water service elsewhere and directed Chevron to purchase water from Perth Amboy. Middlesex Water, in response to such action, filed a petition with the Board, seeking, *inter alia*, approval of the 1973 municipal consent (which it had previously failed to obtain) and raised arguments based on estoppel and laches. The matter was transferred to the OAL for hearing and an Initial Decision. The Board then remanded the matter back to the OAL for consideration of the factual circumstances underlying the estoppel and laches arguments. The ALJ ultimately found on remand that Middlesex Water had demonstrated by a preponderance of the evidence that it detrimentally relied on an act or position of Perth Amboy which constituted an injustice to it. The ALJ further concluded that through the time that Middlesex Water engaged in the construction necessary to serve Chevron and during its years of subsequent service, Perth Amboy never communicated any objections to Middlesex's operations. The Board found that the 1973 Resolutions, taken in the context of contemporaneous correspondence and 20 years of silence on the part of the City, granted Middlesex's request for equitable relief. The Board noted that "while estoppel is rarely applied to state and local government units, the doctrine is invoked where the interest of justice, morality and common fairness dictate that course." Middlesex Water Co., *supra*, PUC 5609-95 at 13.

Based on the foregoing, it is clear that the issue of equitable estoppel has been sanctioned and directly applied by this Board against a municipal entity when common fairness dictates. In this case, NJAWC has made substantial investments in the Borough with respect to the construction and ongoing operation of its existing water system infrastructure for the last century. The capital investments include mains, meters, hydrants, interconnections, and on necessary to provide service to residences and businesses in the Borough. While not complete, the record in this case demonstrates that approximately \$1 million was spent in capital improvements by the Company in the years 1950 to 1973 and 1981 until 2011. Moreover, NJAWC continues to make capital upgrades and modifications to its system as needed to serve these customers including a \$200,000 project slated for 2013.

Thus, in granting the Use of the Streets Consent, the Borough agreed to allow NJAWC to serve its service territory, without interference from the Borough.

The Borough granted NJAWC's franchise, distinguished between its service area and that of NJAWC, knowingly and with the intent to continue to induce NJAWC to make such capital investments in the Borough. It then sat back and watched NJAWC make the necessary investments to provide serve to the Borough residents and now seeks to undermine NJAWC's franchise rights and render its investment worthless.

Like Middlesex Water Co., supra, common fairness dictates that the Borough be precluded, as a matter of law, from constructing a duplicate system, essentially terminating NJAWC's franchise in its designated franchise area within the Borough.

Thus, in summary I **FIND** that:

-The Borough's proposal to construct a duplicate, parallel system is speculative and unsupported;

-The Borough's proposal to construct a duplicate parallel system will have a direct and irreparable impact on NJAWC, ratepayers and other regulated utilities across the state;

-The Board of Public Utilities has exclusive jurisdiction over the parties and subject matter of the dispute;

-NJAWC maintains an existing, valid and perpetual franchise to provide service to its existing customers within the Borough;

-The doctrine of equitable estoppel precludes the Borough as a matter of law from competing with NJAWC in its existing service territory within the Borough;

-The Borough has the statutory option of condemnation.

### CONCLUSION AND ORDER

I hereby **CONCLUDE** that the relief sought in the petition be denied on the basis that it is contrary to the public interest as it would destabilize the water utility industry throughout the State, and it will increase the cost of water service to ratepayers of both the Borough's existing system and NJAWC. Under the current regulatory scheme in New Jersey, investor-owned utilities do not face competition in their franchise service areas by other public utility service providers. All phases of an investor-owned utility in New Jersey are subject to regulation and control by the Board of Public Utilities. Its properties are dedicated to the public use and the utility is obliged to provide water service to all customers within its franchise area who desire service. The rates of NJAWC are set by the Board, and the rates are based on the premise that the investor-owned utility will not face outside competition in its franchise area and that the facilities used in its operations will remain useful for their entire physical life. NJAWC's rates were set based upon the assumption that NJAWC will retain the exclusive right to serve the franchise area, permitting the recovery of the cost of its facilities over the life of the property. Authorizing the Borough to compete by constructing a parallel, duplicate system invalidates long-standing regulatory policy of the State and inhibits NJAWC from making investments of new capital since it would be imprudent to do so in a franchise service area facing competition from another water service provider.

I further **CONCLUDE** and recommend that the BPU deny the Borough the ability to compete within NJAWC's franchise service territory by constructing a parallel, duplicate water system. Construction of a parallel system has been shown to be

impractical, uneconomical, and wasteful. The Borough has the option, if circumstances warrant, to condemn the system, or may seek revocation of the franchise if the utility fails to provide safe, adequate, and proper service. They should not be permitted, however, to construct a duplicate system simply to compete with the Company after having granted it municipal consent.

Based on the Court's February 6, 2012, Decision and Order granting NJAWC's motion for partial summary disposition, NJAWC possesses a valid and enforceable franchise right to provide water service in the Borough.

Therefore, I **ORDER** the petition is hereby **DENIED**.

It is **FURTHER ORDERED** that since the petitioner has issued a municipal consent which was relied upon by NJAWC to make investments necessary to provide service it is estopped from action which materially impairs the value of the consent after NJAWC has changed its position in reliance upon the consent.

I hereby **FILE** my Initial Decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 31, 2013  
DATE

Walter M. Braswell  
WALTER M. BRASWELL, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

JUN - 5 2013

Aura Sanders  
DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

**APPENDIX**

**WITNESSES**

**EXHIBITS**

For Petitioner:

- WP-1 Hon. Pasquale Lepore's direct testimony
- WP-2 George Galbraith's direct testimony
- WP-3 Exhibit A to pre-filed testimony of James DeBlock (Woodland Park Ordinances 08-02 and 09-03)
- WP-4 James DeBlock's direct testimony
- WP-5 Donald J. Norbut's direct testimony
- WP-6 Frederick J. Tomkins' direct testimony
- WP-7 Dennis Enright's direct testimony
- WP-8 NJAWC's Answer to Interrogatory #56
- WP-9 NJAWC's Answer to Interrogatory #43
- WP-10 NJAWC's Answer to Interrogatory #59
- WP-11 NJAW Answer to Interrogatory #60
- WP-12 Portion of American Waterworks 2011 Annual Report
- WP-13 Woodland Park Resolution #12-214 dated July 23, 2012, with cover letter from Andrew Bayer, Esq.

For Respondent:

- NJAWC-1 Answer to Petition
- NJAWC-2 Michael A. Sgro's direct testimony
- NJAWC-3 Suzanne Chiavari direct testimony
- NJAWC-4 Frank X. Simpson direct testimony
- NJAWC-5 Henry J. Ludwigsen direct testimony
- NJAWC-6 Richard A. Verdi direct testimony
- NJAWC-7 March 1, 2004, correspondence from Gerber & Sansom
- NJAWC-8 August 23, 2004, correspondence from Gerber & Sansom



- NJAWC-10 Correspondence from Andrew Bayer with response to Interrogatories dated September 23, 2011
- NJAWC-11 Chiavari Schedule 15
- NJAWC-12 Graph from cross-examination of Norbut
- NJAWC-13 Handwritten chart from cross-examination of Norbut
- NJAWC-14 Interrogatory responses (NJAWC 123 through NJAWC 131)
- NJAWC-15 Correspondence dated August 25, 2011, from Andrew Bayer with responses to Interrogatories
- NJAWC-16 Handwritten diagram of potential competitive issues