Agenda Date: 6/29/22
Agenda Item: 2I

STATE OF NEW JERSEY

Board of Public Utilities
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ENERGY

COUNTY OF CUMBERLAND, Petitioner	)	ORDER ADOPTING INITIAL DECISION
v.	)	DOCKET NO. EC19030317
	)	OAL DOCKET NO. PUC12007-2019S
ATLANTIC CITY ELECTRIC COMPANY, Respondent	)	

Parties of Record:

Theodore Baker, Esq., on behalf of County of Cumberland
Renee Suglia, Esq., Atlantic City Electric Company

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board" or "BPU") following an Initial Decision issued by Administrative Law Judge Tricia M. Caliguire ("ALJ Caliguire") on February 24, 2022 in the above referenced matter ("Initial Decision"). By way of this Order, which is the Final Decision in the matter pursuant to N.J.S.A. 52:14B-10, the Board adopts the Initial Decision in its entirety.

BACKGROUND AND PROCEDURAL HISTORY

On March 8, 2019, the County of Cumberland ("Petitioner" or "County") filed a petition with the Board seeking a declaratory ruling that the relocation of certain utility lines and poles were for the public benefit, and as such, the cost related thereto should be paid by Atlantic City Electric Company ("ACE") ("Petition"). On or about June 11, 2019, ACE filed an Answer and Counterclaim ("Answer"). On or about July 3, 2019, the County filed an Answer to Counterclaim.

On August 20, 2019, this matter was transmitted to the Office of Administrative Law ("OAL"), for determination as a contested case, pursuant to N.J.A.C. 1:1-12, et seq., and assigned to Administrative Law Judge Dorothy Incarvito-Garrabrant ("ALJ Incarvito-Garrabrant"). Evidentiary hearings were held on January 5, 2020, February 5, 2020 and November 10, 2020. After the evidentiary hearings, but prior to issuing an initial decision, ALJ Incarvito-Garrabrant was named to the New Jersey Superior Court. On January 29, 2021, each of the parties submitted Post Trial Briefs. On November 1, 2021, the matter was re-assigned to ALJ Caliguire, and the County and ACE (together, "Parties") agreed that additional evidentiary hearings were not necessary.

On February 24, 2022, ALJ Caliguire issued the Initial Decision granting the relief sought in the Petition. On March 9, 2022, ACE filed exceptions and requested that the Board modify or reject the Initial Decision. On March 17, 2022, the County filed a response to ACE's exceptions and requested that the Board adopt the Initial Decision.

On April 6, 2022, the Board approved a 45-day extension, until May 26, 2022, for Board Staff ("Staff") to review the record and Initial Decision, and for the Board to issue a Final Decision. On May 18, 2022, with the consent of the Parties, the Board approved a second 45-day extension, until July 11, 2022, for Staff to review the record and Initial Decision, and for the Board to issue a Final Decision.

THE PLEADINGS

The Petition involved four (4) projects: 1) the Yank Marine Project ("Yank Marine"); 2) the Willow Grove Lake Project ("Willow Grove"); 3) the Burlington Road Bridge Project ("Burlington"); and 4) the Fortescue Bridge Project ("Fortescue") (collectively, "Projects"). See Petition at p. 2. The County asserted that Willow Grove, Burlington, and Fortescue necessitated the relocation of utility lines and equipment. Yank Marine required expansion of the right-of-way ("ROW"). In each case, the County, and in the case of Yank Marine, the private owner, refused to absorb such costs, and only Willow Grove moved forward to completion without an issue regarding payment. Id.

In its Answer, ACE argued that most of the disputes concerned work where heavy equipment would operate near high voltage power lines, necessitating compliance with the Occupational Safety and Health Act ("OSHA") and the New Jersey High Voltage Proximity Act ("NJHVPA"). Id. at p. 1 and 6 (citing 29 C.F.R. § 1926.416, 29 C.F.R. § 1926.1407 et seq.; N.J.S.A. 34:6-47.1 et seq.). Regarding Yank Marine, ACE asserted that the work was for a private purpose, and as such, the County lacked the right to seek relief on behalf of the private owner, Yank Marine, in relation to that work. See Answer at p. 3. ACE further claimed that it acted in accordance with OSHA, the Company's tariff, the New Jersey Administrative Code ("N.J.A.C."), and New Jersey common law. Id. at p. 4. Regarding Willow Grove, Burlington, and Fortescue, ACE explained that the County engaged third-party contractors that wanted to utilize heavy machinery to facilitate the projects. As high voltage electric delivery facilities existed where the contractors were to work, for safety reasons, these facilities required lines to be de-energized and moved. Id. at p. 5. Additionally, as these lines served customers all over the County, the move required a significant amount of planning, not only to ensure that the work areas were clear of hazards, but that all customers remained reliably served. Id. at p. 5-6. ACE claimed it charged the County for the work related to Willow Grove, Burlington and Fortescue, which the County had not paid, and from which ACE received no profit. Id. at p. 1-3. Accordingly, ACE's Counterclaim sought judgment for the costs associated with work already performed by ACE, and any additional costs accrued up to the time of trial. Id. at p. 7. The County's Answer to Counterclaim asserted that ACE had failed to state a claim upon which relief could be granted. See Answer to Counterclaim at p.3.

OAL EVIDENTIARY HEARINGS

Evidentiary hearings occurred before ALJ Incarvito-Garrabrant on January 15, 2020, February 5, 2020, and November 10, 2020.[1] Betty Jean Yank ("Yank"), Robert Brewer ("Brewer"), and

[1] The January 15, 2020 and February 5, 2020 Evidentiary Hearings were held in person, and the November 10, 2020 Evidentiary Hearing was held virtually.

Douglass Whitaker ("Whitaker") testified on behalf of the Petitioner. Gregory Domsic ("Domsic"), Jeffrey Mercanti ("Mercanti"), and Nicholas Cincotti ("Cincotti") testified on behalf of ACE.

Testimony Regarding Yank Marine and Willow Grove

Yank, Brewer, Domsic and Whitaker all provided testimony regarding either or both of Yank Marine and Willow Grove. See 1T and 2T.[2] However, because the Parties' withdrew their requests for relief and/or resolved their disputes as to Yank Marine and Willow Grove, those projects are not the subject of the Initial Decision or any exceptions, and a summary of those aspects of the record is unnecessary. See 2T.6:12 to 20; See Initial Decision at p. 3.

Testimony Regarding Burlington

Whitaker

Whitaker is an engineer employed by the County. 1T.161:1 to 19. Whitaker's office oversaw the construction, design work, building phase, and closing out of the Burlington project. Whitaker testified that Burlington was a culvert replacement project which required the installation of a cofferdam, which is a makeshift dam, in order to create a dry area to work on the bridge. 1T.195:5 to 196:15. Whitaker further testified that the existing bridge and masonry culvert that carried Burlington Road over a stream was widened in the 1950s with a very large steel bolted pipe culvert. The age of the structure was unknown and, due to wear, the pipe failed. Additionally, the brick and masonry were deteriorating. 1T.195:5-11. Utility poles were present on the west side of the bridge that carried transmission, distribution, and communication lines that required relocation, in addition to the Verizon poles located on the east side, which were relocated at no charge to the County. 1T.195:20 to 199:19.

Ultimately, to facilitate work on the project, all of which was in the public ROW, all of the distribution lines were removed, but not de-energized, the transmission lines remained in place, but were de-energized, and all poles remained in place. 1T.201:6 to 206:17. According to Whitaker, the County initially asked ACE if the lines could be dropped and back-fed instead of being removed and discussed the scope of the project with ACE to minimize any impact. 1T.241:7 to 23. The County was not initially asking about eliminating voltage, it was asking about obstructions. Id. Once the project was completed, the ROW remained the same, but the road was widened. 1T.241:11 to 246:16.

[2] "1T" is a reference to the transcript of the January 15, 2020 evidentiary hearing.

"2T" is a reference to the transcript of the February 5, 2020 evidentiary hearing.

"3T" is a reference to the transcript of the November 10, 2020 evidentiary hearing.

Mercanti

Mercanti, a supervising engineer for ACE, testified that the need for the removal of utility equipment for Burlington was to facilitate the use of a crane. 2T.110:19 to 118:8. ACE and the County discussed options of relocating existing lines and deenergizing lines, as well as the use of a rubber protective barrier, to enable the work on the bridge to be performed. Id. Mercanti testified that, where possible, "really all cases deenergizing and back feeding is the No. 1 option" and moving lines is "always really option 2 because it's more work" and more costly. 2T.118:3 to 118:25. Mercanti sent a letter, Exhibit R-5, to ACE stating the cost to deenergize and remove the lines, which was ultimately the work performed by ACE for which ACE was not paid. 2T.129:20-132:6. Mercanti testified that the County's primary request was to deenergize the line, that the line could have been deenergized and not removed, and the work performed, but that the line was removed anyway. 2T.140:22 to 141:19.

Mercanti maintained that de-energizing the lines is an OSHA requirement, and the removal of the equipment was a "luxury" that was being requested. If the contractor hit the de-energized line while working and damaged it, the contractor would be responsible for the repairs. 2T.190:10 to 191:15. With similar customer-requested projects, ACE bills the customer for the amount that is required to do the work. Mercanti added that the Company does not make a profit on these types of projects. 2T.192:1-25. Mercanti stated that, in his opinion, the contractor of these jobs should pay for the removal and work completed, not the County, which was the practice for similar work. 2T.197:8-21. Additionally, Mercanti claimed that ACE considers the temporary, as opposed to permanent, relocation of lines a work practice, not a public purpose. 2T.205:8 to 206:21.

Testimony Regarding Fortescue

Whitaker

Whitaker testified that the original fenders, which protect Fortescue from boats on either side of the bridge, were washed away. 1T.207:1 to 209:25. To address this problem, Fortescue included two phases. Phase one involved wrapping pile installations that hold the bridge up, and installing new piles and new fenders along both stream approaches of the bridge, directly beneath the power lines. Id. In phase two, 20-inch diameter steel piles were installed instead of the wood piles that were originally planned. Id. According to Whitaker, the County requested that ACE's distribution lines, as well as communication lines, be relocated to allow the installation of these piles. Id. The work to drive the piles directly into the stream bed required a crane with a boom as well as a pile driver. 1T.209:4 to 209:23. Whitaker testified that the distribution lines could not merely have been de-energized and left in place for the work to be completed because 1) the lines were directly in conflict with the location where the piles were to be installed, and 2) deenergizing the lines would de-energize the entire island of Fortescue. 1T.212:1 to 215:23. As a result, the distribution lines were relocated twice during the course of the Fortescue work. Id. The bridge was not widened in the Fortescue project. 1T.215:1 to 218:12. Phase one had no request for payment for moving the poles. In the second phase, ACE sent a letter requesting payment. Id.

Cincotti

Cincotti is employed by ACE's parent company, but was an ACE engineer at the time relevant to this matter. 3T.10:18 to 12:14. Cincotti was tasked with creating a design to mitigate the safety concerns of Atlantic Subsea, Inc. ("Atlantic Subsea"), a contractor bidding to perform the work on the Fortescue project. 3T.13:9 to 14:16. According to Cincotti, the wires could not be de-

energized because they were the only source of power for the nearby island. 3T.19:4 to 20:13. Cincotti stated that an underground solution, as suggested by Atlantic Subsea, was not deemed viable due to the high costs. Id. According to Cincotti, Atlantic Subsea first worked on the east side of the bridge where there were no wires, then worked on the west side once the wires were moved to the east side of the bridge. 3T.20:22 to 23:24. A cost estimate of $23,922.28 was provided by ACE for moving the distribution lines from the west side to the east (not including the price to move the wires back). 3T.31:5 to 32:2.

INITIAL DECISION

ALJ Caliguire issued her Initial Decision on February 24, 2022. In addition to findings of undisputed facts, ALJ Caliguire made the following findings of facts:

1. Both the Burlington Road Bridge project and the Fortescue Bridge project involved the repair of bridges which are part of the County road system, to wit, both bridges carry County-numbered roads over bodies of water.

2. The [ROW] in which the utility facilities are located, and were located at relevant times, are alongside the bridges, not on the bridges. (R-4; R-7).

3. In both cases, the relocation of the utility facilities was temporary as the construction did not impact the [ROW] such that the poles had to be moved to a new location permanently.

4. In both cases, the utility facilities, and in particular the distribution lines, were too close to the planned construction activities for the construction to proceed. Even once de-energized, the lower distribution lines would have been in the way of the construction equipment.

   [Initial Decision at p. 10.]

In her legal analysis, ALJ Caliguire considered that the Board approved ACE's Tariff for Electric Service ("Tariff"), which she quoted, in pertinent part, as follows:

> Whenever the Company shall be requested by a Federal, State, County or local governmental entity ("Governmental Entity") . . .to relocate currently existing overhead facilities . . . the total cost attributable to such relocation/redesign and installation shall be the responsibility of the requesting Governmental Entity . . . unless preempted by law; and the amount of the Company's estimated costs shall be deposited with the Company in advance. This section is intended to apply to all Company owned transmission, sub-transmission, primary, and/or secondary facilities.
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> [Initial Decision at p. 11 (quoting ACE Tariff, Section 9.7 (2017) (emphasis added in Initial Decision)]

ALJ Caliguire stated that the Tariff clearly imposes the obligation for the cost of relocating ACE's facilities on the requesting governmental entity (in this case, the County). However, "the question is whether that obligation is preempted by statute or caselaw." Initial Decision at p. 11. ALJ Caliguire ultimately answered that question in the affirmative by determining that the Tariff is

preempted by the common law, which shifts the costs in this matter from the County to ACE. See id. at p. 13-15 [citing Port of N.Y. Auth. v. Hackensack Water Co., 41 N.J. 90, 96-97 (1963)("Port Authority") and Pine Belt Chevrolet v. Jersey Cent. Power & Light Co., 132 N.J. 564 (1993)("Pine Belt")].

In reaching this conclusion, ALJ Caliguire acknowledged that the NJHVPA imposes obligations on employers to protect their employees who may be engaged in work activities within six (6) feet of high-voltage power lines. Id. at p. 11. ALJ Caliguire quoted the NJHVPA as follows:

> No employer or supervising agent of an employer shall require or permit an employee to participate in the operation, erection, transportation, handling, or storage of any tools, machinery, equipment, supplies, materials, or apparatus or the moving of any building, if in the course of such operation, erection, transportation, handling, storage or moving it is possible for such tools, machinery, equipment, supplies, materials, apparatus or building, to come within 6 feet of a high-voltage line; or to participate in any activity which would cause the employee to come within 6 feet of a high-voltage line; unless precautionary action has been taken to protect against the danger from contact with such high-voltage line, either by de-energizing such high-voltage line and grounding it where necessary, or other effective methods or devices which have been approved in advance by the commissioner for the particular case and for the particular location.
>
> [Id. at p. 11-12 (quoting N.J.S.A. 34:6-47.2)].
>
> Whenever any activity is to be performed requiring precautionary action under section 2 of this act, the employer, contractor or other person responsible for the activity shall, promptly notify the owner or person in charge of the high-voltage line of the intended activity and shall fully comply with and shall be responsible for the cost and for the completion of the precautionary action required under section 2 of this act before proceeding with such activity.
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> [Id. at p. 12 (quoting N.J.S.A. 34:6-47.5)].

ALJ Caliguire considered ACE's argument that the "plain language" of the NJHVPA renders the County or its contractors responsible for taking the precautionary action and the cost associated for such precautionary action. Id. at p. 12. Specifically, ALJ Caliguire considered County of Cumberland v. Atl. City Elec. Co., et al., Docket No. A-4553-15T4 (App. Div. 2017)("Courthouse Case"), a recent non-binding, unpublished Appellate Division decision, upon which ACE relied in support of its position that the County should be responsible for the costs in this matter.

In the Courthouse Case, the Appellate Division found that the utility was not responsible for the cost of relocating its facilities so that construction work on a county courthouse, a public building, could proceed. See Initial Decision at p. 12 (citing Courthouse Case at p. 11-12). As a result, relying on the Courthouse Case, ACE argued that:

> 1) [O]nce the proximity of the work zone to the high-voltage lines is established, the [NJHVPA] requirements of taking precautions to protect workers obligates the party who must take those precautions to bear the cost.
>
> 2) The New Jersey Supreme Court cases cited by petitioner [(Port Authority and Pine Belt)] do not apply because those cases involved road-widening projects in which the utility poles were moved from their original locations to new locations permanently.
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> [Initial Decision at p. 13 (citing ACE's Post Trial Brief at 26-27)].

ALJ Caliguire rejected ACE's arguments by distinguishing the Courthouse Case from the case at bar, explaining that, "contrary to the courthouse building, the bridges are not public structures simply located near public streets but are part of the public street." Id. at p. 13. Furthermore, ALJ Caliguire quoted the Supreme Court of New Jersey in Port Authority:

> Travel anciently was the principal and primary use of the public street. Bridges and tunnels are part and parcel of that subject and hence no more need be said to show the improvements as to them are within the public's paramount right in the streets.
>
> [Id. (quoting Port Authority at 100)].
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> [The utility] is permitted to use the public way because it serves a public interest, but . . . the utility's interest in the public way is subordinate to the public's enjoyment of it. Hence the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities.
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> [Id. (quoting Port Authority at 96-97)(brackets in Initial Decision)].

ALJ Caliguire reiterated that, in the Courthouse Case, the Appellate Division agreed that the NJHPVA rendered the employer, not the utility, responsible for costs of moving power lines to facilitate work, because the work was on a public building near the public ROW, and not the roadway, which was the subject of Port Authority and Pine Belt. Id. at p. 14. By contrast, in this matter, ACE was "asked to de-energize its high-voltage power lines, and to move them, because they were too close to construction activity on public bridges that carry public roads over bodies of water." Id. Unlike the Courthouse Case, here, the work on the public roadway required the de-energization and the movement of the power lines. Id. Therefore, ALJ Caliguire found that the repair, maintenance, and/or improvement of the County Road system at Burlington and Fortescue are public projects with public benefits, and that ACE is responsible for the costs of de-energizing and relocating its utility facilities located within the public ROW as required for the repair, maintenance, and/or improvement of the County Road system at Burlington and Fortescue. Id. at p. 14-15.

EXCEPTIONS

ACE

On March 9, 2022, ACE filed its exceptions to the Initial Decision.[3] ACE identified two factual exceptions. First, ACE took issue with ALJ Caliguire's finding that the "County notified ACE" about the need to temporarily remove power lines and poles "in the way of the planned construction…" Initial Decision at p. 3-4. ACE argued that this finding suggests that poles were removed in relation to the Burlington project when such a finding is not supported by evidence in the record. ACEe at p. 1. ACE requested that the Board modify the ALJ's decision to reflect that the only line that was removed on the Burlington Road Bridge was the distribution wire in the work zone. In addition, the Company requested "that the decision be modified to properly reflect that the hazard at both job sites was electricity, not the power delivery equipment itself." Id. at p. 2.

ACE's second factual exception relates to Burlington. The Initial Decision provided that "ACE submitted an invoice to the County for the estimated cost of relocating lines and poles." Initial Decision at p. 4. ACE stated that Exhibit R-5, which is ACE's cost letter for Burlington, has a "re: line 'cost to de-energize and remove overhead facilities.'" ACEe at p. 3. By contrast, ACE says Exhibit R-9 is a "cost letter for the Fortescue Creek Bridge" that indicates the work would be to "'relocate overhead wires and to remove poles…'" Id. at p. 3. Accordingly, ACE requested that the BPU modify the Initial Decision to reflect "the accurate facts." Id.

ACE also asked the Board to modify the Initial Decision based upon legal arguments, which are addressed in greater detail below. First, ACE argued that the Initial Decision is in error because it did not apply the NJHVPA to the facts of this case. Id. Second, the Initial Decision is in error because it requires ACE and its ratepayers to unfairly subsidize the County's Contractors, who, according to ACE, are the only beneficiaries of the movement or de-energizing of ACE's equipment. Id. at p. 4-6.

Cumberland County Response

The County filed their response to ACE's exceptions on March 17, 2022, requesting that the Board adopt and approve the ALJ's Initial Decision.[4] According to the County, the wires at the Burlington and Fortescue bridge projects were removed, not because they were de-energized as ACE explains, but because they were in the way and created a safety hazard to pile driving activities. Countyr at p. 1. Whitaker testified that as to Burlington, since the transmission lines were much higher, they were able to work below them without any issue. However, the distribution lines were in direct conflict with the crane when they were installing the sheets for the coffer dam. Whitaker provided similar testimony in relation to the Fortescue bridge project. Id. at p. 2. The County believes that the findings in the Initial Decision are accurate and well supported by the record, and there is a distinction between an energized line that is not an obstruction, and a de-energized line that is. Id.

The County asserted that ACE's objection to the estimated costs of removing the lines and poles is irrelevant to the actual determination of the ALJ's decision. The Initial Decision found that the

[3] ACE's Exceptions, filed on March 9, 2022, are referred to hereafter as "ACEe."

[4] Cumberland County's Response to Ace's Exceptions, filed on March 17, 2022, are referred to hereafter as "Countyr."

wires themselves were the obstruction to the work and not the power. Therefore, the County argued that there is no need to modify the findings as it is irrelevant to the conclusion of the ALJ that the cost of removing the wires should be borne by ACE. Id. at p. 2.

The County disagreed with ACE regarding the applicability of the Courthouse Case to the current matter. Id. at p. 3. According to the County, the work in the Courthouse Case was done at elevation within the ROW even if the County was not doing construction *per se* within the ROW. Id. It is the County's belief that the Courthouse Case was wrongly decided, but that the distinction identified by ALJ Caliguire, that the construction here was actually within the ROW and for the benefit of the public, makes the common law rule set forth in Port Authority all the more applicable. Id. at p. 3. According to the common law rule that was espoused by the Supreme Court in Port Authority, "the utility runs the risk that 'changes in the road' may call for relocation of its lines or equipment." Id. at p. 3-4. The Projects here involve bridges, not just roads, and the reconstruction of the bridges is part of the traveling roadway that benefits the public. ALJ Caliguire recognized this distinction and applied the common rule that ACE is responsible for work that is for the public benefit. Id. at p. 4.

The County argued that two (2) unreported cases, Old Bridge Municipal Utilities Authority v County of Middlesex and County of Burlington v. PSE&G ("Burlington Case") both had similar situations where the utility was required to vacate the work site at its own expense for a public ROW project for the benefit of the public.[5] The Burlington Case also involved the NJHVPA, which the utility argued abrogated the common law. There, as here, the judge determined that the NJHVPA did not modify the common law and therefore, the common law was intended to co-exist with the NJHVPA. Id. at p. 4-5.

The County also disagreed with ACE's argument that the costs for these projects should be borne by taxpayers instead of covered by ACE. The County claimed that ACE, arguing that the contractors are being subsidized, is trying to push off their obligation to the County. Id. at p. 6. According to the County, the contractors are paid by the public to do public work, and therefore, the utility's expense should not be shifted from the utility to the public as well. In addition, ACE has its own Tariff, which obligates ACE to bear the cost of relocation expenses where the Tariff is preempted by law. Id. at p. 6.

DISCUSSION AND FINDINGS

The Board agrees with ALJ Caliguire's determination that ACE's Tariff is preempted by the common law, and thus, the common law controls the outcome in this matter. See Initial Decision at p. 13-14 (citing ACE Tariff, Section 9.7 (2017) and Port Authority, 41 N.J. 90). Therefore, the Board also agrees with ALJ Caliguire's finding that ACE is responsible for the costs of de-energizing and relocating its utility facilities. Id. at p. 14-15. Additionally, for the reasons provided herein, ACE's exceptions do not justify modifying the Initial Decision. As such, the Board adopts the Initial Decision in its entirety.

The Common Law Applies to the Facts of This Case

ACE argued that ALJ Caliguire erred by failing to apply the NJHVPA to this matter because, similar to the Courthouse Case, this matter involves de-energization. ACEe at p. 3. ACE further

[5] Old Bridge Municipal Utilities Authority v County of Middlesex, A-581-97T3 (App Div. 1998); County of Burlington v. PSE&G, C-4712 (Ch. Div. Order dated April 30, 2013).

argued that, by applying the common law and not the NJHVPA, "ALJ [Caliguire] acted outside of her authority and did not apply the appropriate law." ACEe at p. 4. The Board disagrees in all respects.

ALJ Caliguire explained that ACE ignored the critical factual distinction between this matter and the Courthouse Case. Here, the Burlington and Fortescue projects were within the public ROW, but in the Courthouse Case, the improvements were **outside of the ROW**, and were unrelated to ROW improvements.[6] See Courthouse Case at p. 11 (emphasis added). Because of this critical factual distinction, the Courthouse Case applied the NJHVPA and not the common law provided in Port Authority and Pine Brook. Id. at p. 11-13. In sharp contrast, Burlington and Fortescue are in the public ROW, and as such, the Board agrees with ALJ Caliguire that the common law provided in Port Authority and Pine Brook governs, and not the NJHVPA. See Initial Decision at p. 14.

Additionally, even though the Courthouse Case involved the de-energization of lines, the Appellate Division's analysis was not reliant upon that lone fact. See Courthouse Case at p. 3 and 13. Instead, the Appellate Division focused on the location of the project and the location of the utility property relative to the public ROW. Because the courthouse façade project was outside of the public ROW, the Appellate Division determined that the common law governing public projects performed in the public ROW, being Port Authority and Pine Belt, did not apply. Id. at p. 10-11. Therefore, the Courthouse Case did not reach the question of whether the NJHPVA requires, contrary to Port Authority, the public to bear the cost of de-energizing lines when necessary to complete a public project within the ROW. The Courthouse Case also does not hold that Port Authority and Pine Belt do not apply where de-energization, rather than movement of wires or poles, is involved.

In contrast to the Courthouse Case, the common law set forth in Port Authority and Pine Belt applies here and dictates who must bear the cost of de-energization on public projects within the public ROW.

The Common Law Is Not Abrogated By the NJHVPA

Although ACE does not explicitly claim it in its exceptions, the only reason Port Authority would not control the outcome here is if the Legislature, by way of the NJHPVA, intended to abrogate the common law articulated in Port Authority and Pine Belt. The Board agrees that the NJHPVA was not intended to abrogate the common law relevant to the facts of this matter.

The idea that "the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities" is a common law principle that long predates the NJHPVA. 41 N.J. 96-97 [citing New Orleans Gaslight Co. v. Drainage Comm., 197 U.S. 453, 461 (1905); Jersey City v. City of Hudson, 13 N.J. Eq. 420 (Ch. 1861), Postal Tel. Cable Co. v. Delaware, L. & W.R.R., 89 N.J. Eq. 99 (Ch. 1918), aff'd o.b. 90 N.J. Eq. 273 (E. & A. 1919); see also Walker v. North Bergen, 84 N.J.L. 248 (1913), and New Jersey Bell Tel. Co. v. Delaware River Joint Comm'n, 125 N.J.L. 235 (1940)]. "The intention to change a long-established rule or principle is not to be imputed to the Legislature in the absence of a clear manifestation thereof." Elberon Bathing Co., v. Ambassador Ins. Co., 77 N.J. 1, 18 (1978); see also State of New Jersey v. Western Union Telegraph Co., 12 N.J. 468, 486 (1953)("Before a statute supersedes the

[6] The Courthouse Case is not binding precedent. However, it is worth discussing because it illustrates the critical factual distinction that dictates the outcome here.

common law, there must be some express or specific statement to that effect."). Nothing in the language of the NJHVPA suggests the Legislature intended to abrogate this common law, and the NJHVPA should not be construed otherwise.

By way of background, in1948, the NJHVPA was enacted "to provide the precautions to be taken in the proximity of high-voltage lines for the prevention of accidents…" See Legislative History of R.S. 34:6-47.1 *et seq.* (April 10, 1970). The NJHVPA is silent regarding public entities or the public ROW, and its text does not even use the term "utility." Instead, the NJHVPA requires an "employer, contractor or other person responsible" for a construction project to be responsible for "the cost and for the completion of the precautionary action required" by the NJHPVA to prevent an employee from coming "within 6 feet of a high-voltage line…" N.J.S.A. 34:6-47.2 and 47.5.

In 1963, the New Jersey Supreme Court in Port Authority expounded on the common law principle, which long preceded the NJHVPA, that "the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities." 41 N.J. 96-97 (internal citations omitted). Port Authority makes clear that bridges and tunnels are part "of the public street" or "the public way." Id. 96-97; 100. In addition, Port Authority described the broad obligation of a utility in relation to its equipment and public projects in the public ROW:

> [I]f government undertakes an activity in the street in the exercise of the police power, the utility must **figuratively move over at its own expense** to the end that the exercise of the police power will not be **impeded or burdened**. And this the utility must do because the law governing the basic arrangement obliges it to do so.
>
> [41 N.J. at 98 (emphasis added).]

In 1966, after Port Authority was decided, the NJHVPA was amended. If the Legislature had any desire to modify Port Authority or the common law in terms of the scope of a utility's obligation in relation to its equipment and public projects in the public ROW, it had a clear opportunity to do so. The Legislature added the words "and insulated power cables enclosed in approved metallic raceways" to the definition of "High-voltage lines." See Legislative History of R.S. 34:6-47.1 *et seq.* (April 10, 1970); see also N.J.S.A. 34:6-47.1(b). No amendment was made to the NJHPVA that addressed the common law at issue here. Given the foregoing sequence of events, we see no basis to construe the NJHVPA to abrogate the common law as articulated in Port Authority.[7]

The NJHPVA does not shift the cost of de-energizing away from the utility where it occurs in the public ROW on a public project that is also in the public ROW. The underlying common law principle is that the exercise of police power should not be "impeded or burdened" by a utility's subordinate right to the public ROW and this is avoided when the utility "figuratively move[s] over at its own expense." Port Authority, 41 N.J. at 98. To the extent de-energizing does not involve literal physical relocation of an object, the expense of de-energizing, if not borne by the utility, would still impede or burden the government's repair or improvement of the ROW. For this

[7] Pine Belt, 132 N.J. 564, illustrates the soundness of the foregoing analysis. The Pine Belt Court noted that "any decision to overturn the common law on costs-allocation in this area should be left to the Legislature" as "the Legislature had, on prior occasions, acted selectively in reassigning such costs [associated with utility-facility relocation] in derogation of the common law." Id. at 573 (citing see Port Authority, 41 N.J. at 107-08). The Pine Belt Court indicated that "[a] determination of the extent of the abrogation intended depends on an analysis of the statutory language and legislative history." Id. at 574.

reason, the Board disagrees with ACE's statement that the common law "does not address requests for de-energization made to electric utilities." See ACEe at p.4.

The Public Benefits From A Utility Bearing the Cost of Accommodating Public Projects

ACE also argued that forcing the utility to pay for de-energization costs, which ACE claims are safety measures that only benefit contractors, is a windfall for contractors performing public projects such as those at issue here. See ACEe at p. 4-7. The Board disagrees. Ultimately, if costs are borne by the utility rather than a public entity, whether transferred away from the public entity directly or through the reduced costs of contractors, it reduces costs to taxpayers. If the utility company bears the cost of de-energizing, as it does for pole relocation, the cost to the taxpayer would conceivably be less, albeit at the expense of ratepayers. Regardless, repair of a bridge is ultimately a public benefit, and merely because the County hires a contractor rather than performing the work directly, does not change this fact. Similarly, moving and de-energizing utility equipment facilitates completion of the public project. Even if the benefit is only for the safety of public employees or contractors hired by a public entity, the measure inures to the benefit of the public because it is necessary for the project to be completed. Aside from the public's general interest in not having people injured or killed in the course of completing public projects, avoiding such outcomes would also limit the potential liability of involved parties relating to damages relating to the same, and would avoid driving up the cost of labor for the contractors, which would ultimately be passed along to taxpayers.

ACE's Fact Exceptions

Lastly, the Board also declines to modify the Initial Decision based upon factual exceptions identified by ACE. ACE requested that the Board modify the Initial Decision to reflect that the only line that was removed on the Burlington Road Bridge was the distribution wire in the work zone and "that the decision be modified to properly reflect that the hazard at both job sites was electricity, not the power delivery equipment itself."[8] ACEe at p. 1-2. The Board disagrees with ACE's characterization of the Initial Decision and rejects the request for modification. ALJ Caliguire found that the "County notified ACE" about the need to temporarily remove power lines and poles "in the way of the planned construction…" See Initial Decision at p. 3-4 (emphasis added). The ALJ did not find, contrary to ACE's exceptions, that poles were in fact removed in relation to the Burlington Road project. ACEe at p. 1. Moreover, the Initial Decision acknowledges de-energizing was necessary to address the electricity hazard, and also correctly acknowledges that utility equipment, namely "the lower distribution lines", were also a physical obstruction. Initial Decision at p. 10. There is evidence in the record that supports the finding that on both the Burlington Road and Fortescue projects de-energizing the distribution lines was not the only issue. The distribution lines were also physical obstructions. 1T.203:16-204:12 and 1T.208:4 to 215:23. As such, the findings in the Initial Decision are supported by the evidence in the record.

[8] ACE also argued that the Initial Decision inadvertently connects the Fortescue cost letter with Burlington where the Initial Decision provides: "ACE submitted an invoice to the County for the estimated cost of relocating lines and poles" regarding Burlington. See Initial Decision at p. 4. Although it is not material to the outcome of this matter and does not undermine the analysis here or in the Initial Decision in any respect, we note that Exhibit R-5 shows that the scope of work estimated by ACE for Burlington was for de-energizing poles and removing overhead facilities, and not for pole removal. Regardless, ALJ Caliguire's characterization of the "letter" as an "invoice" is reasonable, and there is credible evidence in the record to determine that both de-energization and obstruction were issues relating to utility equipment on both Burlington and Fortescue. See Initial Decision at p. 10, finding 4, and See Exhibits R-5 and R-9; 1T.203:16-204:12 and 1T.208:4 to 215:23.

In conclusion, after careful consideration of the Initial Decision, the evidentiary record, the exceptions, and the replies thereto, the Board **HEREBY FINDS** that Burlington and Fortescue were public projects conducted for the benefit of the public within the public ROW. The Board **FURTHER FINDS** that Section 9.7 of ACE's Tariff is preempted by common law, and as such, ACE is responsible for the costs of de-energizing and relocating its utility facilities located within the public ROW.

Therefore, the Board **HEREBY ADOPTS** the Initial Decision in its entirety and without modification. The Board **HEREBY ORDERS** that, consistent with the terms of this Order, ACE bear the costs for Burlington and Fortescue at issue herein and in the Initial Decision.

The effective date of this Order is July 6, 2022.

DATED: June 29, 2022

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESID. ENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

CARMEN D. DIAZ
ACTING SECRETARY

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

County of Cumberland, Petitioner v. Atlantic City Electric Company, Respondent

BPU DOCKET NO. EC19030317
OAL DOCKET NO. PUC 12007-2019S

SERVICE LIST

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PUC 12007-19
AGENCY DKT. NO. EC19030317

COUNTY OF CUMBERLAND,

Petitioner,

v.

ATLANTIC CITY ELECTRIC COMPANY,

Respondent.

Theodore E. Baker, Assistant County Counsel**,** for petitioner (John G. Carr, County Counsel, attorney)

Renee E. Suglia, Assistant General Counsel, for respondent Atlantic City Electric Company (Anne Bancroft, General Counsel, Pepco Holdings LLC, attorney)

Terel Klein, Deputy Attorney General, for Staff of the Board of Public Utilities (Matthew J. Platkin, Acting Attorney General, State of New Jersey, attorney)

Record Closed: February 10, 2022 Decided: February 24, 2022

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner County of Cumberland, New Jersey (County), seeks a ruling from the New Jersey Board of Public Utilities (Board) that in four specific instances[1], the relocation of utility lines and poles within public rights-of-way was for the public benefit and therefore, should be undertaken by respondent Atlantic City Electric Company (ACE, Company) at the expense of the Company and/or its ratepayers.

PROCEDURAL HISTORY

On March 8, 2019, the County filed its petition with the Board. On August 20, 2019, the Board transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the Honorable Dorothy Incarvito-Garrabrant, ALJ, who held a prehearing conference and scheduled evidentiary hearings.

Evidentiary hearings were held in-person on January 15 and February 5, 2020, and were completed on November 10, 2020, via Zoom Audio Communications, Inc., a remote audio/video platform licensed by the OAL for use during the COVID-19 emergency. During the evidentiary hearing, respondent withdrew its objection to covering expenses related to the relocation of utility lines and poles at the Willow Grove Lake Dam.[2] Petitioner and respondent filed post-hearing briefs on January 29, 2021, and February 3, 2021, respectively. The record closed on February 3, 2021.

Prior to issuing an Initial Decision, Judge Incarvito-Garrabrant was named to the Superior Court. On November 1, 2021, the parties participated in a telephone conference with the Honorable Edward J. Delanoy, Deputy Director and Administrative Law Assignment Judge, during which they agreed that additional hearing dates would not be necessary, and this matter was reassigned to me. After review of the file, the transcripts

[1] The relief requested in the petition was modified as described in the Procedural History.
[2] See Post-Trial Br. of Respondent (February 3, 2021), at 2, fn. 2.

of the hearing, and the briefs, I re-opened the record to confirm certain matters with the parties, including the summary of undisputed facts. A telephone conference was held with the parties on December 13, 2021.

By letter dated January 19, 2022, counsel for petitioner notified me that the County Planning Board intended to reconsider a ruling regarding the required expansion of County Route 616, one of the projects involved in this matter. On February 2, 2022, the County Planning Board modified its approval of a certain business expansion project and, therefore, petitioner withdrew its demand that respondent relocate utility lines and poles along County Route 616, as had been required for the expansion project.[3] During a telephone conference with the parties on February 10, 2022, the parties confirmed that the ruling requested from the Board involves payment for only two remaining projects and the record closed.

FACTUAL DISCUSSION

The following **FACTS** are undisputed and therefore, I **FIND**:

ACE is a public electric utility, organized and existing under New Jersey law. ACE owns and maintains both high-voltage and reduced-voltage power lines and the utility poles that carry these lines (collectively, facilities) throughout the County. All ACE facilities at issue in this matter are located within public rights-of-way in the County pursuant to easements granted to ACE by the County and/or respective municipalities.

Burlington Road Bridge

On or about November 2018, the County proposed to repair the Burlington Road Bridge over Indian Run Stream on County Road 638/Burlington Road, Bridgeton. The County notified ACE that the construction project would require the temporary removal of high-voltage power lines and poles as the lines and poles would be in the way of the

[3] Accordingly, the discussions in both parties' briefs regarding the Yank Marine Project was disregarded.

planned construction; the proximity of the lines and poles to the construction cranes would constitute an obstruction and a safety hazard.

ACE submitted an invoice to the County for the estimated cost of relocating lines and poles. The County objected to this request on the grounds that the purpose of the reconstruction was to control flooding and improve the flow of water under and through County Route 638 along Indian Run Stream, making this a public project with public benefit and therefore, the expense was the responsibility of the public utility.

ACE disputed the County's position but agreed to remove the lines and poles so the reconstruction work could proceed. ACE does not dispute the actual cost of de-energizing these high-voltage lines, only whether it bears responsibility to assume this cost.

Fortescue Creek Bridge

The County proposed to reconstruct and repair the Fortescue Bridge over Fortescue Creek on County Route 637, Fortescue. The work was proposed in two phases, first the reconstruction of the eastern side of the bridge, followed by reconstruction of the western side of the bridge. Traffic on County Route 637 would continue to pass over the bridge in both directions throughout the construction period.

The County notified ACE that the reconstruction project would require the temporary relocation of power lines and poles as the proximity of such lines and poles to the construction cranes would constitute an obstruction and a safety hazard.

ACE submitted an invoice to the County for the estimated cost of relocating lines and poles. The County objected to this request on the grounds that the bridge was in need of repair and updates for public safety reasons, making the reconstruction a public project with public benefit and therefore, the expense was the responsibility of the public utility.

ACE disputed the County's position but agreed to remove the lines and poles so the construction work could proceed. After the County completed the work on the east side of the bridge, ACE moved the lines to the east side so that work could proceed on the west side of the bridge. ACE chose to leave the lines on the east side, where they are currently located.

The parties agree that a regulation of the Occupational Safety and Health Administration (OSHA), 29 C.F.R. Part 1926.416, and the New Jersey High Voltage Proximity Act (HVP Act), N.J.S.A. 34:6-47.1 et seq., preclude contractors from allowing their workers to perform work within specific distances of high-voltage power lines and that the power lines extending across both bridges involved here are high-voltage power lines. The dispute between the parties is over who is responsible for the cost of de-energizing and moving the power lines.

Positions of the Parties/Disputed Issues

Petitioner claims that the only issue for resolution regarding each project is whether the utility facilities located in the public right-of-way impede a public project planned for public benefit. Here, the power lines extend from poles located in the public rights-of-way along both the bridges which are being repaired by the County and, therefore, the costs of relocating those lines must be borne by the utility.

Respondent contends that in both instances, the de-energization of high-voltage power lines to prevent electrical contact between the workers and/or their equipment and the power lines is a safety issue. The HVP Act and a ruling of the New Jersey Appellate Division impose the legal and financial obligation to ensure the safety of employees on the employer, in these cases, the contractors hired by the County.

Testimony

Testimony was given by five witnesses in three hearing days over which Judge Incarvito-Garrabrant presided. As stated above, after this matter was reassigned to me, the parties expressed their mutual preference not to recall witnesses for additional hearings. Upon review of the transcripts, I note little dispute as to the matters covered by the various witnesses. The below summaries are limited to testimony presented by the three witnesses who were called to discuss the Burlington Road Bridge and Fortescue Bridge projects.

Douglas Whitaker (Whitaker), Assistant County Engineer and Traffic Safety Division Head, testified for the County. Whitaker has been employed by the County for fifteen years. He is responsible for County roads and construction projects and was involved with both projects at issue here.

Whitaker described the Burlington Road Bridge project as a culvert replacement, explaining that the existing brick and masonry culvert that carries County Road 638 over Indian Run Stream had deteriorated. Whitaker described the work required as follows:

> [T]he pipe culvert had failed and, obviously, the brick and masonry was in deteriorating conditions. . . . [The replacement] was a pre-cast concrete structure on concrete footings.
>
> [T]he construction needed the installation of a cofferdam[4] in order to excavate for the construction, dewater for the construction. With concrete footings, obviously, you can't have running water, it would just wash the footings away. . . . [T]here was a live utility work related to it, both underground and coordination with aboveground utilities.
>
> [The replacement] was successfully completed and then the road was reconstructed on top of the concrete culvert, and the guide rail was installed and the work was completed.

[4] A cofferdam is a watertight enclosure from which water is pumped so that construction can take place within the enclosure, below the waterline.

[Tr. (January 15, 2020) (T-1), at 195, 196.]

The ACE utility poles, carrying both distribution (or local) lines and transmission lines, were located on the west side of the bridge, and a Verizon pole carrying communication lines was on the east side of the bridge.[5] Whitaker stated that the distribution lines had to be de-energized and then removed because they would have been in the way of construction activity. The higher voltage, larger, transmission lines are located much higher on the poles and the construction work was able to proceed below them, once they were de-energized. The poles also remained in place as they were not in the construction zone. The right-of-way, in which the poles are located, was not changed, but "all the work was constructed within the right-of-way." T-1 at 206.

The Fortescue Bridge carries Fortescue Road/County Road 637 over Fortescue Creek. Whitaker explained that over time, the fenders protecting the bridge piles from being struck by passing boats had been damaged and some had washed away. The County proposed to install new jackets around the bridge piles without fenders. The pile installations were located directly under the utility lines on the east side of the bridge. Even when de-energized, the lines were still in the way of the construction.

Further, because Fortescue is an island with only one set of power lines providing power, if the lines had simply been de-energized, the island customers would have been without power. Instead, the lines had to be moved so that construction could proceed on one side, and then returned so the construction could be completed on the other side of the bridge. (It was also necessary to only work on one side of the bridge at a time so that traffic into and out of the island could continue over half the bridge during the construction period.)

Jeffrey Mercanti (Mercanti), Supervisor of Engineering, ACE, testified on behalf of his employer. Mercanti has held this position for thirteen years. His primary function

[5] Whitaker stated that Verizon moved its own lines out of the construction zone.

is to supervise field engineering technicians within the Glassboro, New Jersey district, which includes the geographic area in which the Burlington Road Bridge is located.

Mercanti met with officials from the County to discuss the proposed work on the Burlington Road Bridge and the County's request that ACE remove the power lines extending across the bridge. Because a crane would be used to rebuild part of the bridge, it was necessary to address the proximity of the power lines and poles. The poles are not located on the bridge, but in the public right-of-way on both sides of the bridge and the wires cross over the bridge. Cranes and derricks can be no closer to high-voltage lines than twenty feet[6], where general construction equipment, such as trucks, cannot reach as high and therefore, may not require de-energizing of the lines.

Mercanti stated that two options were considered. The first, and preferred, option was de-energize the line and backfeed the power to customers "downstream of the bridge" to ensure that they had power during the construction. Tr. (February 5, 2020) (T-2), at 116. This required an analysis of the ACE system to determine if there was adequate voltage in the system and a point downstream that could handle this additional load. The second option, and the one which was chosen for this project, was to de-energize the lines and move them to a location away from the construction. Mercanti explained:

> The primary request was to deenergize and then . . . once this option becomes available, I typically ask do you want the wires removed. Because if the wires are in contact and our facility's damaged, then there would be a damage case just as if a random pedestrian ran into our pole, they would have to pay to replace our facilities.[7]
>
> [T-2 at 141.]

[6] The applicable law, quoted below, limits the proximity of equipment to high-voltage lines to six feet, rather than twenty. This discrepancy was not noted by either party.

[7] Mercanti also stated that the County asked that the lower lines, the distribution lines, be removed "as it would be easier" than working around them. T-2 at 173. Mercanti had told County officials that if those lower lines were damaged by construction activity, the County (or its contractor) would have been liable.

Mercanti stated that the Burlington Road Bridge project did not require that the poles be moved, but three power lines were moved. T-2 at 128-29. There was no improvement or change in the area in which the poles are located as they are not on the bridge. T-2 at 143-44. Mercanti said that this work was charged to the contracting crew because it was being done for worker safety, as required by the HVP Act and OSHA standards. However, Mercanti further explained:

> If the facilities are physically in the way of whatever the brand-new improvement is, that wouldn't be chargeable [to the public entity]. So, an example, if you're going to make Burlington Road a four-lane road from a two-lane road, those poles would be sitting in one of those lanes. I would move those lines at no cost to the new right-of-way.
>
> [T-2 at 171.]

As a general rule, if facilities are temporarily relocated, as was done here, Mercanti considers that for "a work practice," to do the work safely according to regulatory standards.

Nicholas Cincotti (Cincotti), testified on behalf of ACE. Cincotti is currently employed as Supervisor of Overhead Distribution Standards, Pepco Holdings, the parent company of ACE. From 2017 through 2020, Cincotti was with ACE as a distribution engineer in Glassboro operations. In this position, he worked on the Fortescue Bridge project.

Cincotti stated that, based on his discussions with the contractor responsible for the Fortescue Bridge project, he understood that a crane was being used to reinforce the bridge and it was therefore necessary to move the ACE high-voltage power lines to accommodate the construction.

Customers on Fortescue Island have only one source of electricity, the lines crossing over the bridge. Before construction began, the lines were located on the west side of the bridge. Work began on the east side and, once that portion was complete, the

lines were moved to the east side of the bridge and construction was performed on the west side. In order to prevent power loss by the island customers, ACE built a new line on the east side and, once it was energized, removed the older lines.

Cincotti described ACE's goal on this project as:

> [To] move our high voltage lines to a safe distance, . . . to avoid any issues with the crane, and things of that nature, you know, related to construction. Basically to provide a safe work zone for the contractors.
>
> [Tr. (November 10, 2020) (T-3), at 24.]

Additional Findings

Based on the above testimony and the exhibits introduced at the hearing, I **FIND** the following additional **FACTS**:

1. Both the Burlington Road Bridge project and the Fortescue Bridge project involved the repair of bridges which are part of the County road system, to wit, both bridges carry County-numbered roads over bodies of water.

2. The rights-of-way in which the utility facilities are located, and were located at all relevant times, are alongside the bridges, not on the bridges. (R-4; R-7.)

3. In both cases, the relocation of the utility facilities was temporary as the construction did not impact the rights-of-way such that the poles had to be moved to a new location permanently.

4. In both cases, the utility facilities, and in particular the distribution lines, were too close to the planned construction activities for the construction to proceed. Even once de-energized, the lower distribution lines would have been in the way of the construction equipment.

LEGAL ANALYSIS

The Board approved ACE's Tariff for Electric Service, which provides in pertinent part:

> Whenever the Company shall be requested by a Federal, State, County or local governmental entity ("Governmental Entity") . . . to relocate currently existing overhead facilities . . . the total cost attributable to such relocation/redesign and installation shall be the responsibility of the requesting Governmental Entity . . . unless preempted by law; and the amount of the Company's estimated costs shall be deposited with the Company in advance. This section is intended to apply to all Company owned transmission, sub-transmission, primary, and/or secondary facilities.
>
> [ACE Tariff, Section 9.7 (2017) (emphasis added).]

As the tariff clearly imposes the obligation for the cost of relocating ACE's facilities on the requesting governmental entity (in this case, the County), the question is whether that obligation is preempted by statute or caselaw.

As the parties agree, the HVP Act imposes obligations on employers to protect their employees who may be engaged in work activities within six feet of high-voltage power lines as follows:

> No employer or supervising agent of an employer shall require or permit an employee to participate in the operation, erection, transportation, handling, or storage of any tools, machinery, equipment, supplies, materials, or apparatus or the moving of any building, if in the course of such operation, erection, transportation, handling, storage or moving it is possible for such tools, machinery, equipment, supplies, materials, apparatus or building, to come within 6 feet of a high-voltage line; or to participate in any activity which would cause the employee to come within 6 feet of a high-voltage line; unless precautionary action has been taken to protect against the danger from contact with such high-voltage line, either by de-energizing such high-voltage line and grounding it where necessary, or other effective methods or devices which have

> been approved in advance by the commissioner for the particular case and for the particular location.
>
> [N.J.S.A. 34:6-47.2.]
>
> Whenever any activity is to be performed requiring precautionary action under section 2 of this act, the employer, contractor or other person responsible for the activity shall, promptly notify the owner or person in charge of the high-voltage line of the intended activity and shall fully comply with and shall be responsible for the cost and for the completion of the precautionary action required under section 2 of this act before proceeding with such activity.
>
> [N.J.S.A. 34:6-47.5.]

For both projects, ACE was contacted in advance regarding the need to move the high-voltage lines due to their proximity to the planned construction activities. By the plain language of the HPV Act, respondent argues, the County or its contractors are responsible for taking precautionary action and for the cost of such precautionary action. Respondent further contends that its position is supported by the recent unreported decision (involving the within parties) of the Appellate Division in County of Cumberland v. Atl. City Elec. Co., et al., Docket No. A-4553-15T4 (App. Div. 2017) (Courthouse Case)[8]. In the Courthouse Case, the Appellate Division found that the utility was not responsible for relocating its facilities so that construction work on the County courthouse, a public building, could proceed. While the County argued there (as it does here) that the issues were whether the utility facilities are located in the public right-of-way and whether the construction is a public project with public benefits, the Appellate Division focused on the work itself, finding that "there was no work on the roadway that required relocation of the lines." Id. at *11. The reason the power lines had to be moved was "to protect the workers while they are working on the façade of the courthouse." Ibid. The protection of

[8] As an unreported decision, the Courthouse Case is not precedential nor binding and its application in other cases is limited. R. 1:36-3. At the same time, it was reasonable for respondent to rely on the holding in that case when it made the decisions being challenged here. See Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 560 (2015).

the workers was not a "collateral benefit" of moving the lines, as the County argued, but the reason that the lines had to be moved. Id. at *12.

On the strength of the Courthouse Case, respondent argues that once the proximity of the work zone to the high-voltage lines is established, the HVP Act requirements of taking precautions to protect workers obligates the party who must take those precautions to bear the cost. Br. of Respondent, at 26. Further, the New Jersey Supreme Court cases cited by petitioner (and discussed below) do not apply because those cases involved road-widening projects in which the utility poles were moved from their original locations to new locations permanently. Id. at 26-27. The construction projects on the Burlington Road and Fortescue Bridges are more like the construction involved in the Courthouse Case, where the power lines extending from the right-of-way were too close to the construction site but there was no work on the roadway that required relocation of the lines. Id. at 27.

What respondent fails to consider is that contrary to the courthouse building, the bridges are not public structures simply located near public streets but are part of the public street. As stated by the Supreme Court of New Jersey:

> Travel anciently was the principal and primary use of the public street. Bridges and tunnels are part and parcel of that subject and hence no more need be said to show the improvements as to them are within the public's paramount right in the streets.
>
> [Port of N.Y. Auth. v. Hackensack Water Co., 41 N.J. 90, 100 (1963).]

The New Jersey Supreme Court explained the utility's obligation to move its facilities to permit construction on the public streets:

> [The utility] is permitted to use the public way because it serves a public interest, but . . . the utility's interest in the public way is subordinate to the public's enjoyment of it. Hence the utility runs the risk that the public welfare may

> require changes in the road which will call for relocation of its facilities.
>
> [Id. at 96-97.]

In the Courthouse Case, the Appellate Division agreed with ACE that "the common law principle discussed in Port Authority of New York . . . is limited to road-widening projects," and that neither that case nor the New Jersey Supreme Court opinion in Pine Belt Chevrolet v. Jersey Central Power & Light Co., 132 N.J. 564 (1993), "suggest that a utility has the duty to move its power lines in order to facilitate work on any public building." Courthouse Case, at *10. Further, since "there was no work on the roadway that required relocation of the lines," and no exemption from the obligations of the HVP Act for work on public buildings, the employer, not the utility, was responsible for the costs. Id. at *11, *13; see also Pennsville Travel Ctr., Inc. v. Atl. City Elec. Co., 2015 N.J. Super. Unpub. LEXIS 928, at *14 (App. Div. April 23, 2015) (utility not responsible for pole relocation where project benefits a private entity and the utility facilities are located on a private easement).

By contrast, as is clear from the undisputed facts, respondent here was asked to de-energize its high-voltage power lines, and to move them, because they were too close to construction activity on public bridges that carry public roads over bodies of water. This is not the same as the Courthouse Case in which the rights-of-way from which the lines extend were located near the public building being improved. Here, the work on the public roadway required the de-energization and movement of the power lines. The rights-of-way here are on land next to the bridges, the bridges are part of the County road system, and the repair and improvement of the bridges was necessary for public safety.[9]

I **CONCLUDE** that the repair, maintenance, and/or improvements of the County road system at the Burlington Road Bridge and the Fortescue Bridge as described herein are public projects with public benefits. Accordingly, I **FURTHER CONCLUDE** that

[9] Neither party discussed this issue, but to conclude that the utility would only be responsible for the cost of moving its lines and poles for bridge repair or improvement if the poles were located on the bridges would incent a dangerous pre-condition.

respondent Atlantic City Electric Company is responsible for the costs of de-energizing and relocating its utility facilities located within the public rights-of-way as required for the repair, maintenance, and/or improvement of the County road system at the Burlington Road Bridge and the Fortescue Bridge.

ORDER

I **ORDER** that the application for relief of petitioner **COUNTY OF CUMBERLAND, NEW JERSEY** be **GRANTED**.

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.

February 24, 2022 — Tricia M. Caliguire

DATE — **TRICIA M. CALIGUIRE, ALJ**

Date Received at Agency: February 24, 2022

Date Mailed to Parties:

TMC:nmn

APPENDIX

WITNESSES

For Petitioner:

Douglas Whitaker

For Respondent:

Jeffrey Mercanti

Nicholas Cincotti

EXHIBITS

For Petitioner:

P-1 – P-6

Related to Withdrawn Claim

P-7 Connectiv Policy Regarding Facility Relocations, dated May 12, 1999

P-8 Related to Withdrawn Claim

For Respondent:

R-1 – R-3

Related to Withdrawn Claim

R-4 ACE Map of Burlington Road with Utility Facilities, dated December 27, 2018

R-5 Letter regarding cost to de-energize and remove overhead facilities, dated November 9, 2018

R-6 ACE Tariff Section 9.7, effective April 1, 2019

R-7 ACE Map of Fortescue Road with Utility Facilities, dated November 19, 2018

R-8 Email chain regarding Fortescue Bridge, dated August 29-30, 2018

R-9 Letter regarding cost to relocate wires and remove poles, dated November 29, 2018