



Agenda Date: 1/31/18
Agenda Item: 5B

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF MIDDLESEX WATER COMPANY)	ORDER GRANTING
FOR APPROVAL OF AN INCREASE IN ITS RATES)	INTERLOCUTORY REVIEW,
FOR WATER SERVICE AND OTHER TARIFF)	RESCINDING INTERVENOR
CHANGES, AND FOR AN ORDER AUTHORIZING)	STATUS, AND REMANDING
SPECIAL ACCOUNTING TREATMENT OF INCOME)	MATTER TO THE OFFICE OF
TAX REFUND PROCEEDS AND FUTURE INCOME)	ADMINISTRATIVE LAW FOR
TAX DEDUCTIONS)	FURTHER CONSIDERATION
)	
)	DOCKET NO. WR17101049
)	OAL DOCKET NO. PUC 16144-17

Parties of Record:

Stephen B. Genzer, Esq., Saul Ewing Arnstein & Lehr, LLP, for Middlesex Water Company
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Ira G. Megdal, Esq., for New Jersey-American Water Company, Inc.

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") by request of the Petitioner, Middlesex Water Company, ("Middlesex," "MWC," or "Company") pursuant to N.J.A.C. 1:1-14.10, for interlocutory review of the January 12, 2018 Order, issued by the Honorable Tricia M. Caliguire, Administrative Law Judge ("ALJ Caliguire"), granting New Jersey-American Water Company ("NJAWC") intervenor status. For the reasons noted herein, the Board grants Middlesex's request for interlocutory review of the January 12, 2018 Order and remands the matter to ALJ Caliguire for further consideration in light of new information.

BACKGROUND AND PROCEDURAL HISTORY

On October 10, 2017, pursuant to N.J.S.A. 48:2-21 and N.J.A.C. 14:1-5.12, and other relevant statutes and regulations, Middlesex filed a petition seeking to increase its rates for water service. On October 30, 2017 the matter was transmitted to the Office of Administrative Law ("OAL"), where ALJ Caliguire was assigned. On December 13, 2017, NJAWC filed a motion to intervene as a party to the above captioned rate case pursuant to N.J.A.C. 1:1-16 et seq., stating it was entitled to intervene because its customers will be substantially affected by the results of this rate case. On December 26, 2017, Middlesex filed a response to the motion to

intervene, stating that NJAWC is not a customer of the Company but a customer of a customer, the Township of Marlboro ("Marlboro"), and therefore pursuant to the rules for intervention at N.J.A.C. 1:1-16.3(a) and -16.3(c), is not entitled to intervene. On January 2, 2018, NJAWC's reply was filed, in which it asserted that although not a direct customer of Middlesex, it is entitled to be a full participant in the rate proceeding because its customers will be impacted by a rate increase. On January 12, 2018, the Order granting NJAWC intervenor status was issued. On January 15, 2018, Marlboro, a customer of record of Middlesex, moved for intervention to the rate case at hand. In a letter dated January 18, 2018, the Company filed an interlocutory appeal of Judge Caliguire's decision granting intervenor status to NJAWC to the Board. The Company demands the Board reverse the Judge's decision because NJAWC does not meet the standard for intervention codified in the New Jersey Administrative Code. NJAWC filed its opposition on January 26, 2018, asserting that it does meet the requirements for intervention and urging the Board not to disturb ALJ Caliguire's order. Following NJAWC's opposition on January 26, 2018, Middlesex filed a reply again asserting ALJ's order should be reversed. On January 29, Marlboro filed a letter in support of NJAWC. Rate Counsel did not file a response.

ALJ's Order at Issue

The January 12, 2018 Order from ALJ Caliguire allowed NJAWC to intervene in the currently pending Middlesex base rate case. In its motion to intervene, NJAWC stated that its interest in this matter results from an agreement for the Supply of Water with Marlboro by which NJAWC pays Marlboro for water purchased by Marlboro from Middlesex at the same rates as Marlboro is charged by Middlesex, arguing that an increase in Middlesex's rates approved by the Board in the rate case will be passed on to NJAWC and, eventually, on to NJAWC's customers.

ALJ Caliguire explained that Middlesex opposed the motion of NJAWC on the grounds that NJAWC's indirect relationship to Middlesex, as a "customer of a customer" is not sufficient to give NJAWC standing to intervene (or participate) in this matter. Middlesex stated that the interests of the customers of NJAWC are already represented by both the Division of Rate Counsel and Board Staff, eliminating the need for multiple representation. Middlesex stated that the actual financial impact of any potential rate increase on the customers which NJAWC represents is not substantial and, therefore, cannot support standing to intervene by NJAWC. Further, Middlesex asserts that NJAWC's interest in this matter is not sufficiently different from that of any other party so as to add measurably and constructively to the scope of this case, and including NJAWC would result in confusion and undue delay.

ALJ Caliguire also explained NJAWC's position: that it seeks intervenor status to protect the interests of its customers, and that it will abide by the procedural schedule already in place in order to avoid confusion or undue delay.

ALJ Caliguire set forth the necessary elements of intervention, found at N.J.A.C. 1:1-16.3(a) as follows:

- 1) the nature and extent of the moving party's interest in the outcome of the case;
- 2) whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
- 3) the prospect for confusion and delay arising from inclusion of the party; and
- 4) other appropriate matters.

She concluded the relationship between Middlesex and NJAWC is indirect. Middlesex's direct customer is Marlboro, which resells water purchased from Middlesex to NJAWC. Yet by its agreement with Marlboro, NJAWC has no ability to negotiate rates and must simply pay whatever the Board approves. The Judge determined that the current proceeding is the only one in which NJAWC can participate to protect its customers from the increase in rates for water sold by Middlesex. ALJ Caliguire granted intervenor status to NJAWC.

REQUEST FOR INTERLOCUTORY REVIEW

Middlesex's Motion

Middlesex's motion was filed as an emergent appeal because it asserts that NJAWC fails to meet the proper criteria for eligibility to file a motion to intervene. Middlesex cites the standards for intervention set forth in N.J.A.C. 1:1-16.1(a), referenced above, as well as N.J.A.C. 1:1-16.3 (a), which states that "Any person or entity not initially a party [. . .] who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene." Middlesex argues, among other things, that NJAWC will not be "substantially, specifically and directly affected by the outcome" of this case.

In its papers, Middlesex explains that NJAWC is not a customer of Middlesex, but a "customer of a customer" of Middlesex. NJAWC's water supplier, Marlboro, to whom NJAWC is a customer, is the customer of Middlesex and has consistently intervened in the Company's rate cases. Middlesex asserts that, through its attenuated relationship of a "customer of a customer," NJAWC claims since its customers "will" be affected by any BPU action in this case that "might" increase the rates to one of its own suppliers, that NJAWC should be deemed to have standing and is therefore "entitled" to become a full intervenor. The Company disagrees with this conclusion and urges the BPU to reject this basis for establishing standing to intervene or participate in a base rate case by overruling Judge Caliguire.

Middlesex explains that, in 2008, NJAWC and Marlboro executed a water supply agreement that contained pricing terms impacted, in part, on certain BPU determined Middlesex tariff rates. Middlesex was not a party to that agreement and played no role in its negotiation or execution. The Company asserts that solely by virtue of those financial terms between itself and Marlboro, NJAWC convinced Judge Caliguire that it has met the eligibility standard of "specific, substantial and direct" impact. The Company further argues that NJAWC's interests are too attenuated to be either an intervenor or a participant in this case and specifically argues that NJAWC, simply by signing a contract with Marlboro, should not be allowed to bootstrap intervention by terms of a contract into which it freely entered.

Middlesex next states that NJAWC's interest is not sufficiently different from any other party, now that Marlboro has moved to intervene (without objection), and will not measurably and constructively add to the scope or analysis of this case.

Finally, the Company states that NJAWC's inclusion in this case will inevitably cause confusion and could cause undue delay. Middlesex emphasizes that discovery and settlement meetings have been set and it believes the second round of discovery would require far more detail, thereby causing significant delay in the proceedings, with NJAWC involved in the case as intervenor. Middlesex states that it would also certainly require different terms for the Non-Disclosure Agreements, which would create significant confusion and time to finalize, if indeed they could be worked out.

NJAWC's Opposition

In its opposition, NJAWC asserts that it sought intervenor status solely to protect the interests of its customers. It explains that any increase in Middlesex's rates will be directly passed, dollar-for-dollar, to NJAWC's customers through its Purchased Water Adjustment Clause. While acknowledging that an increase in Middlesex's rates will not impact its shareholder, NJAWC explains that it solely seeks to fulfill its regulatory responsibility to safeguard customer interests found in N.J.A.C. 14:9-7.6(b)8, which requires it to "investigate the basis for any cost increase proposed by its purveyor." As such, it asserts that it meets the standards for intervention.

More specifically, NJAWC asserts that the law does not require an intervenor to be a direct customer of a utility, and asserts that it does, in fact, meet the standards required for intervention because it has a direct and specific interest in Middlesex's rate case. NJAWC explains that its customers will absolutely be affected by the proceeding and it must be permitted to protect the interests of its customers.

NJAWC further asserts that its interest is substantial because the impact on its customers will be significant. It explains that increases are cumulative, and to fulfill its obligation to customers, it must be permitted to protect them as contemplated in the Board's Rules. NJAWC also asserts that its interest is different from other parties, because it is a regulated public utility and is charged with this responsibility under N.J.A.C. 14:9-7.6.

Lastly, NJAWC claims that its intervention will not cause confusion or undue delay. It states that it has agreed to abide by the procedural schedule set forth in the Prehearing Order entered on December 26, 2017; its intervention will not change the issues in the case; and it intends solely to examine Middlesex's presentation to determine the impact upon its customers. NJAWC agrees that it will not challenge any of Middlesex's designations of its material as "trade secret and confidential."

Middlesex's Reply

By way of reply, Middlesex again asserts that NJAWC will not be substantially, specifically and directly affected by the outcome of the case, as required by N.J.A.C. 1:1-16.1(a). It asserts that NJAWC fails to satisfy this requirement because it has admitted that it will not be affected by the outcome of the case. It also asserts that any interest NJAWC may have is redundant to that of Marlboro, which has since moved to intervene as of right.

Letter From Marlboro

On Monday, January 29, the Board received a letter from Marlboro supporting the intervention of NJAWC in this matter, even though Marlboro fully intends to represent its customers in the rate case. Marlboro states that NJAWC is a customer and therefore supports NJAWC's interest and participation in the case.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed interlocutory by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of: (i) ten (10) days after receiving the request for interlocutory review or; (ii) the Board's next regularly scheduled open meeting after expiration

of the ten (10) day period from receipt of the request for interlocutory review. In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within twenty (20) days of that determination. Under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the judge's ruling shall be considered conditionally affirmed. However, the time period for disposition may be extended for good cause for an additional twenty (20) days if both the Board and the OAL Director concur.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court also held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. Id. at 100. In this regard, the Court noted:

In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of Administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[90 N.J. at 100].

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. In defining "good cause," the Court stated:

In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.

[Ibid.].

As stated above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and while it is to be exercised sparingly to avoid piecemeal adjudication, it may be granted if it is in the interest of justice or for good cause shown. Here, good cause exists to grant interlocutory review because there is a likelihood that this decision will have an impact upon the status of the parties, the presentation of evidence, the decisional process, and/or the outcome of the case.

As to the standard for intervention under N.J.A.C. 1:1-16.1 and NJAWC's claimed purpose of intervening to protect the interests of its customers, the Board is not persuaded that its determination in, or the outcome of, Middlesex's base rate case will "substantially, specifically and directly" affect NJAWC. N.J.A.C. 1:1-16.1(a). Because NJAWC asserts that "no increase in MWC's rates will impact [NJAWC's] shareholder" and that "[n]o such increase will impact [NJAWC's] bottom line," See NJAWC's Motion for Leave to Intervene at 1-2, it is evident that NJAWC will not be substantially, specifically, and directly affected by the outcome of any increase in rates that the Board might approve for MWC. The Board therefore **FINDS** that NJAWC has not met the criteria for intervenor status under N.J.A.C. 1:1-16.1(a).

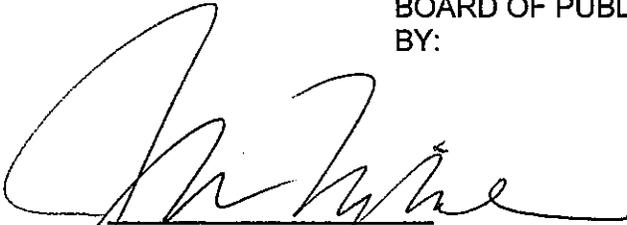
Importantly, since ALJ Caliguire's decision to grant intervenor status to NJAWC, Marlboro, the customer of record of Middlesex, has moved to intervene, on January 15, 2018, and now seeks full participation in the rate proceedings. The Board also notes that on January 16, 2018, Middlesex filed a letter in response to Marlboro's application, in which Middlesex supported Marlboro's intervention, explaining that Marlboro has the statutory right to intervene, and also has "substantial, specific and direct interests in the outcome of this matter."

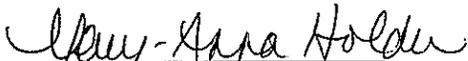
The Board **FINDS** that, specifically pursuant to N.J.S.A. 48:2-32.2(a), Marlboro has the statutory right to intervene, and, given Marlboro's request to intervene in this matter, NJAWC's participation would be redundant to that of Marlboro, and would not add measurably or constructively to the scope of the case, as is required for intervenor status pursuant to N.J.A.C. 1:1-16.3(a). Therefore, the Board **FINDS** that interlocutory review is warranted here. Accordingly, the Board **HEREBY GRANTS** Middlesex's request for interlocutory review of ALJ Caliguire's January 18, 2018 Order, **RESCINDS** intervenor status to NJAWC, and **REMANDS** the matter back to ALJ Caliguire to consider, if necessary, whether any participation by NJAWC is warranted under N.J.A.C. 1:1-16.6 in light of the new information regarding Marlboro's intervention request.

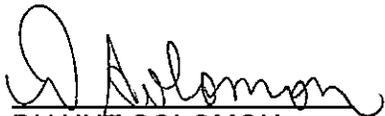
This Order shall become effective immediately and shall be served on the parties today,
January 31, 2018.

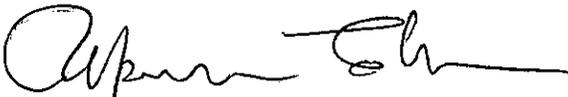
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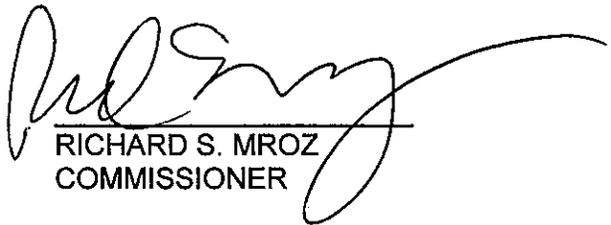
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ASSISTANT BOARD SECRETARY

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 MIDDLESEX WATER COMPANAY FOR APPROVAL OF AN INCREASE
IN ITS RATES FOR WATER SERVICE AND OTHER TARIFF CHANGES, AND FOR AN
ORDER AUTHORIZING SPECIAL ACCOUNTING TREATMENT OF INCOME TAX REFUND
PROCEEDS AND FUTURE INCOME TAX DEDUCTIONS
BPU DOCKET NO. WR17101049
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