Agenda Date: 1/28/09
Agenda Item: 5B

STATE OF NEW JERSEY

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

WATER

IN THE MATTER OF THE PETITION REQUESTING THE ISSUANCE OF A DECLARATORY RULING THAT GLOBAL UTILITY SERVICES, LLC ("GUS") WOULD NOT BE A "PUBLIC UTILITY" PURSUANT TO N.J.S.A. 48:2-13 UNDER THE FACTUAL CIRCUMSTANCES PRESENTED	))))	ORDER DOCKET NO. WO08070500

(SERVICE LIST ATTACHED)

BY THE BOARD:

On July 7, 2008, Global Utility Services, LLC (GUS or Petitioner) filed a letter petition with the Board of Public Utilities (Board or BPU) requesting, pursuant to N.J.S.A. 52:14B-8, a declaratory ruling that completion of the transaction described below would not require that GUS be considered a "public utility" pursuant to N.J.S.A. 48:2-13, and therefore be subject to the Board's regulation.

GUS, a company formed to provide wastewater services, is interested in maintaining and owning the wastewater treatment facility for the Clove Hill Manor community (CHM) in Wantage, New Jersey, which is currently owned and maintained by the Sussex County Municipal Utilities Authority (SCMUA). According to the Petitioner, consummation of the transaction is dependent upon a determination that GUS would not be considered a "public utility."

Therefore, the question before the Board is whether the transfer of the sewer plant and service agreement from the SCMUA to a private entity so that the private entity will be providing sewer service to the 117 condominium town homes constitutes "public use" so that the Petitioner should be declared to be a public utility pursuant to N.J.S.A. 48:2-13 subject to Board jurisdiction.

Background and Procedural History

CHM is an age-restricted community of 117 single-family townhouses which began construction on or about 2004.[1] As part of the contract for purchase of the unit, each purchaser agrees to

[1] At this time, 94 units are constructed and sold, with 23 units remaining to be sold, 3 of which are already constructed. There are no plans for any more than 117 units.

become a member of the homeowners association, and to pay fees for common charges and a pro rata share of the charges for sewer services. Included in the deed to the unit is a grant of a lien for any unpaid charges. Individual units are not separately metered for sewer service. The original developer, Woodland Development Corp. and its successor, Clove Hill Manor, LLC (CHM LLC), contracted with Aqueonics, Inc.[2] to furnish and install the wastewater treatment facilities (Facilities).

At that time, the SCMUA had determined that it wanted to acquire and operate certain decentralized wastewater treatment systems located in Sussex County, and acquired and thereafter operated the wastewater treatment facilities serving CHM. Since then, the SCMUA has owned and operated the wastewater treatment facilities serving CHM through a service contract with Clove Hill Manor Homeowners' Association (CHMHOA).[3] The CHMHOA retains ownership of the sewer mains subject to a utility easement granted to the SCMUA.

However, the SCMUA has recently changed its business model and no longer desires to own and operate decentralized systems, such as the one serving CHM. While the Service Agreement has no specified term, under Section 606 of the Service Agreement, after March 16, 2010, the SCMUA and CHMHOA may agree in writing to terminate the agreement. Accordingly, the SCMUA is interested in and willing to convey the Facilities back to CHM, LLC and CHMHOA for no fee, and they would, in turn, convey the Facilities to GUS. GUS would provide wastewater services under an assignment of the current Service Agreement between the CHMHOA and the SCMUA. The SCMUA will transfer its NJPDES-DGW permit to GUS, subject to the approval of the New Jersey Department of Environmental Protection (NJDEP).

According to the information provided by the Petitioner, as a good faith and "team building gesture" to the CHMHOA, as part of the agreement for the assignment of the Service Contract to GUS, GUS would agree that there would be no increase in the rate to be charged to CHMHOA by GUS from the SCMUA rate in effect as of October 2007, for a period of three years, except in the event of a material (greater than 10%) increase in the operating costs of the Facilities serving the community. Section 402 of the proposed service agreement, allows an increase in the rates after that period, with the amounts still subject to negotiation at this time. Additionally, under that same section, the parties must enter into a new agreement by June 1, 2010 or either party can terminate the agreement. By letter dated January 8, 2009, GUS represented that it would contractually agree to certain limitations on future rate increases to ensure that its rates do not exceed the maximum rates that the Board permits regulated entities to charge for similar service.

The parties involved in the transaction, Clove Hill Manor, LLC (the developer), Clove Hill Homeowner's Association (CHMHOA), and the Sussex County Municipal Utilities Authority (SCMUA), all filed letters supporting the petition. The New Jersey Department of the Public Advocate, Division of Rate Counsel does not oppose the Petitioner's request as stated in its letter dated November 18, 2008.

A conference call was held on December 23, 2008 to discuss the status of the proceeding and the rights of the parties under N.J.S.A. 52:14B-8. Attorneys for the Petitioner, John Miaone

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[2] Aqueonics, Inc is headquartered in Greenville, South Carolina. GUS is a wholly owned subsidiary of Aqueonics.

[3] Service is provided pursuant to the service contract among SCMUA, CHM LLC and CHMHOA dated March 16, 2005 (Service Contract).

Homes and Clove Hill Manor, LLC, the SCMUA, and the CHMHOA participated, as did Staff and the Deputy Attorneys General assigned to this matter. By letter dated December 23, 2008, GUS, the CHMHOA, the SCMUA and John Maine Homes and Clove Hill Manor, LLC, stated that they believed that there are no genuine issues of material fact in dispute requiring evidentiary hearings prior to a Board decision in this matter, and acknowledging that they were offered the opportunity to submit any supplemental information, briefs or position papers to the Board by January 8, 2009.

By letter dated December 23, 2008, counsel for the SCMUA reiterated its support for a declaration by the Board that GUS would not be a public utility if it owns and operates the Facilities. According to the letter, the transfer is being undertaken at the request of the SCMUA which will provide technical support for "a short, but reasonable time period after the transfer is consummated."

Complying with the timetable established on December 23, 2008, on January 8, 2009, GUS submitted a letter brief in support of its request for a ruling that consummation of the proposed transaction will not make GUS a public utility subject to Board regulation. In its brief, Petitioner restated the facts as previously described in the petition, stating that there are no disputed material issues of fact that warrant an evidentiary hearing, and that the parties waived their right to a public hearing[4]. Petitioner stated that, as relevant to the proposed transfer, under N.J.S.A. 48:2-13, to be a public utility, an entity must not only own, operate, manage or control a wastewater treatment system, but must do so for public use under privileges granted by the State or any of its political subdivisions. For purposes of this petition, GUS concedes that if the transaction is completed as proposed, it would be operating under privileges granted by the State. GUS maintains that there is no "public use" as that term has been described under case law and Board decisions.

Citing to Lewandoski v. Brookwood Musconetcong River Property Owners Association, 37 N.J. 433 (1962), and Re General Motors Corp., BPU Docket No. EE95100486 (July 7, 1996), GUS states that each case must be determined on its own facts, and the agreement or understanding between the supplier and those supplied is not determinative. GUS maintains that there is no "public use" because: 1) the Facilities can only serve the CHM and not the general public; 2) there is only one customer to the Service Agreement, the CHMHOA; 3) there is no potential for expansion; 4) this is a relationship among private parties on private property; 4) no party has asked the Board to regulate this service in the public interest, and there is no impact on the regulated market; 5) NJDEP will regulate the operation of the Facilities for purposes of ensuring safe and environmentally appropriate operation; and 6) upon information and belief, there are other similarly situated facilities which the Board has not taken steps to regulate. Petitioner also repeats its request for an expeditious ruling.

No other submissions were received.

DISCUSSION AND FINDINGS

As noted above, the question is whether the Board should grant the petition of GUS, a private waste water company, for a declaratory ruling under N.J.S.A. 52:14B-8 that it should not be

[4] While the right to an evidentiary hearing in connection with a petition for a declaratory ruling under N.J.S.A. 52:14B-8 can be waived where there are no adjudicative facts in dispute, public hearings, if required, as for example, under N.J.S.A. 48:2-32.4 or 32.6, cannot be waived. Public hearing requirements apply only to entities that qualify as public utilities, the very issue presented by this petition.

declared a public utility pursuant to N.J.S.A. 48:2-13. The Board, in its discretion, may render a declaratory ruling which binds the agency and all parties to the proceedings on the facts alleged, but only after the interested parties have been afforded full opportunity for hearing. All of the parties to this proceeding have agreed that there are no facts in dispute, and the Board FINDS that it has sufficient information to proceed.

Under N.J.S.A. 48:2-13, an entity that owns, operates, manages or controls sewer plant or equipment for public use under privileges granted by the State or by any of its political subdivisions, is a public utility. As GUS would be operating under a NJDEP permit and therefore under privileges granted by the State, a point which has been conceded by the Petitioner, the only question is whether the described provision of service constitutes operation for public use. The determination depends on whether the Board concludes that provision of service to up to 117 town homes through a contract with the homeowners' association constitutes "public use." Based on the available cases, it does not appear that this specific fact situation (service to 117 town homes by a private entity owning the sewerage plant, and the service contract and ownership of the sewer mains in the name of the homeowners' association) has previously been reviewed by the Board.

As stated by the Petitioner, under the case law, the determination of whether there is "public use" is fact specific, and does not depend on the agreement between the service supplier and the customer. Additionally, that determination requires consideration of at least the following factors:

1. What is the present and potential use of the system?
2. Are a significant number of customers being served?
3. Are the facilities located in public streets and are other public resources utilized?
4. Are the services metered and/or are there separate charges for the services?
5. Is the service being provided incidental to the main business of the provider (landlord/tenant or similar situation)?
6. Is there an economic impact on the regulated market?
7. Is there potential for expansion?

This list is distilled from a long line of cases, both before the courts and before the Board, some of which are discussed below. Because each case must be determined on its own facts, no one case provides the answer, only the various considerations.

In a leading court case on this issue, cited by GUS, the Supreme Court of New Jersey upheld a Board determination that the property owners' association (Association) which operated the water system supplying water service for a development of up to 1,000 single family homes was a public utility. In Lewandowski v. Brookwood Musconetcong River Property Owners' Association, 37 N.J. 433 (1962), homeowners petitioned the Board to assume jurisdiction over the Association as a public utility. Homeowners were required to apply for membership in the Association when they executed their contracts of purchase. The applications also required the purchasers to pay the Association for the installation of the water mains, and to allow the Association to provide utility services for which the purchasers were required to pay charges fixed by the Association. While only homeowners (and the developer) could be members of the Association, the membership in the Association could be expanded in the event that the development expanded into adjoining lands. The Association contested the jurisdiction of the Board, contending that there was no public use because there was no undertaking to serve the public at large, service was exclusively for the benefit of the landowners, and the possibility of extension of the development did not alter the character of the use. The Board determined that

the Association was a public utility finding that the membership restrictions were so broad that the Association could not be construed as private, the streets above the mains had been dedicated to the public use, and municipal consents to operation of the system were implied in the agreements recognizing the use of the streets for that purpose.

In upholding the Board's decision, the Court agreed that there was a pubic use, finding that there was a significant use of the State's natural resources for the ultimate use of a broad group of consumers. Based on this finding, the Court did not decide whether there would only be a private use if the users were in fact a "restricted group." The Court concluded that the developer directed its sales campaign to the public at large, and required all purchasers to become members of the Association. At the time of the hearing, there were 350 — 400 purchasers and unsold lots still available to the public.

> An undertaking of this size with consumers being indeterminate from the outset cannot be classified as a project merely among neighbors and colored by any private cast which might attach to such a group. The character of the use is clear, i.e. to serve all members of the public who buy lots from the Developer. The extent of the use is equally clear, i.e., an entire housing development is dependent upon the Association for a prime necessity of life. As the character and extent of the use make it public, we conclude the Association is operating a water system "for public use" within the meaning of N.J.S.A. 48:2-13.

[Id at 446.

In Petition of South Jersey Gas Co., 116 N.J. 268 (1989) (SunOlin), the Court upheld a decision of the Board which found that SunOlin, a seller of significant quantities of methane-rich gas which was a byproduct of its refinery business to only one high volume customer, was a public utility. SunOlin had admitted that it owned, and operated a pipeline under privileges granted by the State, and therefore, the only issue was whether it was doing so for public use. Finding evidence in the record to support the Board's conclusion that SunOlin had the capacity and desire to replace up to two-thirds of the regulated local gas distribution company's firm industrial load, and had solicited business from other large industrial users in the region, the Court agreed that SunOlin was operating for public use.

In Antique Village Inn, Inc.v. Pacitti, 160 N.J.Super. 554 (Law Div. 1978), a tenant in a mall asked the court to find that the landlord which supplied electricity as a component of the rent, was a public utility that should be subject to regulation by the Board. The court framed the question as whether the landlord had the right to purchase energy from a utility and distribute it to its tenants without being subject to regulation. The court discussed a Maryland case involving a shopping mall, and an annotation discussing the provision of services by landlords to tenants, "Landlord Supplying Electricity, Gas, Water, or Similar Facility to Tenant as Subject to Utility Regulation," 75 A.L.R. 3d 1204. According to the cited annotation, the provision of energy service is incidental to the actual business of renting space, the presence or absence of individual meters was not a decisive factor, and consumer protection of tenants should not be the basis for extending regulation over the landlord. The court denied the request to find that the landlord was subject to Board jurisdiction, concluding that there was no public use.

Similarly, in Freehold Water & Utility Co. v. Silver Mobile Home Park, Inc. 68 PUR 3d 523 (1967), a public utility (Freehold Water) filed a petition seeking an order finding that the owner of a trailer park (Silver Mobile) providing water service to tenants from a well on the property was a public utility that should be prevented from competing in Freehold Water's franchise territory.

The owner of the trailer park testified that there were 29 or 30 spaces rented to tenant trailers on a monthly basis with potential of up to 200, and that rent included outside maintenance, landscaping and utilities. Water was provided from a well on the property that had been properly permitted, and all streets within the park were owned and maintained by the owner. After finding that Silver Mobile operated under privileges granted by the State, the Board turned to the question of whether there was public use, stating that all facts and circumstances of the case needed to be examined in light of Lewandowski.

The fact that Silver Mobile's system served only a small number of users was not dispositive because of the potential for significant expansion. What the Board did find significant was that the provision of water service was incidental to the business which was the conduct of the trailer park which rented space for the tenant trailers. The Board distinguished Lewandowski, finding that there had been no showing 1) that Silver Mobile had been formed for the purpose of providing a utility service, 2) that the facilities were located in public streets, 3) that there was substantial diversion of a pubic resource, or 4) that there were other indicators of utility company operation such as individual metering and specified rates.

In contrast, the Board in Re Cedar Glen West, Inc, 70 PUR 3d 115 (1976), reached a different conclusion. Cedar Glen West was a co-operative corporation which owned and operated a senior citizen residential park, and also provided lawn care, garbage collection and water service. The sponsor-builder, Even-Ray Co., Inc. (Even-Ray) was the builder of up to 532 dwelling units under contract with Cedar Glen. Each owner had to buy stock equal to the cost of the unit based on a prospectus offered to the general public to any age qualified individual. Each "owner" was also required to pay a maintenance fee for, among other things, the water service. Even-Ray provided maintenance and management services for all of the facilities within the community which were owned by the co-op. After discussing Lewandowski, the Board concluded that the water system was being operated for pubic use, even though the entire system was on private property, finding that the residents were consumers of the water system notwithstanding that they were also stock-holders. The Board discussed the fact that Even-Ray's control of the maintenance equipment and personnel required to operate the system would put it in an advantageous bargaining position with respect to any negotiations with the co-op given that there was no readily available alternative supplier. This case was decided before passage of N.J.S.A. 48:2-13.2 which allows a non-publicly-owned, nonprofit water company that is exclusively owned and controlled by the consumers that it serves, to opt out of Board regulation by vote of a majority of the membership of the association which controls the water company.

In Re Glen Wild Lake Co., Inc., 89 PUR 3d (1971), the Board was asked to determine whether the real estate development corporation that supplied electricity to 170 leaseholders was a public utility. Glen Wild, in addition to selling the land to the individual home builders, resold electricity to them which it bought from Butler Power & Light. Glen Wild maintained its own distribution system, and provided individual meters for the homes. In addition to its real estate operations, Glen Wild's charter provided that it was authorized to purchase, install, operate and maintain electric lighting and electricity.

In making its determination of whether there was public use, the Board first discussed Lewandowski and the various factors suggested by the courts including the following: whether the proposed service was an inducement to prospective users, whether there was a sales campaign, whether a significant number of consumers are being served, whether there is potential for expansion, whether the facilities are located in public streets, and whether the company has the usual incidents of utility operation, such as separate charges and metering.

While there was no large development with a required association membership and no use of public streets, the Board concluded that Glen Wild was providing electricity for a public use because the availability of electric supply was an inducement to home builders, there was no option to put in an individual system, there were separate charges for the service, and 175 customers was a significant number of users. Included in the decision was a discussion of Re Lakeside Community Club Corp., Docket No. 6911-736 (Nov. 24, 1970). There the Board had found that a real estate developer providing water to sixty residents was a public utility even though the service was not metered, and there was no use of the public streets or of any large-scale promotional campaigns.

On the other hand, in Re General Motors Corp., BPU Docket No. EE95100486 (July 15, 1996), cited by GUS, in response to a petition for a declaratory ruling, the Board determined that an on-site cogeneration project (TES) developed by an independent subsidiary of a Texas public utility to supply the energy needs of a single General Motors (GM) plant, was not a public utility The Board stated that the decision on public use must be made on a case-by-case basis, guided by the factors outlined in Lewandowski, weighing the impact of the various factors to determine whether the overall public interest is best served by the exercise of the Board's regulatory authority. The Board concluded that since the size of the plant was limited, there would be no third party sales outside of possible incidental sales of excess electricity to an electric public utility subject to BPU jurisdiction, public resources were not diverted, no necessity of life was provided, and there was no public interest in providing protection to the industrial customers involved, subject to stated restrictions, the TES would not be a public utility.

More recently, in 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, BPU Docket No. WO04101115 (November 19, 2004) ("Princeton Bio-Tech"), the owner of the sewer system was the commercial condominium which would provide service only to the owners of the five commercial condominium units on the property. The plant was located totally within the boundaries of the property, the usage would not exceed the capacity as reflected in the NJPDES permit, and the costs would be allocated to the unit owners either for actual use if metered, or on a percentage of the total costs basis, without any profit to the condominium.

In finding that the provision of sewer service to the five commercial units did not constitute public use, the Board noted that the entire system was on private property, no customers other than the unit owners would be solicited, no public resources would be utilized in the operation of the system, and the operational costs were to be allocated among the owners with no profit realized by the owner of the system. Additionally, the Board found that there was no impact on the regulated market and no evidence that the sewerage system would be expanded beyond the boundaries of the property.

In December, the Board decided In re Request of Rock-GW, LLC, BPU Docket No. WO08030188 (December 9, 2008). Rock-GW is the owner of the sewer treatment plant and collection system (STP) on private property that serves commercial facilities on that private property. Under the terms of previous Board Orders, Rock-GW was required to petition the Board for re-evaluation of its status prior to any changes in the provision of service. Rock-GW is negotiating to sell a portion of the property for a hotel, and to lease or sell a portion of the property for construction of a small medical office building.

In finding that consummation of the proposed transactions would not constitute public use, the Board considered that Rock-GW represented the following: that it had entered into an operating

agreement with Applied Water Management, Inc, (Applied) which employs New Jersey licensed operators, that it had no intention of providing sewer service outside of the property, that the sewerage generated would be less than half of the rated capacity of the STP, and that Rock-GW had no intention of being the long-term provider of sewer service as it was in negotiations with Applied and the Florham Park Sewerage Authority (FPSA) to sell the system. Additionally, charges under the service agreements were based on the rates charges by the FPSA, no public resources are utilized, and there would be no increase in the capacity of the STP.

Turning to the facts of this case, according to the Petitioner, the development consists of up to 117 town homes, and the Facilities will not be expanded and will continue to operate within the discharge limits set by the NJPDES permit and the Sussex Countywide Water Quality Management Plan/Wastewater Management Plan. The Facility is located on private property with no public streets, and, there will be limited utilization of public resources pursuant to the discharge permit. The Petitioner has represented that it will not seek to provide services outside of the property, and will not expand the Facilities. According to the form of the Service Agreement, the CHMHOA contracts for the services on behalf of the owners of all of the town homes, and is technically the only billed "customer." The units are not individually metered, but pay a flat fee based on the maximum permitted flow rate as calculated under N.J.A.C. 7:14A-23.3.

GUS is a company that was formed specifically to provide sewer service which distinguishes it from Princeton Bio-tech, Antique Inn and Silver Mobile where the provisions of service were found to be incidental to ownership/ rental of the property supplied. As in Lewandowski, the developer is continuing to market the units to the general public as indicated by the statement that the Public Offering Statement must be amended subject to the approval of the Department of Community Affairs if the transfer to GUS is approved. The units are residential and individually owned and, although not separately metered, there is a separate charge for wastewater service. Although the Service Agreement according to its terms is a contract between the supplier (currently the SCMUA and potentially GUS) and the CHMHOA, under the case law, the agreement or understanding of the supplier and those supplied does not control and there are up to 117 end users of the service. After the three year period for which GUS has committed that it will not increase rates absent a significant increase in costs, GUS will be in a position to set rates for its service with the CHMHOA which does not have an alternative service provider. Under Section 402 of the proposed service agreement which is still under negotiation, the parties must enter into a new agreement by June 1, 2010, and if they are unable to do so, either party may terminate the relationship after a notice period. The Petitioner has asserted that there are other similarly situated communities which the Board does not regulate: however, Board Staff has informed the Board that it is not aware of any such communities.

Based on the information provided, GUS is an entity formed for the provision of sewer service, and will be supplying that service to up to 117 residential users who are not tenants of GUS or co-owners of the service. While the Service Contract is in the name of the homeowners' association and not the individual unit owners, membership in the association is mandated as part of the property sale, and there is no alternative to use of the wastewater service. While the wastewater service is not being offered to the general public, ownership of the units is being marketed to the general public within the age qualified population and, as previously stated, there is no alternative to use of the wastewater service.

Therefore, based on the foregoing and the record in this matter, the Board HEREBY FINDS that provision of services under the circumstances described would constitute "public use" as that term is used in N.J.S.A. 48:2-13, and that consummation of the proposed transfer would

render GUS a public utility operating sewerage facilities for public use subject to regulation by the Board. Accordingly, the request for a declaratory ruling that GUS would not be a public utility under the factual circumstances presented is HEREBY DENIED.

DATED: 2/3/09

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

I/M/O GLOBAL UTILITY SERVICES, LLC REQUESTING ISSUANCE OF A DECLARATORY RULING THAT GLOBAL UTILITY SERVICES WOULD NOT BE A PUBLIC UTILITY PURSUANT TO N.J.S.A. 48:2-13 UNDER THE FACTUAL CIRCUMSTANCES PRESENTED
BPU Docket No. WO08070500

SERVICE LIST

William R. Watkins, Esq.
Lindabury, McCormick, Estabrook & Cooper, P.C.
PO Box 2369
Westfield, NJ 07091

Joseph Quirolo
Counsel's Office
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Kristi Izzo, Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Maria L. Moran, Director
Marco Valdivia, Chief Bureau of Conservation & Engineering
Dante Mugrace, Chief of Rates
Ken Welch, Staff
Division of Water
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Arlene E. Pasko
Deputy Attorney General
124 Halsey Street, 5th Floor
Newark, NJ 07102

Kerri Kirschbaum
Deputy Attorney General
124 Halsey Street, 5th Floor
Newark, NJ 07102

Debra Robinson, Esq.
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101