Agenda Date: 6/24/21
Agenda Item: 5B

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF NEW JERSEY-AMERICAN WATER COMPANY, INC. FOR APPROVAL OF INCREASE TARIFF RATES AND CHARGES FOR WATER AND WASTEWATER SERVICE, CHANGE IN DEPRECIATION RATES AND OTHER TARIFF MODIFICATIONS	))))))	ORDER ADOPTING INITIAL DECISION BPU DOCKET NO. WR17090985 OAL DOCKET NOS. PUC 14251-2017S & PUC 16279-18

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Debbie Albrecht, Esq, Vice President and Division General Counsel, on behalf of New Jersey-American Water Company
Jay L. Kooper, Esq., Vice President, General Counsel and Secretary, on behalf of Middlesex Water Company
James H. Laskey, Esq., Norris McLaughlin & Marcus, P.A., on behalf of New Jersey Utility Shareholders Association

BY THE BOARD:

BACKGROUND AND PROCEDURAL HISTORY

On September 14, 2017, New Jersey-American Water Company ("Company," "NJAWC," or "Petitioner"), a public utility of the State of New Jersey subject to the jurisdiction of the New Jersey Board of Public Utilities ("Board"), filed a petition pursuant to N.J.S.A. 48:2-18, N.J.S.A. 48:2-21, N.J.S.A. 48:2-21.1, N.J.A.C. 14:1-5.7, and N.J.A.C. 14:1-5.12, seeking to increase rates for water and wastewater service. The combined proposed rates would increase the Company's annual revenues by $129.3 million or approximately 17.54% over pro-forma present rate revenues. The Petitioner serves approximately 631,000 water and fire service customers and approximately 41,000 sewer service customers.

On September 27, 2017, 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; N.J.S.A. 52:14F-1 to -13, where it was assigned to Administrative Law Judge ("ALJ") Jacob S. Gertsman. ALJ Gertsman issued a Prehearing Order establishing the procedures and hearing dates for this proceeding on December 18, 2017. ALJ Gertsman issued an Order Establishing Revised Prehearing Submission Deadlines on May 23, 2018. Motions to intervene were filed by the following parties (collectively, "intervenors") and were unopposed: Rutgers, the State University

("Rutgers"), Princeton University, Phillips 66 Company, Johanna Foods, Inc., and Cogen Technologies Linden Venture, L.P.- (collectively, "OIW"); Middlesex Water Company ("Middlesex"); Mount Laurel Township Municipal Utilities Authority ("Mount Laurel"); Aqua New Jersey, Inc. ("Aqua"); and City of Elizabeth. The motions to intervene filed by the OIW, with the exception of Rutgers, Middlesex, Aqua, and the City of Elizabeth, were granted by Orders dated December 18, 2017, which were subsequently amended on January 16, 2018. Rutgers and Mount Laurel were granted intervenor status by Orders dated January 16, 2018 and February 28, 2018, respectively. On May 31, 2018, AARP filed a motion to participate, which was unopposed. ALJ Gertsman granted AARP leave to participate on June 8, 2018. On July 2, 2018, the New Jersey Utility Shareholders Association ("NJUSA") filed a motion to participate. On August 1, 2018, ALJ Gertsman entered an Order granting NJUSA's motion to participate, which Order was amended on August 3, 2018 to correct a typographical error.

After proper notice to the general public in newspapers of general circulation and after service of notice upon affected municipalities and counties within NJAWC's service area, four public hearings were held. One public hearing was held on January 8, 2018 at 1 :00 p.m. in Westfield, New Jersey; two public hearings were held on January 10, 2018 at 1:00 p.m. in Ocean City, New Jersey and at 6:00 p.m. in Howell Township, New Jersey; and one public hearing was held on January 16, 2018 at 6:00 p.m. in Haddonfield, New Jersey. A representative of NJUSA attended the hearing in Haddonfield. Members of the public also attended and spoke at the Howell Township hearing in general opposition to the proposed rate increase. No members of the public attended the Westfield or Ocean City hearings. In addition, the Board received over 100 written comments in opposition to the petition.

On February 8, 2018, NJAWC filed supplemental direct testimony related to the Tax Cuts and Jobs Act of 2017. On April 13, 2018, the New Jersey Division of Rate Counsel ("Rate Counsel") and certain intervenors filed direct testimony and on May 11, 2018, NJAWC filed rebuttal testimony. Evidentiary hearings took place on June 11, 13, 14, and 18, 2018. The Board issued Orders suspending the proposed rate increase on October 20, 2017 and on January 31, 2018. Prior to the expiration of the second suspension period, NJAWC provided notice that it would implement interim rates. On May 18, 2018, Rate Counsel filed a motion requesting the Board issue an Order rejecting the Company's proposed provisional Rates. The motion was opposed by the Company. The Board issued an Order denying Rate Counsel's request on June 22, 2018. The Company implemented interim rates that included a $75 million increase, effective June 15, 2018, in accordance with N.J.A.C. 14;1-5.12(f). This resulted in a 12.323% increase applied equally to all rate classes using the existing rate design for the utility approved by the Board; pursuant to N.J.A.C. 14:1-5.12(e)(2).

After discovery and comprehensive settlement discussions, on October 16, 2018, the Company, Board Staff, Rate Counsel, and OIW (collectively, "Parties") reached a stipulation of settlement regarding the revenue requirement and rate and tariff design issues ("Partial Stipulation"). Among other things, the Partial Stipulation agreed that NJAW's revenues from base rates should be increased by $40.0 million, and provisional rates that were effective June 15, 2018 will decrease by $35.0 million effective for service rendered on and after October 29, 2018, or on such other date as the Board deems appropriate. The revenue requirement was set forth on Schedule A to the Partial Stipulation.

Aqua, Middlesex, Mount Laurel and the City of Elizabeth indicated that they did not object to the Partial Stipulation by correspondence dated October 16, 2018.

The Parties were unable to reach an agreement with regard to certain plant acquisition adjustment issues as further described below and agreed to brief the issues before ALJ Gertsman.

ALJ Gertsman issued his Order to Bifurcate Partial Initial Decision Settlement ("Partial Initial Decision") on October 18, 2018 recommending adoption of the Partial Stipulation executed by the Parties, finding that the Parties had voluntarily agreed to the Partial Stipulation that the Partial Stipulation fully disposes of all issues, except for certain plant acquisition adjustment issues.

The Board adopted ALJ Gertsman's Partial Initial Decision by Order dated October 29, 2018, and remanded the acquisition adjustment issues to the OAL. The remanded matter was filed with the OAL on November 13, 2018.

PLANT ACQUISTION ADJUSTMENT ISSUES

Prior to the filing of this matter, NJAWC acquired Shorelands Water Company ("Shorelands")[1] and acquired the water and wastewater assets of the Borough of Haddonfield[2] ("Haddonfield"). The price for Shorelands exceeded the original cost less depreciation of Shorelands. NJAWC also paid a premium over original cost less depreciation for the Haddonfield system assets. As a result, NJAWC proposed full rate base recognition of the Shorelands purchase price in this case, including an acquisition adjustment and full rate base recognition of the Haddonfield system assets, including rate base recognition of an acquisition adjustment. NJAWC proposed to amortize both acquisition adjustments over a period of 40 years. The Partial Stipulation did not resolve the issue of whether NJAWC is permitted to recognize the proposed acquisition adjustments for Shorelands and Haddonfield ("Acquisition Adjustments")[3]. The Partial Stipulation also agreed that the Parties would continue to litigate the proposed Acquisition Adjustments before Judge Gertsman.

As noted above, the remanded matter was filed with the OAL on November 13, 2018. ALJ Gertsman conducted a pre-hearing telephone conference on November 29, 2018. Since the remanded matter was a new matter before the OAL, the previous orders granting both intervenor and participant status were no longer in effect. Middlesex was included as an intervenor in this matter on remand from the Board and NJUSA filed a motion to participate on May 6, 2019. ALJ Gertsman granted NJUSA's motion by Order dated May 16, 2019.

During the pre-hearing conference call, the Parties agreed that the record from the previous matter related to the Acquisition Adjustments was sufficient for the current matter to proceed. Initial Briefs were filed by NJAWC, Rate Counsel, Board Staff, Middlesex and NJUSA on January 18, 2019. NJAW, Rate Counsel and Middlesex filed reply briefs on February 25, 2019. Staff and the NJUSA relied on their prior submissions.

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[1] I/M/O the Joint Petition of American Water Works Company, Inc.; New Jersey-American Water Company, Inc.; and Shorelands Water Company, Inc. for: (1) American Water Works Company, Inc. to Acquire Control of Shorelands Water Company, Inc.; (2) for Shorelands Water Company, Inc. to Transfer Upon its Books all of its Capital Stock to American Water Works Company, Inc.; (3) Shortly Thereafter, for Shorelands Water Company, Inc. to be Merged into New Jersey-American Water Company, Inc.; and (4) for such other Approvals as may be Necessary to Complete the Proposed Transaction, Docket No. WM16101036 (March 24, 2017).

[2] I/M/O Matter of the Petition of New Jersey-American Water Company, Inc. for Approval of a Municipal Consent Granted by the Borough of Haddonfield, County of Camden, Docket No. WE15010073 (May 19, 2015).

[3] The Company's original filing included a proposed acquisition adjustment related its acquisition of Roxiticus Water Company (I/M/O the Joint Petition of New Jersey-American Water Company, Inc., and Roxiticus Water Company, Inc. for, Among Other Things, Approval of a Change in Control of Roxiticus Water Company, Inc., Docket No. WM15080982 (February 24, 2016). The Company withdrew the proposed Roxiticus acquisition adjustment during the original phase of this proceeding.

On May 6, 2019, NJAWC filed a motion to reopen the record to admit the supplemental testimony and schedule of John S. Tomac to correct an error in Schedule DMD-RT-4. On May 31, 2019, Rate Counsel filed a reply to NJAW's motion, including supplemental testimony and exhibits of Howard Woods. On June 17, 2019, NJAW filed a letter response to Rate Counsel's reply, including surrebuttal testimony of John S. Tomac.

By letter dated July 15, 2019, ALJ Gertsman advised the parties that since this was new matter at the OAL, any testimony or exhibits related to the acquisition adjustments that was previously entered into the record during the prior phase of the proceeding must be entered into the record for the remanded matter.

ALJ Gertsman converted the oral argument that had been scheduled for November 21, 2019, into an evidentiary hearing where the joint exhibits were entered into the record. During the evidentiary hearing, the Parties were given the opportunity to present their arguments and underwent questioning by ALJ Gertsman. Post-hearing briefs were submitted on January 8, 2020, by NJAWC and Rate Counsel. Staff, Middlesex and NJUSA relied on their prior submissions. ALJ Gertsman closed the record on January 21, 2020. Orders of extension were entered in this matter to allow time in which to file the initial decision due to ALJ Gertsman's voluminous caseload. Further, due to the COVID-19 pandemic and the public health emergency declared in Executive Orders issued by Governor Murphy, the time to complete administrative decisions was extended.

The record remained open in order for NJAWC and Rate Counsel to submit proof of service that the post-hearing briefs were served on all parties. The record closed on January 16, 2020 after the parties submitted proof that their post-hearing briefs had been served on all parties. The record was reopened on January 17, 2020, when it was determined that the index of the joint stipulated record did not correspond to the order of the exhibits in the exhibit binder. The revised index was filed on January 21, 2020 and the record was closed.

THE INITIAL DECISION[4]

On March 2, 2021, ALJ Gertsman issued his Initial Decision regarding the plant acquisition adjustment issues. In the Initial Decision, ALJ Gertsman found that the Board had issued a number of Orders addressing plant acquisition adjustments. ALJ Gertsman stated that the Board, in I/M/O Elizabethtown Water Co., 11 N.J.A.R. 303, 1984 WL 981081 (Bd. of Pub. Utils. 1984), rev'd on other grounds, 205 N.J. Super. 528 (App. Div. 1985), aff'd as modified, 107 N.J. 440 ("Elizabethtown") denied Elizabethtown Water Company's request for acquisition adjustments related to the acquisition of two water systems, Peapack and Gladstone, but recognized an acquisition for another system. He noted that the Board explained that it will continue to recognize the appropriateness of acquisition adjustments where a specific benefit can be shown, such as the acquiring of needed facilities, which benefit the entire system. Initial Decision at 34 (quoting Elizabethtown at 2).

ALJ Gertsman noted that the Board affirmed its acquisition adjustment policy the following year in I/M/O the Petition of South Jersey Gas Co. for Approval of Increased Base Tariff Rates & Charges, BPU 843-184, 1985 WL 1205840 (Dec. 30, 1985) ("South Jersey Gas"). ALJ Gertsman went on to state that the Board noted that its policy was "clearly set forth" in the Elizabethtown

[4] Although summarized in this Order, the detailed findings and conclusions of ALJ Gertsman's Initial Decision control, subject to the findings and conclusions of this Order.

matter and that the Board stated "[t]here the Board indicated it would recognize an acquisition adjustment only where it was proven that a specific and tangible benefit inured to ratepayers from the acquisition." Initial Decision at 34 (quoting South Jersey Gas at 4). ALJ Gerstman went on to note that the Board additionally found that the ALJ was correct in "rejecting the Company's position that the Board should look to both utilities and their ratepayers in determining if any benefits were created by the transaction" and that the Company "failed to carry its burden of proof as to whether any specific and tangible benefits resulted from its acquisition of New Jersey Natural." Ibid.

Based on these precedents, ALJ Gertsman concluded that NJAW failed to meet its burden to demonstrate that both the Shorelands and the Haddonfield acquisitions provided tangible benefits to ratepayers. He further concluded that the plant acquisition adjustments sought by NJAW for both the Shorelands and Haddonfield acquisitions failed to meet the requirements set forth by the Board in its Elizabethtown. and South Jersey Gas Orders. He thus recommended that the Board reject the proposed plant acquisition adjustments. Initial Decision at 39-40.

EXCEPTIONS TO THE INITIAL DECISION

On March 15, 2021, the Company filed its exceptions to the Initial Decision ("Exceptions"). Specifically, the Company took exception to the following findings in the Initial Decision: (1) the Company failed to demonstrate that the capital projects specified in the petition will not proceed; (2) Mr. Woods "presented reasonable conditions where any or all the projects may proceed, which NJAWC has failed to sufficiently address;" and (3) the testimony of NJAWC witnesses Shields, Tomac and Keane was not persuasive because they failed to "commit" to the avoided capital projects. Additionally, the Company took exception to the following conclusions of law in the Initial Decision: (1) NJAWC failed to meet its burden to demonstrate that the Shorelands acquisition will provide tangible benefits to ratepayers; (2) the Company failed to meet its burden that the Haddonfield acquisition provides tangible benefits to existing customers; and (3) the acquisition adjustments failed to meet the requirements set forth by the Board in Elizabethtown and South Jersey Gas.

The Company argued that a careful analysis of the record demonstrates that the only finding supported by the evidence is that the Company demonstrated specific benefits to its customers as a result of the acquisitions. The Initial Decision's findings, the Company argues, are supported solely by unsupported allegations—the speculation and conjecture of Mr. Woods with respect to three out of 10 projects — and not by substantial credible evidence. Further, the Company stated that the Initial Decision's heightened burden of proof requiring the Company to promise that it would avoid the capital projects, under any circumstances, even if unforeseen events at some indeterminate future time warranted a similar project, is an impossible burden to meet and runs afoul of Board precedent and policy.

Nowhere in I/M/O the Petition of New Jersey-American Water Co. for an Increase in Rates for Water and Sewer Service and Other Tariff Modifications, BPU WR98010015, 1999 WL 615854 (March 31, 1999) (overruled on other grounds) ("Howell") or Elizabethtown did the Board require that the acquiring utility guarantee that any alleged avoided capital projects be avoided essentially forever according to the Company. The Initial Decision's new standard would stifle acquisitions in the State in favor of otherwise avoidable capital investments. Additionally, neither Howell nor Elizabethtown suggested that the BPU or the OAL should deviate from the burden shifting process or the substantial evidence standard. Substantial evidence "does not rise from bare surmise,

conjecture, speculation or rumor." Accordingly, the Company respectfully requested that the Board reject the Initial Decision and approve rate base recognition of the acquisition adjustments.

The Company next argued that the Initial Decision's findings with respect to Shorelands are contrary to the substantial record evidence and that it presented through testimony and evidence, and rather, the Shorelands acquisition results in the cancellation of $29,000,000 in previously planned capital investments:

Additionally, the Company claimed that the Initial Decision's Finding that NJAWC failed to prove its case is based solely on a new evidentiary standard and rewriting the Elizabethtown and Howell precedents and the acquisition of Haddonfield provided tangible benefits to customers and, therefore, the acquisition adjustment should be allowed in its entirety. Finally, the Company indicated that it requires the Board's guidance on how to respond to the commitment requirement contained in the Initial Decision.

REPLY EXCEPTIONS

On March 22, 2021, Rate Counsel filed its exceptions to the Initial Decision ("Reply Exceptions"). Rate Counsel asserted that NJAW did not meet its burden of proving that existing ratepayers will receive net benefits from NJAWC's acquisitions of Shorelands Water Company and Haddonfield's water and sewer systems. Moreover, Rate Counsel claimed that nothing presented by NJAWC in the Exceptions changes the material relevant facts, many of which are agreed to by all the parties. Nor has the governing of law changed.

Rate Counsel pointed out that a utility can only recover an acquisition adjustment in rates in two limited circumstances: when the acquired system is a troubled system or when existing customers of the acquiring system will benefit. The record evidence demonstrated that neither of these circumstances applied to the acquisitions of the Shorelands and Haddonfield systems. The ALJ's decision is fully supported by the record and well-established law and the Board should adopt the Initial Decision in full.

Rate Counsel indicates that the Board's policy regarding acquisition adjustments was set forth in Elizabethtown. In that case, Rate Counsel stated that the Board found that an acquisition adjustment is appropriate only when a utility can demonstrate specific benefits to existing customers, finding that "[w]e will continue to recognize the appropriateness of acquisition adjustments where a specific benefit can be shown, such as the acquiring of needed facilities which benefit the entire system." Reply Exceptions at 3 (quoting Elizabethtown) at 1. In denying the acquisition of the Peapack and Gladstone Water System in that case, the Board accepted the analysis of the ALJ, whose Initial Decision found that "existing customers received no benefit from the Peapack-Gladstone acquisition…petitioner offered no evidence as to why existing ratepayers should bear the cost associated with a purchase that may be in the public interest, but does not particularly aid existing customers of the system." Ibid. The Board also noted an additional circumstance where acquisition adjustments may be appropriate, which was a utility's acquisition of a troubled small water company. The Board made it clear that its policy was limited to distressed systems that are "hard-pressed to provide safe, adequate and proper service" consistent with "the intent of the Small Water Company Takeover Act, N.J.S.A. 58:11-59 et seq." Id. at 3 (quoting Elizabethtown at 1-2).

Rate Counsel added that the Board affirmed its policy on acquisition adjustments in South Jersey Gas In that matter, the Board made it clear that benefits must inure to ratepayers of the existing

system, noting that "[i]n his Initial Decision, Judge Sullivan properly recognized the Board's policy in this area and correctly rejected the Company's position that the Board should look to both utilities and their ratepayers in determining if any benefits were created by the transaction." Id. at 4, citing South Jersey Gas at 4. In denying the requested acquisition adjustment, the Board found that "the Company bears the burden of proof with regard to any benefits from its acquisition" and "the Company failed to carry its burden of proof as to whether any specific and tangible benefits resulted from its acquisition from New Jersey Natural." Ibid.

Similarly, in the present matter, Rate Counsel argued that the ALJ properly recognized the governing law on acquisition adjustments as set forth in Elizabethtown and South Jersey Gas and correctly found that the Company failed to meet its evidentiary burden. Thus, Rate Counsel claimed that, contrary to NJAWC's assertions, the ALJ did not create a new standard for evaluating whether acquisition adjustments should be reflected in rates. Indeed, good public policy dictates that acquisition adjustments be limited to the narrow circumstances outlined in the Board's policy. Allowing the Company to receive acquisition adjustments above the system's current book value in this matter would send a problematic signal to both sellers and purchasers regarding future acquisitions. Acquisition adjustments are an exception to the rule that utilities can only recover a rate of return on the book value of their assets. Without any tie to the book value of the system, water utilities could purchase systems at any inflated price, knowing that they will recover any excess costs from ratepayers. Rate Counsel claimed that this will almost certainly raise the future purchase price of acquisitions, as the seller will know there is little to no ceiling on cost and the purchaser can increase their earnings by overpaying for a system. Rate Counsel further added that it will significantly impinge the bargaining power of a frugal purchaser, as the seller will know the purchaser can simply pass excessive costs on to ratepayers. For this reason, Rate Counsel reiterated that acquisition adjustments must only be granted in very limited circumstances, which have been explicitly stated in the Board's acquisition adjustment policy.

Furthermore, Rate Counsel argues that there is no dispute that neither Haddonfield or Shorelands was a troubled utility when acquired. According to Rate Counsel, the Company has never asserted that Shorelands was a troubled utility when acquired, and during oral argument the Company clarified its position regarding the issue of whether Haddonfield was a troubled utility at the time of its acquisition. Specifically, the Company conceded that Haddonfield was not troubled at the time of its acquisition, and the Company is not seeking rate recognition of the proposed acquisition adjustment on these grounds ("New Jersey American is not claiming that the acquisition adjustment should be recognized because the entities were either small or troubled.") citing to 33T:L11- 14 (Nov. 11, 2019).

Additionally, Rate Counsel stated that the ALJ properly found that NJAWC failed to prove by a preponderance of the evidence that its acquisition of the Shorelands System provided net benefits to existing NJAWC customers. Specifically, in his Initial Decision, Rate Counsel points out that the ALJ denied the proposed acquisition adjustment of approximately $26.7 million for NJAWC's acquisition of the Shorelands system. The only factual issue before the ALJ was whether NJAWC proved by a preponderance of the evidence that certain capital projects would be avoided or deferred to a later date, and thus represent a positive benefit to ratepayers. Rate Counsel noted that the ALJ found that NJAWC failed to meet its burden. The ALJ stated that "I am persuaded by Woods' testimony regarding the [sic] Shoreland's Acquisition and thus FIND that the [sic] Company's has failed to demonstrate that the capital projects specified in the petition are not proceeding, " Reply Exceptions at 6 (quoting Initial Decision at 28). The ALJ also found "that Woods has presented reasonable conditions where any or all [of] the projects may proceed, which NJAWC has failed to address." Id. at 7 (quoting Initial Decision at 30).

Indeed, asserted Rate Counsel, the Company's net benefits analysis is speculative and cannot meet the Company's burden of proof. For example, Rate Counsel stated that the Company claims that due to its acquisition of Shorelands, it can avoid the cost of rebuilding the Englishtown Wells and delay the construction of the ASR Wells for five years. These wells are designed to help alleviate capacity issues in the Coastal North System. Rate Counsel argued that the flaw in this claim is that the Company admitted in its testimony that it has capacity issues in its Coastal North System that encompasses Shorelands, citing to Shields Testimony at 14. Rate Counsel also referred to the testimony of Company witness Donald Shields who testified that "[t]he Coastal North System has a reliable maximum day supply deficit." Id. This means that the Company struggles to meet water demand in this area on its maximum demand days according to Rate Counsel. Furthermore, as Mr. Woods testified, the Coastal North System is and will continue to be a high growth area. Given these facts, Rate Counsel argued that the Company could not guarantee that ratepayers would in fact receive this benefit. Rate Counsel asserted that all of these factors add up to speculation rather than evidence supporting the Company's claims that it can avoid and/or defer well construction, and speculation does not satisfy the Company's burden of proof.

Rate Counsel also cited to Mr. Woods testimony where he testified that the Company's net benefits analysis contains certain assumptions that may not be realistic, and absent such assumptions, the Shorelands acquisition ends up as a net liability to existing ratepayers. One example of a flawed assumption in the Company's analysis cited by Rate Counsel relates to its Navy Tank. RC-1 at 32-35. The Navy Tank is a 1.2-million-gallon standpipe with operating range between 240 feet and 278 feet. Id. at 32. Replacement of the Navy Tank is one of the avoided projects under the Company's analysis, with an avoided cost of $3,700,000, citing to Schedule FXS-1. The Company's analysis assumes that the Navy tank will remain in service for the next 40 years, without needing replacement during that time. Woods Testimony at 33.

Yet, added Rate Counsel, Mr. Woods' testimony illustrates the sensitivity of the analysis offered by the Company simply by examining its assumption about the Navy Tank. As Mr. Woods demonstrated, if the Navy Tank needs to be replaced in 2023 – the end of its 72-year depreciation life – then the Shorelands acquisition transforms from an acquisition with a $6.6 million net benefit to ratepayers under the Company's analysis, to a $197,000 net cost to ratepayers. RC-1 at 35. Simply with one reasonable change to the Company's analysis, Mr. Woods demonstrated that the Company's claim of net benefits from the Shorelands acquisition does not stand scrutiny. The Company's analysis is based upon hopeful and highly speculative assumptions. If any of those assumptions prove inaccurate, the result of the cost benefit analysis changes dramatically. Rate Counsel indicated that, as the ALJ correctly concluded, an analysis built on such speculative assumptions cannot sustain the Company's burden of proof.

Furthermore, Rate Counsel claimed that, as Mr. Woods testified, unless the Company's overall capital spending is somehow capped, there is no guarantee that ratepayers will actually experience lower rates, even if the capital projects contained in the analysis remain avoided. Woods Testimony at 37. Rate Counsel stated that the Company has never claimed that its capital spending will be reduced as a result of acquiring Shorelands. Rather, the Company has aggressively invested in new plant in its service territory, in the amount of $868 million since its last rate case only three years prior. Id. As Mr. Woods testified, absent a cap it is likely that any avoided costs will simply shift dollars elsewhere, with ratepayers being asked to pay for both the acquisition premium and the new investment. Id. Without seeing any relief in rates, customers will hardly experience a benefit from these alleged avoided projects.

Rate Counsel additionally argued that the alleged benefits of the acquisition claimed by NJAWC lack merit. First, Rate Counsel argued there is no aspect of the ALJ's Initial Decision that adopts a new "standard." The ALJ properly applied long-established case law to the facts that were part of the record before him. Indeed, most of the facts before the ALJ were entered into the record by NJAWC itself. NJAWC submitted the net benefit analysis in support of its case. NJAWC was the party claiming that these costs would be avoided as a result of acquiring Shorelands. Yet NJAWC did not want to commit to actually avoiding the costs. The ALJ used this fact, along with Mr. Woods's testimony, to find that NJAWC did not meet its burden of proving there will be net benefits to existing ratepayers. The ALJ did not adopt a new "standard" here; Rate Counsel alleged that NJAWC does not like how the ALJ weighed the evidence it presented. Disagreement with an ALJ's determination is not a basis for overturning that determination. Accordingly, and for all of the reasons noted above, Rate Counsel urged the Board to uphold the ALJ's denial of an acquisition adjustment for Shorelands.

Likewise, Rate Counsel indicated that the ALJ Properly found that NJAWC failed to prove by a preponderance of the evidence that its acquisition of the Haddonfield system provided net benefits to existing NJAWC customers, based upon the case law set forth in Elizabethtown and South Jersey Gas . Using this well-established body of law, the ALJ properly found that NJAWC failed to meet its burden of proving by a preponderance of the evidence that net benefits will inure to existing NJAWC ratepayers as a result of the acquisition. Reply Exceptions at 10. Specifically, the ALJ found that "Woods [sic] testimony was particularly compelling when he testified that he was 'not aware of any short-term synergies that would benefit existing New Jersey American ratepayers. By contrast, there are significant benefits to Haddonfield ratepayers in the short run.'" Ibid. at (quoting Initial Decision at 30). The ALJ also noted that "NJAWC has cited various benefits that solely benefit former Haddonfield customers while it remains unable to quantify the impact of the acquisition on its ability to address the perfluorinated compounds ("PFCs"), which would conceivably benefit its existing customers." Ibid. (quoting Initial Decision at 39).

Rate Counsel stated that the Company asserts to the Haddonfield water allocation permit as one benefit to existing ratepayers from the Haddonfield system acquisition, and through the testimony of Mr. Shields, the Company claims that this allocation will be useful in addressing water quality requirements associated with PFCs. Shields Testimony at 18. However, Rate Counsel claims that Mr. Woods successfully rebutted Mr. Shields' testimony in that he testified, "three years after the acquisition of the Haddonfield system, [the Company] still cannot quantify the impact of these groundwater quality issues or the impact that the Haddonfield acquisition may or may not have on the solution to these problems." Woods Surrebuttal Testimony at 3. When asked in discovery to quantify the impact of the Haddonfield acquisition on the Company's ability to address the new PFC standards, the Company could not answer, instead stating that it "is still evaluating the overall impact of the new PFC standards on the company wells and does not have an overall impact developed at this time." RCR-E 139; RCR-E 140. Based upon this evidence, Rate Counsel claimed that the Company has not therefore met its burden of proving any alleged benefits to existing ratepayers from the Haddonfield system acquisition.

Rate Counsel next directed the Board to the Exceptions, where the Company notes that the New Jersey Department of Environmental Protection (NJDEP) transferred the Haddonfield system's former allocation rights to other Company-owned wells in the area and it claims that this is a clear benefit to legacy customers, citing to the Exceptions at page 34. Rate Counsel stated that it is not a benefit, but nonetheless has never disputed that this transfer was made through the consolidation of permits. To the contrary, Rate Counsel indicated that the points of diversion (i.e.,

the wells) were simply added to a pre-existing allocation permit issued by NJDEP to the Company. Woods Surrebutal Testimony, at page 3, lines 13-16. The Company also noted that it abandoned the Center Street wells, which were previously associated with this allocation. However, Rate Counsel states that the Company fails to acknowledge in its Exceptions is that this merely shifts the point of diversion. NJAWC made an economic decision to pay a premium for the Center Street Wells, which it promptly abandoned, and then transferred the allocation rights to other Company-owned wells so that they could avoid the cost of renovating and upgrading the Center Street Treatment Plant – a benefit to Haddonfield customers, not NJAW legacy customers. DeStefano Rebuttal Testimony at page 4, lines 3-17. Rate Counsel further claimed that the water needed by Haddonfield customers is still being produced at other Company wells and at the Company's surface water treatment plant in Delran for Haddonfield's benefit, not for the benefit of the legacy customers, as the Company asserts in the Exceptions.

Furthermore, Rate Counsel asserted that the Company's initial income schedules for the Haddonfield system post-acquisition failed to include any production costs or the cost of capital associated with producing water from Haddonfield for sources outside of the Borough. Rate Counsel pointed out that it questioned the Company about this, and the Company made adjustments to its schedules to reflect the external cost of production. These adjustments identified a continuing shortfall in Haddonfield revenues relative to the revenue requirement caused by Haddonfield. Woods Surrebuttal Testimony at page 2, line 20 to page 3, line 2. There is nothing of value purchased from the Borough of Haddonfield that has served to reduce the revenue requirement for the Company's legacy customers.

Citing to page 35 of the Exceptions, Rate Counsel stated that the Company implies that the transfer of allocation rights from Haddonfield's water allocation permit to a pre-existing allocation permit issued to New Jersey American somehow resulted in an "increased supply." However, Rate Counsel avers that this alleged increase was never argued on the record, and it should not be accepted here. See N.J.A.C. 1:1-18.4(c) ("Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions."). Rate Counsel added that NJDEP also issued a "Minor Modification" to Permit WAP5197 where it simply added the instantaneous, monthly and annual diversion limits to the prior permit limits and it listed the three Haddonfield wells as points of diversion on the revised permit. Woods Surrebuttal Testimony at page 3, lines 13-16. Rate Counsel claimed that there was no increase in supply resulting from this acquisition; rather there was only an administrative consolidation of two independent water allocation permits. This was not a benefit to existing NJAWC ratepayers, and Rate Counsel argued that any argument to that effect should be rejected.

For all of these reasons, Rate Counsel concluded that the Company failed to meet this burden of proof, and per Board policy its request for an acquisition adjustment for Haddonfield should be denied, and the Board should adopt the Initial Decision denying acquisition adjustments for the Shorelands and Haddonfield systems.

NEW JERSEY-AMERICAN MOTION FOR LEAVE TO FILE A SUR-REPLY TO REPLY EXCEPTIONS

On March 26, 2021, the Company made an application for leave to file a sur-reply to Rate Counsel's reply exceptions, along with the sur-reply[5]. In support of its motion, the Company

[5] For those reasons set forth in further detail the Discussion and Findings, the Board will not consider the Company's sur-reply and therefore deems it unnecessary to summarize them in this Order.

asserted that Rate Counsel misstated the legal standard applicable regarding the adjudication of plant acquisition adjustments, and requested that it be granted leave to file a sur-reply in response to the Reply Exceptions to address the same. The Company argued that Rate Counsel is asking the Board to disregard the legal standard in Elizabethtown in favor of a new "net benefits" test without any citation or legal support for its new test. The Company emphasized that if the Board adopts Rate Counsel's newly-invented standard, such a departure from established Board precedent would have wide-ranging implications for all utilities in the State and accordingly could impact all future utility acquisition activity.

RATE COUNSEL OPPOSITION TO NEW JERSEY-AMERICAN'S MOTION FOR LEAVE TO FILE A SUR-REPLY TO REPLY EXCEPTIONS

Rate Counsel filed its opposition to the Company's motion via correspondence dated March 30, 2021, asserting that the rules contain no provision for what NJAWC's sur-reply. Citing to case law in support of its position, Rate Counsel stated that the NJAWC's effort has been tried and rejected before. See El-Hewie v. Bd. of Educ. of Bergen County Vocational School Dist., 2008 N.J. AGEN LEXIS 1310 (Apr. 10, 2008) ("N**.**J.A.C. 1:1-18.4 makes no provision for replies to reply exceptions, and thus they were not considered."); Fitting v. N.J. Dep't of Envtl. Prot., 2009 N.J. AGEN LEXIS 753 (Sept. 25, 2009) ("Petitioners' exceptions could not be considered where the deadline for filing exceptions with the Department was September 1, 2009, petitioners' exceptions were postmarked two days after the deadline, on September 3, 2009, and were received a week after the deadline, on September 8, 2009."); Muhammad v. Public Service Electric & Gas Co., 2013 N.J. PUC LEXIS 311 (Oct. 16, 2013) ("The N.J. Board of Public Utilities rejected a utility customer's exceptions to the initial decision on the customer's billing dispute with a utility company as issued by an Administrative Law Judge (ALJ) because the exceptions were not filed within the 13-day period following the mailing of the decision as required by N.J.A.C. 1:1-18.4."). Thus, because the filing of a sur-reply is impermissible, Rate Counsel urged the Board to deny NJAWC's motion and reject its accompanying sur-reply.

Following the filing of the Company's motion and Rate Counsel's opposition, the Board requested two extensions from the OAL to render its decision in this matter, which were granted. The matter was then presented by Staff at the Board's June 24, 2021 agenda meeting, at which time Staff recommended that the Board adopt ALJ Gertsman's decision without modification. On July 7, 2021, the Company requested the issuance of an expedited Order.

DISCUSSION AND FINDINGS

The Board will first address the Company's motion for leave to file a sur-reply to Rate Counsel's Reply Exceptions. N.J.A.C. 1:1-18.4(a) provides that parties may file written exceptions to an initial decision within 13 days from the date of mailing. Replies to the exceptions may be filed within five days from receipt of the exceptions. N.J.A C. 1: 1-18.4(d). N.J.A.C. 1:1-18.4 makes no mention of the filing of sur-replies to reply exceptions. El-Hewie v. Bd. of Educ. of Bergen County Vocational School Dist., 2008 N.J. AGEN LEXIS 1310 (Apr. 10, 2008). Nonetheless in the matter at hand, the Company asserted that it should be afforded the opportunity to address Rate Counsel's alleged mischaracterization of the established Board precedent on acquisition adjustments through a sur-reply, but fails to cite to any case law or rule in support of its position. Accordingly, the Board agrees with the argument advanced by Rate Counsel in its opposition, and therefore **DENIES** the Company's motion for leave to file a sur-reply to the Reply Exceptions.

Turning to the plant acquisition adjustment issues, the Board has been given broad authority in the general supervision, regulation of and control over public utilities. N.J.S.A. 48:2-13. The Legislature has delegated its power over the activities of public utilities and has vested the Board with broad discretion in the exercise of that authority. See, e.g., In re Pub. Serv. Elec. and Gas Co.'s Rate Unbundling, 167 N.J. 377, 384 (2001). In exercising its authority to set just and reasonable rates as mandated by N.J.S.A. 48:2-21, the Board carries out a legislative function which requires the use of its expertise in a manner that is sufficiently flexible to be responsive to changing conditions, and which balances complex and competing interests. Id. at 384-85. In reaching this decision, the Board must balance the needs of the ratepayer to receive safe, adequate, and proper service at reasonable rates, while allowing the utility the opportunity to earn a fair rate of return. See N.J.S.A. 48:2-21 and N.J.S.A. 48:3-1.

In a rate proceeding, the utility bears the burden of proof on all elements or expenditures it seeks to pass -through in rates to its customers, including proving that its proposed rates are just and reasonable. In re Pub. Serv. Elec. and Gas Co., 304 N.J. Super. 247, 265 (App. Div. 1997); In re Jersey Cent. Power & Light Co., 85 N.J. 520, 529 (1981); In re Pub. Serv. Coordinated Transp. v. State, 5 N.J. 196, 219 (1950).

To demonstrate that a requested rate increase is just and reasonable, "the utility must prove: (1) the value of its property or the rate base, (2) the amount of its expenses, including operations, income taxes, and depreciation, and (3) a fair rate of return to investors." In re N.J. Am. Water Co., 169 N.J. 181, 188 (2001) (citations omitted). The conventional procedure involves the establishment of a rate base reflecting the fair value of the utility's useful property, the calculation of allowable operating expenses, the computation of net income, the determination of a fair rate of return and the design of a proper rate schedule to produce reasonable revenues. In re Redi-Flo Corp., 76 N.J. 21, 28 n.6 (1978) (citations omitted). The Company's rate base is the fair value of the property of the Company that is used and useful in public service. Pub. Serv., 5 N.J. at 217. This includes the value of any utility plant in service less depreciation that a utility has acquired. However, generally any premium paid for a property should not be placed in rate base and passed to ratepayers with a return. The Board will only recognize the premium paid to acquire a utility "where it was proven that a specific and tangible benefit inured to ratepayers from the. acquisition." I/M/O South Jersey Gas Co., BPU Docket No. GR8508858 (Sept. 24, 1984). "The Company bears the burden of proof with regard to any benefits from its acquisition." Ibid.

In Elizabethtown, the Board denied Elizabethtown Water Company's request for acquisition adjustments related to the acquisition of two water systems, Peapack and Gladstone, but recognized an acquisition adjustment for another system. In that case, the Board explained:

> We will continue to recognize the appropriateness of acquisition adjustments where a specific benefit can be shown, such as the acquiring of needed facilities which benefit the entire system. Reasonable incentives should be given for acquisition of small water companies which are typically undercapitalized and hard-pressed to provide safe, adequate, and proper service. Such is the intent of the Small Water Company Takeover Act, N.J.S.A. 58:11 59 et seq. In addition to the lack of a showing of a specific benefit, we have the additional factor that the system in question was acquired through competitive bidding between utilities which could only serve to enhance the purchase price in relation to original cost.
>
> [Elizabethtown at 2 (citations omitted).]

Likewise, in Howell, the Board approved acquisition adjustments related to NJAWC's acquisition of several systems - including Sunbury Village and Aberdeen - finding that they were either acquired under the Small Water Take Over Act or that such adjustments had been agreed to in prior rate case stipulations that had been adopted by the Board. Howell, 1999 WL 615854 at *15. The Board also approved acquisition adjustments resulting in the acquisition of several other systems finding that they were "small systems that will necessary benefit from the economies of scale and increased reliability in the provision of safe, adequate and proper service." Id. at 16.

Similarly, in I/M/O the Petition of Long Beach Water System, BPU Docket No. 831-855 (July 5, 1994), the Board held that the acquisition premium should be split between ratepayers and the company. The Board stated "that reasonable incentives must be given for the acquisition of the small water company, typically under-capitalized and unable to provide safe, adequate and proper service. Id. at 2. The Board explained that "[u] nder the circumstances of this case, with a well-established customer benefit, we believe that an equal sharing of the difference between purchase price and original cost is appropriate, and therefore would give recognition in rate base to one-have of that difference, as an acquisition adjustment." Ibid.

In the matter at hand, the Company conceded at the hearings before ALJ Gertsman that it was "not claiming that "…the acquisition adjustment [sic] should be recognized because the entities were small or troubled." Initial Decision at 27, citing to 33T:11-16. Nor has the Company made such claims in its Exceptions to the Initial Decision. See Exceptions at 7 n.11 ("the Company is not asserting, and has never asserted that either the Shorelands or Haddonfield systems is troubled"). Instead, the Company argued that there is substantial evidence in the record demonstrating that existing NJAWC customers benefit from the acquisitions of the systems. As such, the issue before the Board is whether the acquisitions of the Haddonfield and Shorelands systems provided any specific and tangible benefits to NJAWC's legacy customers.

With regard to the Shorelands system, the Company asserted that the acquisition resulted in avoided capital projects, benefits from deferred capital projects and resulted in significant synergistic savings. Specifically, the Company claimed that the Shorelands acquisition resulted in the cancellation of $29,000,000 in previously planned capital investments. However, the Board is not persuaded by these arguments and agrees with ALJ Gertsman's finding that the inclusion of these improvements and their resulting benefits are speculative.

While the Shorelands acquisition allowed the Company to expand its service territory in northern Monmouth County, the testimony indicates that there were little or no synergy savings resulting from the Shorelands acquisition. Moreover, NJAWC's claim that it will avoid capital costs is not supported by any tangible evidence. NJAWC may very well still endeavor to complete the projects which it claims it will not, at a later date. Therefore, there are no guarantees that the Shorelands acquisition will result in lower overall capital costs to NJAWC's existing customers, and the Board **HEREBY FINDS** that the Company failed to meet its burden to show that the Shorelands acquisition provides a benefit to ratepayers. Moreover, passing this large premium to ratepayers would strike an unfair balance between ratepayers and the Company because NJAWC would earn a return on investment on a premium which does not tangibly benefit ratepayers. Accordingly, the Board **HEREBY DENIES** NJAWC's request to include the Shorelands acquisition adjustment in rates.

Turning to the Haddonfield acquisition, the Board is also unpersuaded by the Company's argument that the acquisition of the system provided tangible benefits to ratepayers. The greatest

benefits cited in the record were with respect to the avoided capital of replacing or fixing existing Haddonfield facility, but this benefit only benefits former Haddonfield customers. To the contrary, existing NJAWC ratepayers are burdened by the acquisition because the cost of providing service to the Haddonfield system and the costs of the acquisition are significant. Thus, the Board **HEREBY FINDS** that the burden to ratepayers far exceeds any tangible benefits claimed by NJAWC and would therefore strike an unjust balance between ratepayer interests and the Company. As such, the Board **HEREBY DENIES** NJAWC's proposed plant acquisition adjustment for the Haddonfield system.

Based on its review of the extensive record in this proceeding, the Board has determined that the Initial Decision, represents an appropriate resolution of the issues in this contested-case matter.

Therefore, the Board **FINDS** the Initial Decision, to be just and reasonable, in the public interest, and in accordance with the law. Accordingly, the Board **HEREBY ADOPTS** the Initial Decision, without modification, as its own.

This Order shall be effective on July 29, 2021

DATED: July 29, 2021

BOARD OF PUBLIC UTILITIES
BY:

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PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

IN THE MATTER OF THE PETITION OF NEW JERSEY-AMERICAN WATER COMPANY, INC. FOR APPROVAL OF INCREASE TARIFF RATES AND CHARGES FOR WATER AND WATEWATER SERVICE, CHANGE IN DEPRECIATION RATES AND OTHER TARIFF MODIFICATIONS

BPU DOCKET NO. WR17090985
OAL DOCKET NOS. PUC 14251-2017S & PUC 16279-18

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