



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE REQUEST OF ROCK-GW,)
LLC FOR A DETERMINATION THAT THE ANTICIPATED)
PROVISION OF SEWERAGE TREATMENT SERVICE BY)
ROCK-GW, LLC TO THE ADDITIONAL PROPERTIES OF)
LOTS 1,3,4 AND 5, BLOCK 1401; LOT 1, BLOCK 1402)
FLORHAM PARK; LOTS 1 AND 4, BLOCK 1401)
MADISON DOES NOT CONSTITUTE UTILITY SERVICE)
PURSUANT TO N.J.S.A. 48:2-13

ORDER

DOCKET NO. WO08030188

(SERVICE LIST ATTACHED)

BY THE BOARD

By letter dated March 20, 2008, Rock-GW, LLC ("Rock-GW" or "Petitioner") requested a determination by the Board of Public Utilities ("Board") that the proposed addition of two buildings, a medical office building to be owned by Rock-GW and a Marriott Hotel, to be served by the Rock-GW sewerage treatment plant ("STP") and collection system (collectively the "Sewer System") would not constitute "public use" as defined in N.J.S.A. 48:2-13, and, accordingly, that such use would not cause Rock-GW to be considered to be a public utility subject to the Board's regulatory authority. The petition was filed in accordance with the provisions of a previous Board Order¹, discussed more fully below, which required petitioner to file with the Board prior to any additional development and expansion of service beyond the current structures.

Rock-GW is the owner of the STP. According to the petition, Rock-GW has no intention of providing sewer service to any party outside the boundary of the property as described. The streets on the property are private roads and do not affect any public right of way. A sewer main, built before the construction of the road, crosses under Route 24 as the STP serving the property is on the north side of Route 24 while the developable portion of the property is on the south side. This is the only part of the Sewer System within a public road.

¹ In re the Request of Rock-GW, LLC and Exxonmobil Research and Engineering Company for a Determination that the Anticipated Provision of Sewerage Treatment Service by Rock-GW, LLC Does Not Constitute Utility Service Pursuant to N.J.S.A. 48:2-13, BPU Docket No. WO060503080 (June 7, 2006) ("June 2006 Order").

The property consists of 650 acres of land in the Boroughs of Florham Park and Madison, New Jersey (the "Property"), and has been the subject of three filings with the Board resulting in Orders in 1997, 1999 and, as noted above, in 2006 (collectively, the "Prior Orders"). The Property currently has three occupied office buildings, two leased by Novartis and one by AT&T, and an office/training facility for the New York Jets football team ("Jets") which is currently under construction.

Initially, by Board Decision and Order dated November 6, 1997, the Board determined that Exxon Research and Engineering Company ("ER&E") was not a public utility by virtue of owning and operating the Sewer System located on the Property to serve two office buildings owned and occupied by ER&E, one office building owned by ER&E and leased to AT&T, and several small outbuildings, all located on the Property. The Board concluded that the sale of a portion of the Property to a developer, Rock-Florham², would not require regulation of ER&E as a public utility since sewer service was not being offered to the public. Subsequently, Rock-GW demolished the two ER&E office/research buildings on the Property.

By letter dated October 6, 1998, ER&E advised the Board that it planned to sell an additional portion of the Property to the same developer, Rock-Florham, for the construction of two more office buildings totaling approximately 445,000 square feet that, upon completion, would also be served by the Sewer System. ER&E further advised the Board that, as was the case in 1998, the Sewer System: (1) had sufficient excess capacity with which to serve all structures on the property, existing as well as proposed; (2) continued to have all necessary Department of Environmental Protection ("DEP") permits; (3) continued to be operated in accordance with all applicable laws and regulations; and (4) did not and would not be providing service to any off-site structure. By Board Order dated January 20, 1999, in Docket No. WO98111378, the Board found that the proposed sale would "...not render [Exxon] a public utility operating sewerage facilities for public use." The Board also found that, while the sewer line crossing under Route 24 was technically located in a public street, use of the right-of-way without other factors which make it necessary for the Board to regulate the entity does not necessarily give rise to a finding of public use. However, the Board also directed that, in the event that it was proposed that the Sewer Service be used to serve additional customers within the original 650 acre site or that it be sold, ER&E should petition the Board for a determination as to the utility status of the Sewer System based on then present conditions.

By letter petition dated May 19, 2006, Rock-GW and the original owners of the Property advised the Board that Rock-GW was the contract purchaser of the Sewer System from ER&E, as well as a substantial portion of the Property. Rock-GW represented to the Board that the Sewer System would be operated by an appropriately licensed operator, and that all required DEP permits were in effect. Additionally, Rock-GW represented that Exxon had discontinued its operations on the Property leaving two office buildings and ancillary outbuildings unoccupied, and there was a possibility that a portion of the Property would be sold for construction of the Jets office/training facility. The Petitioner represented that under the proposed plan, the total wastewater flows would still be below the levels approved by the Board in 1999. Based on the information provided, in the June 2006 Order, the Board found that the proposed transactions did not require a finding that Rock-GW was a public utility operating sewerage facilities for public use subject to Board regulation. However, Rock-GW was advised that it would need to file a petition with the Board for reevaluation of its status prior to any additional development and expansion of service beyond that contemplated under the Order.

² Rock-Florham is an affiliate of Rock-GW.

The instant petition was filed because negotiations are underway to sell portion of the Property to the Marriott Corporation for construction of a 250-room hotel including a fitness center and meeting rooms, and to lease or sell a portion of the Property to Atlantic Health Systems to construct a small medical office building. According to Rock-GW, both hotel and medical office buildings can be served by the existing STP, without expansion. The sewage generated by the six buildings (including the two additions) would be less than half of the rated capacity of the STP. Rock-GW's charge for sewer service to the existing three buildings, the Jets Facility, hotel and medical office building will generate less revenue than its costs for operation of the Sewer System as such charges are based on those charged by the Florham Park Sewerage Authority. Petitioner maintains that to proceed in a timely manner to closing on the contract for the hotel and to finalize negotiations for lease of the property for the medical office building, a determination is needed as to whether these additions to the Sewer System will require that Rock-GW be regulated as a public utility.

By letter dated November 6, 2008, counsel for the Petitioner memorialized the conduct of a visit to the Property by representatives of Board staff and the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel"), and formalized for the record the following relevant representations made by Rock-GW to Board staff and Rate Counsel during that visit:

1. The STP was built about fifty years ago to service buildings on the Property and has done so since that time.
2. Rock-GW has entered into an operating agreement with Applied Water Management, Inc. which employs New Jersey licensed operators, to provide sewer service to the buildings on the Property.
3. Rock-GW has no intention of providing sewer service to any party outside of the boundary of the Property.
4. The only portion of the Sewer System which is within a public road is the sewer main that connects the Sewer System to the STP on the north side of Route 24.
5. Sewerage generated by the currently existing, under construction and proposed buildings would be less than half of the rated capacity of the STP.
6. As Rock-GW's charges for sewer service generate less revenues than its costs for operation of the Sewer System, Rock-GW has no intention of being a long-term provider of sewer service, and has had substantial negotiations for sale of the Sewer system to Applied Wastewater Management or for sale of the collection system portion of the Sewer System to the Florham Park Sewerage Authority.

By letter dated November 19, 2008, Rate Counsel filed its comments supporting a determination that Rock-GW should not be found to be a public utility subject to the Board's regulatory authority. Rate Counsel concluded that Rock-GW is not providing wastewater service to the public as there are no residential customers serviced on the Property, service agreements with the current building owners/tenants specifically preserve the right to switch providers, and it is unlikely that the Rock-GW system could expand. Rate Counsel conditioned its position on the inclusion with the Order of the same provision contained in the Prior Orders indicating that the relief granted is based on the facts presented, and if the facts change, the Board could assert jurisdiction.

DISCUSSION AND FINDING

The Board has discussed what constitutes a "public utility" in the Prior Orders and in other Orders including In re Request of Princeton Bio-Technology Center Condominium for a Determination that its Provision of Sewerage Treatment Services Does not Constitute Service Pursuant to N.J.S.A. 48:2-13, Docket No. WO04101115, November 19, 2004, ("Princeton Bio-

Tech”) cited in the June 2006 Order. According to the case law, the determination of whether an entity is a public utility subject to Board regulation begins with a review of the above cited statute which focuses on two issues; 1) whether the system will be operated under privileges granted by the State or any of its political subdivisions, and 2) whether the operation of the system is for public use.

Based on the representations submitted on behalf of the Petitioner, the Board ACCEPTS the following facts:

1. A portion of the property may be sold to the Marriott Corporation to construct a 250-room hotel;
2. A portion of the property may be leased to Atlantic Health System to construct a small medical office building;
3. All structures to be served by the STP are located on the original 650 acres;
4. The STP will not be expanded and, including the possible addition of the hotel and medical building, will continue to operate at a level below its capacity;
5. The operation of the STP will have no impact on the regulated market related to sewerage service; and
6. The STP continues to possess all necessary DEP permits and will be operated by a duly licensed operator pursuant to all applicable laws and regulations.

Based on these representations, there is no question that the Sewer System is operated under privileges granted by the State as a result of the issuance of the DEP permits. While in its January 20, 1999 Order, the Board found that the fact that a main traverses a public right-of-way does not, without other factors, compel a finding of public use, the issue is whether the addition of the proposed hotel and medical building to the Sewer System make it necessary for the Board to regulate Rock-GW as a public utility.

As stated in Princeton Bio-Tech,

New Jersey courts have held that a decision on public use “depends upon the character and extent of the use and not upon agreement or understandings between the supplier and those supplied.” In addition, it is necessary to consider “present and potential use, and all other facts and circumstances associated with the operation.”...In addition, the Board is guided by various factors including but not limited to the following: 1) whether a significant number of retail customers are being served; 2) whether the facilities are located in public streets and /or whether other public resources are utilized; 3) whether the company provides meters and/or charges separately for its service; 4) whether and to what extent there is an economic impact on the regulated market; and 5) whether there is a potential for expansion.
(Citations omitted.)

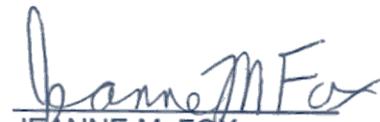
The Board notes that, according to the Petitioner, charges to the owners and tenants under the current agreements are based on the rates charged by the Florham Park Sewerage Authority and do not cover all of the costs of operation. Petitioner has represented that it has no intention of serving any customers not located on the Property. No public resources are utilized in the operation of the Sewer System, and there will be no increase in the capacity of the STP as a result of the contemplated transactions.

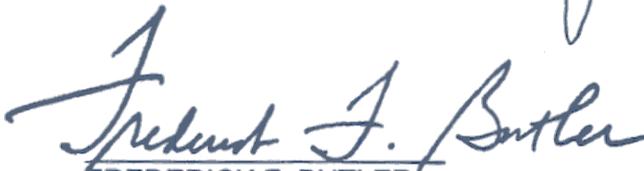
Therefore, the Board, based on the foregoing and the record in this matter, HEREBY FINDS that the proposed additions to the property will not render Rock-GW a public utility operating sewerage facilities for public use subject to regulation by the Board.

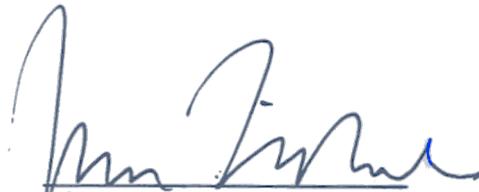
Rock-GW is further advised that this determination is limited specifically to the facts presented and that changing conditions, including additional development and expansion of service beyond those buildings as described in this Order, including the addition of retail customers and/or residential customers, must be the subject of a petition filed with the Board in advance of any such development, and could subsequently lead to the modification of the Board's determination. The Board will make a further determination based upon the conditions present at that time.

DATED: 12/9/08

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

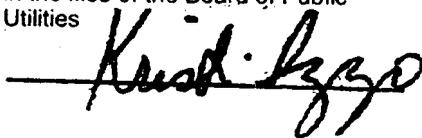

NICHOLAS ASSELTA
COMMISSIONER


ELIZABETH RANDALL
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

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



IN THE MATTER OF THE RESQUEST OF ROCK-GW, LLC FOR A DETERMINATION THAT
THE ANTICIPATED PROVISION OF SEWERAGE TREATMENT SERVICE BY ROCK-GW,
LLC TO THE ADDITIONAL PROPERTIES OF LOTS 1,3,4 AND 5, BLOCK 1401; LOT 1,
BLOCK 1402 FLORHAM PARK; LOTS 1 AND 4, BLOCK 1401 MADISON DOES NOT
CONSTITUTE UTILITY SERVICE PURSUANT TO N.J.S.A. 48:2-13

BPU DOCKET NO.WO08030188

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