Agenda Date: 7/19/13
Agenda Item: 9C

STATE OF NEW JERSEY
Board of Public Utilities
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IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES N.J.A.C. 14:3-8.1 ET SEQ.	)))	ORDER DOCKET NO. AX12070601

Parties of Record:

Kevin Coakley, Esq., on behalf of Toll Bros., Inc.
Frank J. Petrino, Esq., on behalf of New Jersey Builder's Association
E. Richard Kennedy, Esq., on behalf of Dunham's Farm Developers
Barry Spindler, Pro Se

BY THE BOARD:

The New Jersey Board of Public Utilities ("Board") will address issues arising from the Appellate Division decision In re Centex Homes, LLC Petition for Extension of Serv., 411 N.J. Super. 244 (App. Div. 2009) ("Centex Decision") and In the Matter of the Board's Main Extension Rules N.J.A.C. 14:3-8.1 et seq., 426 N.J. Super. 538 (App. Div. 2012) ("Main Extension Decision"). As a result of these decisions, the Board initiated a stakeholder process to amend its rules as well as provide notice and refunds pursuant to the Main Extension Decision. This order is limited to addressing a utility's ability to provide refunds of contributions which were required as non-refundable contributions in Areas Not Designated for Growth, pursuant to the Board's Main Extension Rules, N.J.A.C. 14:3-8.1 et seq. The Board's stakeholder process will continue and will result in a final rulemaking, which will amend the Main Extension Rules and address any remaining issues related to the return of contributions paid for extensions to serve Areas Not Designated for Growth.

PROCEDURAL HISTORY

The Board's jurisdiction over utility extensions can be found at N.J.S.A. 48:2-27, which provides that the Board:

> [M]ay ...require any public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction ... and when the financial condition of the public utility reasonably warrants the original expenditure.

On November 16, 2004, the Board adopted Main Extension Rules at N.J.A.C. 14:3-8.1 et seq. which became effective on March 20, 2005. The adoption of these rules was intended to replace various existing rules governing extensions of service with one consolidated, comprehensive set of new extension rules that support the State's smart growth policies pursuant to then Governor McGreevey's Executive Order No. 4 ("EO 4"), issued on January 31, 2002, and Executive Order No. 38 ("EO 38"), issued on October 25, 2002. The rules addressed whether and how a regulated entity may contribute financially to an extension made in response to an application of service.

Under the Board's prior Main Extension Rules, if an extension would produce sufficient revenues over a specific period of time to justify the construction of it, the utility provided the extension free of charge or after the payment of a refundable deposit. Under the March 2005 rules, extensions to serve Designated Growth Areas continued to be addressed using these same basic principles although the criteria for determining if sufficient revenues would be produced was modified. However, in Areas Not Designated for Growth, utilities were (with limited exceptions) now prohibited from contributing to the cost of a utility extension and therefore applicants were required to pay the full cost of the extension as a non-refundable contribution in aid of construction.

On December 30, 2009, the Appellate Division issued the Centex Decision, in which the Appellate Division agreed with Centex that the Board's interpretation of N.J.S.A. 48:2-27 is inconsistent with the function of that statute, as clarified in prior decisions, and is ultra vires. Significantly, the Court noted that where N.J.S.A. 48:2-27 confers a duty on the BPU to order that utilities pay for extensions, the Main Extension Rules prohibit voluntary payment where the project is within an Area Not Designated for Growth.

On March 24, 2010, the Board issued a Secretary's letter indicating that the Board will undertake a rulemaking process to amend its Main Extension Rules at N.J.A.C. 14:3-8.1 et seq. The letter further stated that until the Board amends its rules, utilities should process an application for an extension as if it were built to serve a Designated Growth Area under N.J.A.C. 14:3-8.1 et seq. The utilities were also advised that the Board will analyze all applications pursuant to N.J.S.A. 48:2-27 by applying the applicable suggested formulae at N.J.A.C. 14:3-8.9 through 8.11, if all other statutory criteria are met. N.J.A.C. 14:3-8.1 et seq. This is applicable to all applications and deposits received on or after December 30, 2009, including those deposits received under protest pursuant to the Board's January 20, 2010 Secretary's Letter.

On October 22, 2010, after reviewing comments from numerous interested parties, the Board issued an Order limiting the Centex decision to any person or entity whose case was still pending on direct review before the Board on December 30, 2009. The Board further applied Centex to those persons who were then in the process of requesting an extension under the Board's Main Extension Rules, N.J.A.C. 14:3-8.1 to 8.13, but who had not yet requested, paid for, or had a portion of their extension installed.

On June 22, 2012, in the Main Extension Decision, the Appellate Division reversed and remanded the Board's October 22, 2010 Order applying pipeline retroactivity, and ordered the Board to apply full retroactivity to the Centex Decision. The Court also indicated that its decision must be implemented through a rulemaking process pursuant to the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), and that in addition to time, place and manner requirements for refund requests, the Board may consider whether costs associated with the invalidated rules were passed on to home buyers by developers.

On October 4, 2012, the Board issued a Secretary's Letter directing all utilities to submit information regarding utility extensions built between March 1, 2005 through December 30, 2009. Certain utilities subsequently asked for an extension of time to respond, which was granted by the Board on December 19, 2012. The utilities subsequently submitted information in response to the October 2012 Secretary's letter.

On December 17, 2012, the Board issued a Notice of a Public Stakeholder meeting. On January 11, 2013, interested parties attended the stakeholder meeting where they expressed concerns about how refunds would be requested and supplied by utilities. Specifically, interested parties were concerned with how notice would be made to affected consumers, how expeditiously refunds would be issued, and whether the Board would require that refunds be given to the original applicant for the extension or the ultimate owner of the property served by the extension. Utilities further expressed concerns about indemnification against competing claims for refunds. On January 18, 2013, the Board requested written comments regarding prior draft rule amendments as well as questions relating to the process for distribution of refunds and notification of consumers of entitlements to refunds.

For purposes of this Order, the Board will only consider comments relating to refunds. The Board received comments from the following parties:[1]

1. Toll Brothers, Inc. ("Toll Brothers")
2. Division of Rate Counsel ("Rate Counsel")
3. Dunham's Farm Developers ("Dunham")
4. South Jersey Gas ("SJG")
5. Rockland Electric Company ("RECO")
6. New Jersey Natural Gas ("NJNG")
7. Atlantic City Electric ("ACE")
8. Public Service, Electric and Gas ("PSE&G")
9. Verizon ("Verizon")
10. Jersey Central Power & Light ("JCP&L")
11. New Jersey Builders Association ("NJBA")
12. New Jersey American Water ("NJAWC")

PUBLIC COMMENT

There was a general consensus among the commenters that refunds should go to the applicant that paid the original contribution for the extension, rather than subsequent owners of the property served by the extension. Additionally, the parties generally believed that some form of notice should be provided to effectuate refund requests.

Toll Brothers believes that the refunds should be provided to the applicant and that no pass through costs should be considered. They further believe that this would simplify the process by not involving third parties and would prevent the utility companies from being susceptible to liability. Toll Brothers notes that the declining housing market did not permit developers to pass on any extra costs, such as utility extensions to homebuyers. Toll Brothers further asserts that the applicant that paid the original contribution for the extension should submit a refund request to the developers and the utilities should contact depositors in writing who may qualify for a deposit. Toll Brothers does not believe that general notice should be mailed to utility customers as they are often not the developer who qualifies for the refund. Toll Brothers does believe that

[1] In addition to these commenters, Board Staff has heard from numerous parties since the Court's ruling requesting that the Board expeditiously effectuate refunds.

notice should be made by general newspaper advertisements. Toll Brothers asserts that applicants/developers should be required to seek refunds within six month of appropriate notice from the utilities.

Rate Counsel states that refunds should go to the applicant that paid the original contribution for the extension, not a subsequent home purchaser. Rate Counsel highlights that any attempt to calculate how costs of service extensions were included in the sale price of a home would be very resource intensive and would become more difficult if the homes were subsequently sold. Rate Counsel further asserted that each applicant that paid the original contribution for the extension should be required to apply for a refund after a utility provides individual or public notice. Rate Counsel asserts that the applicant that paid the original contribution for the extension should be required to seek refunds within six month of appropriate notice from the utilities. Rate Counsel further believes that the Board should require each applicant to agree to hold harmless and indemnify the utility against any competing claim for refund by a third party.

Dunham states that refunds should be paid to the applicant that paid the original contribution for the extension. Dunham further highlights that the challenging housing market during the relevant period would not permit a developer to pass on extension costs to home buyers. Dunham further agrees that an applicant that paid the original contribution for the extension should be required to request a refund from the utilities after direct notice is provided by utilities. Dunham does not believe that notice should be sent to purchasers of homes as it would likely cause confusion and they would not be eligible for refunds. Finally they feel a reasonable time period should be afforded to make application, to a utility, for refund.

SJG also believes that main extension refunds should go to the applicant that paid the original contribution for the extension, not a subsequent home purchaser. SJG states that applicants should be required to submit a request for refund, along with proof of payment. SJG indicates that notice provided via newspaper or website posting should be sufficient to alert applicants of their right to recover their deposits.

RECO believes that refunds should be provided to the applicant that paid the original contribution for the extension. RECO further states that the applicant that paid the original contribution for the extension should provide documentation of their entitlement to a refund. RECO further believes that notice should be provided in a manner consistent with other utility notices.

NJNG believes that refunds should only be provided to the applicant that paid the original contribution for the extension. It further states that public notice should be made through newspapers. They further believe that demonstration of payment is essential.

ACE believes that refunds should be paid to the original applicant that paid the original contribution for the extension. It further believes that notice should be provided via direct mailing to applicants it can identify as having made a deposit. Additionally, ACE believes that general newspaper advertisements or bill inserts would be confusing and not likely effective.

PSE&G indicated that it would facilitate refunds by contacting the job contact for the initial applicant that paid the original contribution for the extension, when the service extension was made. It would then review payment documentation.

Verizon believes that refunds should only be made to the applicant that paid the original contribution for the extension. It further states that it would prepare and send written correspondence to the contact who supplied payment of the service extension deposit,

informing them of the rule change and possible qualification for a refund. A refund qualification would be substantiated through payment documentation.

JCP&L believes the refunds should be paid to the applicant that paid the original contribution for the extension. It further believes that a person seeking a refund should be required to provide proof of identity and entitlement to the refund. JCP&L believes it would be appropriate to engage in a direct mailing of those persons it has identified as potentially being entitled to a refund. JCP&L is concerned with any notice that would create an invitation for false or speculative claims.

NJBA agrees with the comments submitted by Toll Brothers and Dunham Farms that refund should be provided to the applicant that paid the original contribution for the extension. It further believes that general advertisements should be made and that persons seeking a refund should be required to do so within 6 months of the last advertisement.

NJAWC states that utility main extension costs are only one of many cost inputs borne by developers. It further believes that when real estate is sold, it is constrained by the real estate market. Therefore, refund of deposits should be paid to the applicant that paid the original contribution for the extension without any mechanism to pass this money to subsequent home purchasers. While NJAWC supports the concept of a generic newspaper posting, it indicates that it has sufficient records to send a direct mailing to original applicants, and should be permitted to opt-out of the general notice requirement. NJAWC also believes that bill inserts are very unlikely to be effective as many applicants/developers are commercial builders.

On May 3, 2013, a follow up Stakeholders Meeting was held at the Board's offices seeking additional comments from the public to discuss procedural issues relating to the ongoing stakeholder process. The parties discussed that the Board should permit utilities to provide parties with refunds without additional delay. Additionally, several members of the public described how the failure to receive a refund has had a severe negative affect on them and their business.

DISCUSSION AND FINDINGS:

As stated above, on June 22, 2012, in the Main Extension Decision, the Appellate Division ordered the Board to apply full retroactivity to properties affected by the Centex Decision. The Appellate Division ordered the Board to propose and adopt rules consistent with the court's ruling addressing at a minimum topics involving: 1) the timing of submissions of refund requests, 2) the procedures for submitting a refund request, 3) the maximum number of years during which a utility can incrementally refund the cost of the service extension, and 4) the method of calculating the reimbursement rate.

Since the Appellate Division's ruling in Main Extension Decision, Board Staff has been working with interested parties to develop a rulemaking to address the myriad of issues in the Centex Decision as well as the provision of refunds.

The Board is mindful of the burdens on developers and individual home builders who have paid non-refundable contributions for extensions to serve Areas Not Designated for Growth pursuant to N.J.A.C. 14:3-8.1 et seq. Specifically, the Board is concerned that the ongoing rulemaking process is unnecessarily delaying utilities from providing refunds where the applicant for the extension and utility agree to the amount of the applicable refund. This is particularly true where the contribution was paid by an individual or small developer, where the financial burdens are often magnified. An additional inequity exists, in that the Board understands that certain utilities

have provided refunds on a case by case basis. The Board is also mindful of concerns that there may be competing claims for refunds.

Therefore, considering the information submitted through the rulemaking process, and the general consensus of the commenters that refunds should be provided to the original applicant for the extension, the Board believes it is appropriate to authorize the utilities to provide refunds where the utility and applicant for the extension agree to the appropriate refund amount.

The Board previously ordered that all extension applications since December 30, 2009 be treated under the current rules as if they were built to serve an Area Designated for Growth – and thus are not subject to the growth/non-growth distinction in the rules. See In the Matter of the Board's Main Extension Rules N.J.A.C. 14:3-8.1 ET SEQ., non-docketed matter, October, 22, 2010, pg. 5. Specifically, the Board ordered that all such extensions be treated as if the extension were built to serve an Area Designated for Growth under the Board's rules, pending a subsequent rulemaking. Ibid. The Board further ordered that a limited number of utility extensions prior to December 30, 2009 would be treated consistent with the Board's March 24, 2010 Secretary's letter as if they were built to serve an Area Designated for Growth under the Main Extension Rules. Id. at pg. 6. By and through this Order, the Board now addresses those utility extensions between March 20, 2005 and December 30, 2009, for which applicants were not permitted to seek a refund because the extension was built to serve an Area Not Designated for Growth.

Having reviewed the information from the stakeholder process and the Orders of the Appellate Division, the Board **HEREBY FINDS** that all contributions paid by applicants for utility extensions installed between March 20, 2005 and December 30, 2009, where the contribution, or a portion of the contribution, was not refunded because the extension was built to serve an Area Not Designated for Growth shall be re-evaluated consistent with the Board's March 24, 2010 Secretary's letter. Specifically the Board **HEREBY FINDS** that these contributions shall be refunded to the original applicant for the extension as if the extension were built to serve an Area Designated for Growth under the then existing Main Extension Rules. In order to minimize the delay of these refunds and the associated negative impact that delaying the refunds will have on the recipients of the refunds, the Board **HEREBY ORDERS** that the affected utility companies shall expeditiously issue these refunds and shall not wait for the outcome of the rulemaking proceeding, in cases that meet all of the following criteria:

1. The party requesting the refund has submitted to the utility company a written request for refund of the contribution.
2. The utility and the party requesting the refund agree upon the appropriate recipient of the refund, which shall be the person, or entity, that paid the original contribution, or the appropriate successor entity as documented in 3. below.
3. Where necessary, due to changes in control, ownership, assignment, or bankruptcy, the party requesting the refund has provided sufficient evidence, with supporting affidavits, of entitlement.
4. The utility and the party requesting the refund agree upon the appropriate amount of the refund which, consistent with the Board's March 24, 2010 Secretary's letter, shall be equal to the amount that would have been refunded had the extension been built to serve an Area Designated for Growth.
5. The party requesting the refund has agreed in writing to hold harmless and indemnify the utility, as to the amount of the refund, against any competing claim for the refund.
6. Where the utility does not have sufficient documentation reflecting proof of payment and if requested by the utility, the party requesting the refund shall submit proof of payment of the original contribution for the extension. For example, the party requesting the

refund may provide a copy of the cancelled check, a copy of a receipt from the utility, or a bank record.

If the parties cannot agree as to the amount of a refund, the Board will look to its refund formula for extensions to determine the amount that would have been refunded if the extension were built to serve an Area Designated for Growth set forth in N.J.A.C. 14:3-8.1 et seq.

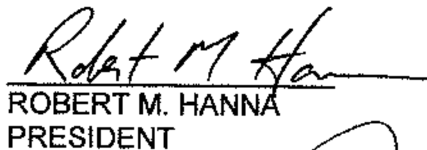
The Board **DIRECTS** the affected utilities to provide individual or public notice, depending upon the specific utility's ability to identify eligible persons, that persons or entities that paid contributions for extensions built to serve Areas Not Designated for Growth between March 20, 2005 and December 30, 2009 may be entitled to a refund of all, or a portion of the contribution. The affected utilities are **HEREBY ORDERED** to begin this notification process by no later than August 29, 2013. Based upon the success of this initial notification process, the rulemaking proceeding will address any final round of notice and appropriate deadlines for filing requests.

The Board's stakeholder process will continue and will result in a final rulemaking, which will amend the Main Extension Rules and address any remaining issues related to the return of contributions paid for extensions to serve Areas Not Designated for Growth.

This Order shall be effective on July 29, 2013.

DATED: 7/19/13

BOARD OF PUBLIC UTILITIES
BY:



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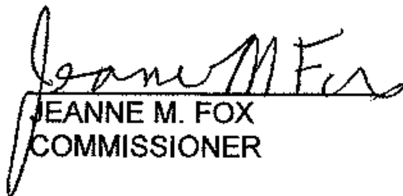
PRESIDENT



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DIANNE SOLOMON
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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

Docket No. AX12070601 – In the Matter of the Board's Main Extension Rules
N.J.A.C. 14:3-8.1 et seq.

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