



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

ENERGY

ORDER

IN THE MATTER OF THE PETITION OF ATLANTIC)
CITY ELECTRIC COMPANY FOR APPROVAL OF THE)
SALE OF CERTAIN LAND AND PREMISES SITUATE IN)
THE TOWNSHIP OF MAURICE RIVER, IN PART, AND)
THE CITY OF MILLVILLE, IN PART, COUNTY OF)
CUMBERLAND AND STATE OF NEW JERSEY TO)
R.W.V. LAND & C.M. LIVESTOCK, L.L.C. PURSUANT)
TO N.J.S.A. 48:3-7)

DOCKET NO. EM02050313

(SERVICE LIST ATTACHED)

BY THE BOARD:¹

This matter comes before the New Jersey Board of Public Utilities on a request by Atlantic City Electric Company ("ACE") for permission for the sale of utility property claimed no longer used or useful pursuant to N.J.S.A. 48:3-7. The purchaser selected by ACE, R.W.V. Land & C.M. Livestock, L.L.C., intervened through its affiliate, Millville 1350, LLC (collectively, "Millville 1350"), in this proceeding. In addition, a coalition of environmental groups, represented by the Columbia University School of Law Environmental Law Clinic ("Environmental Law Clinic"), as well as the New Jersey Department of Environmental Protection ("DEP"), sought and received permission to intervene. The Department of the Public Advocate, Division of the Rate Counsel, also intervened in the matter.

As presented in its petition, ACE is seeking approval to sell approximately 1,350 acres of property located in Millville, New Jersey. The property currently consists of vacant land, a corporate meeting facility, and a holly farm. ACE had originally purchased the property for a coal-fired electric generation plant, but that plan did not come to fruition and instead ACE subdivided and determined that the property was no longer used or useful for utility purposes.

According to ACE, several bids were received as part of the process of marketing the property for sale, including the \$4 million bid, with contingencies, presented by Millville 1350, and a \$2.553 million bid from DEP's Green Acres Program. ACE claims that it accepted the highest and best bid – the \$4 million from Millville 1350.

¹ Commissioner Asselta has recused himself from this matter and thus did not take part in the discussion or decision. Commissioner Fox dissents from the decision and Order in this matter, and has issued a separate dissent.

This sale petition, received by the Board on May 22, 2002, raised a number of issues, most notably because one of the bids that the company refused was from Green Acres and the New Jersey Department of Environmental Protection. That bid was predicated upon the stated desire to retain the property in a "natural" state and preserve it from present or future development. While it consisted of cash "up front" as opposed to the back-loaded funding of the Millville 1350 offer, ACE considered it substantially lower than the \$4 million winning bid from Millville 1350, and thus rejected the offer.

Because of the ongoing local interest as to possible purchasers, the Board held a public meeting in Millville, New Jersey, on December 1, 2003, presided over by then-Commissioner Frederick Butler. At that meeting, more than fifty members of the public spoke, as well as a number of elected officials, including Senator Nicholas Asselta and Assemblymen Jeff Van Drew, and Doug Fisher. All of the elected officials present spoke in favor of the sale to the developer, citing the pressing need for tax ratables in the community and surrounding county. All of the parties who identified themselves as "environmentalists" were opposed to the sale to the developers and instead supported the Green Acres bid, while the residents of the immediate area seemed split in their support. Commissioner Butler, at the meeting, indicated that written comments would be accepted through January 15, 2004 for those who wished to submit them.

On January 9, 2004, counsel for the purchasers, R.W.V. Land & C.M. Livestock, L.L.C. and Millville 1350, LLC, filed an emergent application for permission to intervene. This motion was granted by the Board on March 3, 2004. Following this motion, a similar motion seeking intervention was filed by a collection of environmental groups, including Citizens United to Protect the Maurice River and Its Tributaries, Inc., New Jersey Audubon Society, New Jersey Conservation Foundation and the Association of New Jersey Environmental Commissions. This motion was opposed by Millville 1350, but was granted by the Board on March 18, 2004. On May 19, 2004, the Board also granted authority to the New Jersey Department of Environmental Protection to intervene. Following this final intervention motion, the parties engaged in the process of discovery.

In addition, the Board became aware of litigation against the Millville Planning Board over the approval of a General Development Plan for the proposed development by Millville 1350. This litigation continued on, in one manner or another, through 2007.

On September 23, 2008, the Deputy Attorney General representing the Board sent a letter to the parties, indicating that the Board intended to "move forward" on the matter in the near future, that the parties should prepare for evidentiary hearings, and requested from each party a "general position" on the open issues. Each of the parties replied, indicating continued interest in the proceedings and the desire for a speedy yet fair resolution to the matter. In addition, a number of the parties noted changed representation, although no party indicated a change in position.

Based upon these representations, the Board requested the Division of Law to schedule a pre-hearing conference on January 23, 2009 for the purposes of scheduling an evidentiary hearing and ensuring that all parties were operating under the same procedural understanding. As a result of that pre-hearing conference, the Board issued a Pre-hearing Order on April 14, 2009, setting forth a schedule for discovery and setting a second pre-hearing conference.

A specific element of that discussion involved the submission of updated economic analysis. Based upon the discussion at this pre-agenda meeting, and the determination by the Board, the

parties were offered the opportunity to submit a new appraisal and updated economic analysis. DEP, Millville 1350, and the Environmental Intervenors each filed updated economic analysis.

The Board-directed second pre-hearing conference was held on May 7, 2009, and was attended by representatives from the various parties. From this meeting flowed a July 31, 2009 Scheduling Order, that set an evidentiary hearing date and designated Commissioner Fox as the presiding Commissioner.

On September 23, 2009, a one-day evidentiary hearing was held before Commissioner Fox, limited by agreement of the parties to the cross-examination of the economic reports filed earlier in the year. At the hearing, a number of witnesses were presented for cross-examination, and the parties engaged in a spirited discussion of the proper valuation methodology for the various bids presented both in the original marketing process and in the 2009 updated offer from the DEP. Following the conclusion of testimony, Commissioner Fox set a schedule for the submission of post-hearing briefs.

Post-Hearing Briefs

Initial briefs were due no later than October 30, 2009, and reply briefs, if desired, were due no later than December 4, 2009. Post-hearing briefs and replies were filed by ACE, Millville 1350, the Division of Rate Counsel, DEP, and the Environmental Intervenors.

ACE's initial brief notes that the petition for review and approval under N.J.S.A. 48:3-7 was filed in 2002, and was based upon a 1999 decision to advertise and sell the property. According to ACE, 6 offers were received on the property, but three of those offers were considered "not serious" and were dismissed. Of the remaining three offers, the high bidder was Millville 1350, at \$4 million. ACE further notes that the property was again advertised in July, 2001 and January, 2002 at a proposed price of \$4.2 million, but received no response. Accordingly, ACE states that it entered into a contract for sale with Millville 1350 in January, 2002. The contract required a total purchase price of \$4 million, with \$300,00 paid immediately, an additional \$100,000 paid upon the conclusion of an Inspection Period, \$100,000 due each of the first three years from the date of closing, and a balloon payment of \$3.3 million due four years from the date of closing. ACE asserts that the only outstanding condition on closing the deal is final Board approval, and to date a total of \$400,000 has been paid.

In its legal argument, ACE claims that it has satisfied all the requirements necessary for Board approval under the relevant statute such that the Board should immediately approve the transaction. Citing to In re Erie Lackawanna Railway Company, 75 P.U.R.3d 246, 247 (1968), ACE claims that three criteria must be met for the sale of utility property to be approved – the property must no longer be used or useful for utility purposes, now or in the future; the transfer will not have a detrimental impact upon the ability of the utility to provide service; and the sale price is the best price reasonable and represents fair market value. ACE asserts that no authority can be found where the Board has gone beyond these requirements in reviewing a property sale. Thus, ACE believes that the Board should not and need to go beyond these three criteria here. Furthermore, ACE states that of the three criteria, two of them, dealing with the used and useful requirement and the detrimental impact, are not contested by any party. And as to the third element, dealing with the question of the best possible price, the only competition to the Millville 1350 offer is a lower offer made by DEP "years after the Agreement was executed" and thus of no significance. (ACE brief, at 5.) Accordingly, ACE calls upon the Board to approve the sale petition without delay.

Millville 1350 also filed a post-hearing brief. Much as with the filing made by ACE, Millville 1350 notes that the underlying Petition is a relatively simple decision under N.J.S.A. 48:3-7, and that the record in the case has been clear for some time that the criteria for approval have been satisfied. While agreeing with ACE in the majority of the procedural history, Millville 1350 adds details to the discussion, noting that ACE sought an appraisal of the property in 1999, which should a value of \$3.9 million. ACE then sought an updated appraisal in 2002, which indicated a \$3 million "as-is" value, and well as a net present value ("NPV") of the Millville 1350 offer of \$3 million. Beyond that, Millville 1350 makes numerous comments about the delay associated with the Board's process, which have no legal significance and thus will not be further discussed.

As to the legal substance of the argument, Millville 1350 asserts that the Purchase Agreement reflects the best price obtainable and fair market value, without regards to the timeframe considered. Millville 1350 claims that the marketing associated with the sale in 1999 was comprehensive and fair, and, in conjunction with the appraisal reports, provides sufficient foundation for the Board to find that the sale satisfies the requirements of N.J.S.A. 48:3-7. During that process, Millville 1350 claims that DEP submitted an offer of \$2.553 million as compared to the initial offer of \$3 million, and final offer of \$4 million, submitted by Millville 1350. This, according to Millville 1350, is more than sufficient to justify ACE's decision to accept Millville 1350's offer. This was an arms-length transaction, and no party has shown or even claimed collusion or any other form of misbehavior in association with the process. Furthermore, as noted, an appraisal was conducted that showed a NPV on the deal of somewhere between \$2.9 million and \$3.4 million, depending upon assumptions – a value substantially greater than that offered by DEP. Thus, claims Millville 1350, even assuming that DEP had been ready to close on the deal, the Millville 1350 offer was the best that ACE was able to do under the circumstances and at the time. This is, in the words of Millville 1350, "where the matter should have ended." (Millville 1350 brief, at 17.)

Millville 1350 continues on, noting its belief that the economic analysis provided by the other parties has been flawed and does not, in any way, undercut the assertion that the Purchase Agreement reflects the fair market value of the property. The analysis provided by the Environmental Intervenors in 2003, for example, reduces the value of the \$4 million by more than 50%, based upon allegations that certain contingencies are "risky" and by a claim of a loss in lease payments from the utility's affiliate. This risk of contingency, claims Millville 1350, is misplaced, as the only remaining contingency to be satisfied is the approval of the Board; nothing else remains open and nothing else represents any risk whatsoever to the final completion of the sale. Furthermore, the analysis, claims Millville 1350, compared this discounted value to the non-discounted DEP offer of \$2.553 million. The modern analysis, claims Millville 1350, is no better – both DEP and the Municipal Intervenors recently submitted updated analyses that overly discount the Millville 1350 offer while under-discounting the DEP offer, and all fail to recognize the commitment made by Millville 1350 to consummate this deal.

This, coupled with other flaws in the process, the obvious results-driven approach taken by the Environmental Intervenors and the DEP, and the baseless decision to not discount the DEP offer, despite numerous contingencies, makes the analyses provided of no value and thus, claims Millville 1350, they should be essentially ignored in this process. Thus, claims Millville 1350, it has, as it has done at all times throughout the proceeding, proven that the offer provided and accepted by ACE is the best possible offer and should be approved.

The second major argument advanced by Millville 1350 is that the Board can not and should not deny the petition on some type of "public interest" basis or otherwise act as a back-up or substitute to the State's Department of Environmental Protection. Millville 1350 claims that the

other parties in the case have consistently called on the Board to act to deny the Purchase on grounds outside of those that fall within the domain of the Board, such as "public interest" or "environmental" grounds. The Purchase and any associated development are subject to all environmental regulation, and nothing in this Petition changes that, according to Millville 1350. As to the public interest at stake, it is Millville 1350's position that the public interest applies to the public utilities it regulates and the services those entities perform. Asking the Board to function as a State planning board and the Department of Environmental Protection takes this concept of "public interest" too far, in the opinion of Millville 1350. Millville 1350 then cites to two cases where the Board has been reversed in attempts to "overstep[] its authority," and thus implicates that using a "public interest" standard to deny the Petition here would be a similar overstepping of authority.

Finally, Millville 1350 claims that, even if public interest is a proper element to consider in this proceeding, the balancing of those interest are in favor of the Board approving the transaction. The public interest has already been determined in favor of the transaction by the elected officials of Millville through the planning process. The Board simply should not interject itself into this process in this manner. Likewise, the Millville 1350 plan is, contrary to allegations, an environmentally-responsible development, and has been recognized as such by a notably cross-section of interests and groups. As such, even if the Board could and should consider the public interest, that interest calls for approval. Thus, Millville 1350 asks for an immediate approval of the Petition.

The Environmental Intervenors, in their initial brief, call upon the Board to reject the Petition because the sale does not represent the best possible value for the property, fails to recognize the market value, and is in violation of the public interest. The Environmental Intervenors recognize the property as one of the most environmentally sensitive properties in the State, and that its development would threaten woodlands and wetlands vital to the State's interests. This property, according to the Environmental Intervenors, could serve as a key link in a belt of undeveloped and protected land stretching across Cumberland County, and sale would result in an "island" of development in an otherwise pristine environment. Numerous endangered and threatened species are claimed to use or live on the property, and the property borders waterways protected under the federal Wild and Scenic Rivers Act.

The Environmental Intervenors do not significantly differ from Millville 1350 on the procedural history associated with the advertising and promotion of the property, but do highlight that the Company is authorized to cancel the contract for sale if the Board fails to approve the transaction, and notes that Millville 1350 may "walk away" from the transaction without having to pay the balloon payment and that such abandonment would leave ACE without any additional recourse other than to take back the property, in whatever shape it may be in. This speculative nature of the transaction, coupled with the sensitivity of the property, provides the backdrop for the Environmental Intervenors' concern and legal argument.

The Environmental Intervenors claim that DEP made a second offer for the property in March, 2004, offering \$3.4 million in cash. Furthermore, the Environmental Intervenors claim that DEP made a third offer, for \$3.5 million, in March, 2009. These offers are significant, notes Environmental Intervenors, because they represent a better value for the property and come closer to recognizing the value found in the appraisals. Environmental Intervenors note that the appraiser retained by ACE found market values of the property at \$3.9 million in 1999, \$3 million in 2002, and \$4.15 million in 2009. Environmental Intervenors further assert that ACE's appraiser found the 2002 offer by Millville 1350 to be below market value and that the project is no longer financially feasible under current market conditions.

In a similar vein, the appraiser for DEP found a market value of \$2,393,600 in 1999 and \$3.5 million in 2009. DEP's appraiser also found, according to Environmental Intervenor, that the underlying development plan was economically unfeasible. Finally, the Environmental Intervenor note that DEP hired a second appraiser, who found a market value as of 2009 of \$3,635,000 and that the highest and best use for the property would be as "public use of land preservation and passive recreation." (Environmental Intervenor brief, at 14.)

The Environmental Intervenor also discusses the economic reports filed in the proceeding – one each filed by the Environmental Intervenor, Millville 1350, and DEP. The review performed on behalf of the Environmental Intervenor by Steven Gabel in 2003 identified a number of significant risks associated with the Millville 1350 purchase, including a lack of business history and the likelihood of receipt of approvals and the overall completion of the project. Based upon these and other risks, Gabel applied a 15% discount rate to the Millville 1350 offer, and considered this a conservative discount rate. This resulted in a net value of the Millville 1350 offer of \$2.2 million, less than the undiscounted DEP offer. As to the analysis performed by Millville 1350, Environmental Intervenor notes that it found a NPV of between \$2.666 million and \$3.375 million for the Millville 1350 offer, and did not compare it to the DEP offer. Finally, Environmental Intervenor observes that the 2009 DEP analysis found that the DEP offer was the best price obtainable as of the date of the Millville 1350 agreement, after applying a 14% discount to the Millville 1350 offer and a 10% discount to the DEP offer. Based upon these findings, the Environmental Intervenor claim that all of the analyses that looked at both the DEP offer and the Millville 1350 offer found that the DEP offer was higher. These findings were further confirmed by the 2009 updates to the economic analyses, which looked at the DEP 2009 offer of \$3.5 million, and again all three found that the DEP offer was higher under most circumstances.

Following a final discussion on the procedural history, the Environmental Intervenor set forth their understanding of the standard of review in this matter. According to the Environmental Intervenor, the Board must conform not only with N.J.S.A. 48:3-7 dealing with the sale of utility property, but also with N.J.S.A. 48:2-13 on the general supervision of utilities and N.J.S.A. 48:2-16, requiring utilities to comply with State and local laws and ordinances. Furthermore, the Environmental Intervenor note, the Board is charged with regulating utilities in a manner that shall "preserve the quality of the environment and prevent the pollution of the waters, land and air of the State." N.J.S.A. 48:2-23. Much as with Millville 1350, the Environmental Intervenor agree that of the three prong test set forth in In re Erie-Lackawanna Railroad Co., 75 P.U.R.3d 246 (1968), only the third prong dealing with the best price obtainable is in consideration here. The Environmental Intervenor, however, also note the significance of the public interest requirement.

The Environmental Intervenor assert that the Board should deny the Petition because the Millville 1350 contract is not the best price obtainable. Environmental Intervenor agree that the analysis requires a review of the proposed sale price to other, competing offers, and that the risks associated with each transaction must be considered. Here, Environmental Intervenor note that the risk factors between the Millville 1350 offer and the DEP offer are significant and that the structure of the payments must be considered in any analysis. The ability of Millville 1350 to put up a relatively small amount of money to purchase what is essentially an option on the property should, in the opinion of the Environmental Intervenor, significantly discount the value of the offer. This risk, as well as others associated with the completion of the project, can best be reflected in a discount rate that should be applied to the offers to create a fair basis for comparison. Based upon this fundamental understanding, and based upon a significant

discussion, Environmental Intervenor asserts that a risk premium discount rate of no less than 8% should be applied to the Millville 1350 offer to properly reflect the risks associated with payment and completion of the project. The DEP offer, on the other hand, should receive a discount rate of no more than 4%, if any, because of the lack of market or regulatory risk. When compared with these numbers in place, the NPV of DEP's most recent offer is higher than the NPV of the Millville 1350 offer. This 2009 offer is the appropriate offer to consider, claims Environmental Intervenor, because it best reflects the reality of the current situation; nevertheless, Environmental Intervenor asserts that using the 2002 offers would still show a greater NPV for the DEP offer than for the Millville 1350 offer. As such, the Board should deny the petition as it has failed to show that it is the best available price.

Second, Environmental Intervenor claims that the Board should deny the petition because the price does not represent the fair market value of the property. Three separate appraisals were conducted, and they value the Property in 2009 at between \$3.5 million and \$4.15 million, yet the NPV of the Millville 1350 offer is no higher than \$3.375, using the highest valuation of the offer made by Millville 1350's own review. Furthermore, the "cartwheels" that Millville 1350 turns to attempt to reduce the fair market value should be seen as just that and rejected, according to the Environmental Intervenor. In light of the requirement of In re Erie-Lackawanna Railroad Co. that the Board must consider the market value in its review, the Environmental Intervenor calls upon the Board to deny the Petition on this ground.

Finally, the Environmental Intervenor requests that the Board deny the Petition on the grounds that it fails to satisfy the public interest. As an initial element, the Environmental Intervenor asserts that the Board's very purpose is to help ensure the public interest in the context of regulating public utilities. The Environmental Intervenor cites a number of cases for the proposition that the Board can and has considered the public interest in prior actions, and should and can do so at this time. Once that predicate is set, the Environmental Intervenor notes the significant and irreplaceable nature of the property in question, and the biodiversity that resides upon it. The protection of open space is of the highest importance, according to the Environmental Intervenor, and the risk to open spaces and the environment associated with this project is such that the Board can best serve the public interest by denying the Petition. Accordingly, the Environmental Intervenor calls upon the Board to deny the Petition in full.

An initial brief was also received from the DEP. In setting forth its understanding of the procedural history, DEP notes that it made an offer on the property in 1999 of \$2.553 million, which offer was neither accepted nor explicitly denied; instead, in 2002, ACE and Millville 1350 entered into the agreement. In 2009, DEP made a cash price offer of \$3.5 million. DEP claims that both of its offers have a greater cash value than the Millville 1350 offer such that the Board should deny the Petition. In addition, DEP claims that the sale is in violation of the public interest such that the Petition should not be approved.

DEP, in discussing the nature of its offer, notes that the 1999 \$2.553 million offer was based upon the higher of two appraisals and was contingent only upon ACE providing marketable and insurable title, a hazardous waste assessment, and an appropriation of funds. This is in stark comparison to the contingencies associated with the Millville 1350 offer.

In 2009, DEP submitted a new purchase offer at \$3.5 million, which included no significant contingencies and was to be an all-cash deal. In fact, according to DEP, the funds for the purchase do not need to be appropriated as they already exist and have been set aside to acquire the Property.

As with the Environmental Intervenors, above, DEP notes the various submissions in this matter, and the overall understanding that the Millville 1350 offer should be subject to a level of discounting that shows, according to DEP, that the NPV of the DEP offers are higher than the NPV of the Millville 1350 offer.

With this understanding in place, the DEP calls upon the Board to deny the Petition because it does not represent the best price obtainable for the property. DEP observes that the two analyses performed by DEP and the Environmental Intervenors show that the DEP offer has a greater economic value than the Millville 1350 offer, and that the Millville 1350 offer does not reflect the current net present value for the property. As with the arguments presented by the Environmental Intervenors, above, the DEP finds compelling the discount structure set out in the analyses it sponsored and believes that, under any consideration, the value of the Millville 1350 offer is less than the value of the DEP offers and that the Petition must therefore be denied.

Furthermore, DEP calls upon the Board to deny the Petition as being in violation of the public interest. The sale is neither in the public interest economically nor environmentally, and thus it is incumbent upon the Board to disallow the transaction. DEP notes that the Legislature intended the Board to act in the best interest of the public, rather than the best of interest of any limited group, such as the developer or the purchaser. Likewise, DEP claims that the Board should not simply decide the case as though it were still 2002 – the Board can and should, according to DEP, consider the changes in the world and in this case over the years. Here, with a deal that offers less than present market value, in a high-risk development where Millville 1350 can start to build, damage the land, and then simply walk away, the Board can and should work to "effectuate the State's environmental policies, laws and regulations." (DEP brief, at 27.)

Finally, DEP calls upon the Board to reject the submissions made by Guastella Associates on behalf of the Millville 1350 as the foundation for the "expert" opinion is lacking, and the content of the reports are without substance. For all these reasons, DEP requests that the Board deny the Petition and instead direct ACE to sell the property to DEP on the terms outlined in the 2009 offer.

The final party to submit an initial brief was the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel"). In its filing, Rate Counsel notes that while it initially supported the sale, following review of the proceeding, and in recognition of the benefits to ratepayers and citizens of the DEP purchase, Rate Counsel now supports the sale to DEP. Rate Counsel asserts that the sale to DEP represents the highest value to ACE, and on that basis alone the Board should deny the Petition. Rate Counsel notes that even the witness for Millville 1350 acknowledges that the DEP's 2009 offer is higher than that put forth by Millville 1350, and that the Board has a responsibility to ensure that the highest value is obtained for a property sold by a utility. The Board, according to Rate Counsel, has sufficient authority to ensure that ACE accept DEP's 2009 offer of \$3.5 million.

In addition, Rate Counsel asserts that the Board should consider the environmental benefit to ratepayers and citizens of New Jersey when comparing the two offers. The public interest is expressed in the decision by DEP to seek to purchase the property, and the Board should respect that decision. Thus, Rate Counsel call upon the Board to reject the Millville 1350 offer and instead order ACE to sell the property to DEP on the terms outlined in the 2009 offer. (Rate Counsel brief, at 10.)

In keeping with the post-hearing schedule, reply briefs were filed. On December 2, 2009, ACE filed a letter in lieu of brief, adopting the arguments made by Millville 1350, and taking objection

to the request by DEP and Rate Counsel that ACE be required to sell the property to DEP as part of the Board's denial of the Petition. ACE claims that neither DEP nor Rate Counsel cite any foundation for the Board to make such an order because no such support exists. Similarly, the request to force a sale was not before this Board, according to ACE, and thus ACE had no notice. Furthermore, the "offer" made by DEP is incomplete, according to ACE, and is insufficient to form the foundation of a commercial transaction for the sale of property. Finally, ACE claims that the only method for the State to compel the sale of land is eminent domain, a process that has requirements not followed in this proceeding. Thus, ACE asks the Board to reject the request for a forced sale and instead approve the Petition as filed.

On December 4, 2009, Millville 1350 filed its reply brief. Millville 1350 claims that the Board should have made the decision on this Petition some time ago, and that to allow the delay caused by the Board to form the foundation for requiring additional information would be illogical. During that period of time, asserts Millville 1350, the situation may have changed, but very little for the better, and none of those changes have shown that the DEP offer is somehow better than the initial Millville 1350 offer as the various contingencies that existed at the time DEP made its initial offer still exist – DEP's offer is no more definite today than it was when original made. Furthermore, even considering these changed circumstances, Millville 1350 claims that the changes would be of no import – the Millville 1350 offer remains the best offer under the situation and thus should be approved. Millville 1350 distinguishes the cases cited by the other parties on the basis that the lag between request and action in this case is significantly different than that in other cases, and that the delay has been caused by the Board's inappropriate action.

Millville 1350 also claims that the extent of the Board's authority as cited by DEP, Rate Counsel, and the Environmental Intervenors, is without foundation and wrong. The Board's authority over utilities is clear, but this does not then extend authority over environmental issues and to land use questions. Millville 1350 distinguishes the various cases cited by the other parties and concludes that any "public interest" standard that may apply to Board decisions advocates for the approval of this petition, not the denial.

Furthermore, according to Millville 1350, the economic analysis provided by the parties has been flawed from the beginning and reflects inappropriate and wrong assumptions. Millville 1350 claims that the parties have over-considered the risks associated with the Millville 1350 offer and significantly ignored the risks associated with the DEP offer. The DEP offer remains subject to significant conditions, not the least of which is the funding, which consists of \$4 million allocated to 52 different pieces of property, and thus the assertions that the money exists and is ready to go is speculative at best. Likewise, none of the parties recognize the time, effort, and money that Millville 1350 has placed into this process, and the idea that Millville 1350 would simply "walk away" is without foundation. Thus, Millville 1350 calls upon the Board to approve the petition as filed.

Also on December 4, 2009, the Environmental Intervenors filed a letter in lieu of reply brief. Environmental Intervenors made a number of comments and counter-arguments, most notably the idea that the Board may not simply "rubber stamp" the petition, but must instead engage in a substantive and full review. Further, the Environmental Intervenors note that for determining market value, an options contract such as the Millville 1350 offer is insufficient to serve as proof of market value. Likewise, the Environmental Intervenors note that significant economic and environmental impacts could occur in the event of default, that speculative future revenues have no place in the analysis under In re Erie-Lackawanna Railroad Co., the State funding exists and is ready to be use for the purchase, and that the Board should consider current conditions

because the question of the best price obtainable should be considered in light of the best possible information, and artificially constraining that analysis would be an abdication of the Board's responsibility. Finally, Environmental Intervenors reaffirm their belief that approval of the Petition is in violation of the public's interest, as shown by the positions taken by both DEP and Rate Counsel in this matter. Accordingly, the Board should deny the petition.

On December 4, 2009, DEP filed its reply in the form of a letter. DEP notes that no conflict exists on the issue of DEP opposing the petition and then serving as the agency that may consider environmental questions associated with the development of the property, assuming that the petition is approved. DEP is capable and authorized to perform both functions without conflict, and any aggrieved party retains the right to seek judicial review of any action or inaction that may be alleged. Thus, according to DEP, this argument is of no import. Furthermore, DEP notes that money has been explicitly set aside for this purchase, and, in light of Millville 1350's refusal to believe the evidence, provides a certification to that extent.

DEP further notes that Millville 1350 failed to dispel the notion that the transaction is risky and thus deserves the higher discount rate. The nature of the companies, the terms of the purchase agreement, the expectation of future revenues, and the conditions in the contract all point to the proper understanding that the agreement is speculative and deserving of a significant discount rate. Finally, DEP notes that the decision by DEP and its Green Acres program to seek to purchase this property is the true expression of the public interest, and the economic benefits to Millville 1350, the town of Millville, or other entities with financial interests should not guide the Board. Thus, the petition should be denied.

Finally, on December 4, 2009, Rate Counsel filed its reply letter. In its reply, Rate Counsel highlights the fact that all three experts in the case agree that the DEP offer has a greater monetary value than the Millville 1350 offer. Rate Counsel further notes that the State's commitment to preserving open spaces is at an all-time high, and that the Board should consider this. Furthermore, the Board must fully review the petition, may not simply accept Millville 1350's position without examination, and need not consider the costs and efforts that Millville 1350 has spent to its own benefit as part of the analysis. Finally, Rate Counsel reminds the Board of the public importance of the property and asks once again for the Board to deny the petition.

Following the conclusion of the briefing period, Millville 1350 and the Environmental Intervenors engaged in a cycle of correspondence with the Board on assorted issues, including a number of clarifications. Perhaps most significant was the highlighting by Millville 1350 to the Board of the issuance of the decision in I/M/O Centex Homes, LLC Petition for Extension of Services and/or for Exemption from Main Extension Rules N.J.A.C. 14:3-8.1 et seq. Pursuant to N.J.S.A. 48:2-27 and N.J.A.C. 14:3-8.8(a)(4) or (a)(6), 411 N.J. Super. 244 (App. Div. 2009) and Millville 1350's claim of its import. Additionally, Environmental Intervenors responded, setting forth their understanding of the import. While beyond the timeframe set in the briefing schedule, the Board will nevertheless accept these submission.

DISCUSSION

As an initial matter, the Board must acknowledge that this has been an extraordinary process and does not reflect the Board's traditional review of a request by a utility to transfer property. The Board does not usually have parties such as the DEP and Environmental Intervenors seeking to halt the transfer; at worst, the Board sometimes sees disappointed bidders.

Therefore, no party should consider the delay associated with this particular case as a standard approach used by the Board.

As all the parties have acknowledged, the controlling statute on the transfer of utility property is N.J.S.A. 48:3-7(a). That statute states in part:

Except as otherwise provided by subsection g. of this section, no public utility shall, without the approval of the board, sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof; or merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with that of any other public utility.

[N.J.S.A. 48:3-7(a).]

The Board has, through regulation and decision, interpreted this statute to require a public utility to make three specific showings prior to receiving approval for the sale or transfer of utility property. As set forth in In re Erie-Lackawanna Railway Company, 75 P.U.R.3d 246 (1968), the utility must show that:

- (a) The property must be no longer used or useful, presently or prospectively, for utility purposes.
- (b) The sale and conveyance of the property under the terms proposed will not adversely affect the ability of the utility to render safe, adequate, and proper service.
- (c) The proposed sale price is the best price obtainable and represents fair market value for the property.

[Id. at 247.]

The parties in this case have all agreed that elements (a) and (b) above are not implicated in this matter, and that it is (c) that provides the underlying issue. In addition, the parties opposing the sale argue that a "public interest" element is also involved in the case.

Despite the complicated procedural history and the significant briefing in this matter, the ultimate elements of the case are relatively simple. Between 1999 and 2002, ACE advertised the property and solicited bids. After considering the various bids associated with the process, ACE selected Millville 1350 as the winning bid with a \$4 million offer that involved a four-year pay-out and a balloon payment. ACE explicitly rejected a number of other bids and effectively rejected a \$2.553 million bid by DEP by entering into the agreement with Millville 1350. ACE, in its business judgment, believed that the Millville 1350 offer reflected the best possible offer under the circumstances, and that the offer represented the market value based upon arms-length negotiations between unrelated business entities. Following this decision on the part of ACE, a number of entities sought to intervene in the matter based upon the environmental nature of the property and the impact the proposed development might have. This case flowed from those interventions.

Much has been made of the question of what discount rate should be applied in the course of determining the net present value of the Millville 1350 offer versus the DEP 2009 offer, and what

time frame should be used to determine the market value of the property. These questions, however, jump beyond the initial and fundamental issue – before the Board at this time is a 2002 Petition seeking approval of a specific sale agreement. ACE, the utility selling the property, believes that the Millville 1350 offer was the best offer available at the time and reflected fair market value. ACE had the opportunity to consider the DEP offer and rejected it as being too low in value; at no time has any party claimed that ACE's rejection was predicated upon bad faith. ACE reviewed the offers before it in 2002 and chose the offer it considered best. Various parties can and have advocated for any number of different discount rates for multiple reasons, but the final consideration is that, except in rare situations, the Board is hesitant to replace a valid and reasonable business judgment of a utility with its own business judgment. Here, ACE made the business judgment that the Millville 1350 offer, even considering the contingencies, was of more value to the company than the DEP offer. In this particular "battle of the experts," with each party providing different and conflicting discount rates, the Board is inclined to accept the judgment of the party that has the most financial stake in the decision and the most desire to maximize financial benefit – and that is ACE. This is especially true in the situation, such as here, where the property is no longer in rate base and thus the proceeds of the sale will not go to the ratepayers, but instead to the shareholders. As such, the Board HEREBY FINDS that the Millville 1350 offer satisfies the requirements that the sale price "is the best price obtainable and represents fair market value for the property."

Similarly, the Board finds that the review should occur based upon the situation as it existed in 2002, not as it was modified in 2009. ACE submitted its Petition in a timely manner and made its decision based upon the information at its disposal at the time. For the Board to impose an analysis on the deal based upon changes beyond ACE's control seems unfair and inappropriate. ACE is, based upon its litigation position, willing to accept the 2002 offer despite the delay; it is not the Board's role to second-guess that decision. Accordingly, the Board HEREBY FINDS that the review of the offers and fair market value based upon the 2002 submission is appropriate and guiding.

The other major issue is the question of the public interest. It is true that the Board is charged with considering environmental elements in terms of the provision of safe and adequate utility service. N.J.S.A. 48:2-23. Specifically, the statute allows that:

The board may, after public hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and including furnishing and performance of service in a manner which preserves and protects the water quality of a public water supply, and to maintain its property and equipment in such condition as to enable it to do so.

[N.J.S.A. 48:2-23.]

This provision does not, however, grant to the Board the ability or authority to place environmental issues above utility issues. The primary organization for the protection and regulation of environmental issues and concerns is, on the State level, the New Jersey Department of Environmental Protection. As noted in the recent decision, I/M/O Centex Homes, LLC Petition for Extension of Services and/or for Exemption from Main Extension Rules N.J.A.C. 14:3-8.1 et seq. Pursuant to N.J.S.A. 48:2-27 and N.J.A.C. 14:3-8.8(a)(4) or (a)(6) 411

N.J. Super. 244 (App. Div. 2009), the Board must be cognizant of its statutory role, and the recognition that it is primarily an economic regulatory agency. All the Board is doing in this decision is authorizing the sale of a piece of property to a developer. Nothing that the Board does today in any way limits the ability or authority of the New Jersey Department of Environmental Protection to regulate the actions taken on that property and to fully enforce any and all environmental regulations. The Board has absolute faith that the New Jersey Department of Environmental Protection to fully discharge its duties.

Accordingly, based upon the above, the Board HEREBY FINDS that the proposed property to be sold to Millville 1350 is no longer used or useful for utility purposes, that the sale will not adversely affect the ability of ACE to provide safe, adequate, and proper service, and that the sale price reflects the best price obtainable and the fair market value at the time of the agreement. The Board FURTHER FINDS that the proposed sale is in accordance with regulation and law, and accordingly HEREBY APPROVES the sale, subject to the following conditions:

Petitioner shall inform the Board of the date upon which the transaction is completed, within ten (10) days of completion;

This Order shall be of no effect, null and void, if the sale hereby approved is not completed within six (6) months of the date of this Order unless otherwise ordered by the Board; and

Nothing in this Order shall set or in any way limit the exercise of the authority of this Board, or of the State, in any future petition or in any proceeding with respect to rates, financing, accounting, capitalization, depreciation or in any other matter affecting Petitioner.

DATED: 6/21/10

BOARD OF PUBLIC UTILITIES
BY:


LEE A. SOLOMON
PRESIDENT

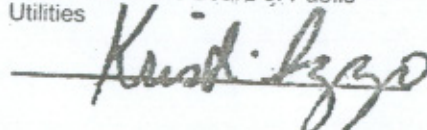

JOSEPH L. FIORDALISO
COMMISSIONER


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



DISSENT OF COMMISSIONER JEANNE FOX

I dissent from the Board's decision to approve the contract of sale of 1,350 acres of land located in the City of Millville and Township of Maurice River, Cumberland County, New Jersey by Atlantic City Electric ("ACE")² to R.W.V. Land & C.M. Livestock, LLC, and to be developed by Millville 1350. I have a number of concerns with the Board's decision allowing this sale to proceed.

The Board has an affirmative duty to review sale of utility land

The Board has the affirmative duty to review contracts of sale for utility owned property. The Court has recognized the expertise of the Board in reviewing such matters and has acknowledged the Legislative intent to instill these administrative reviews and decisions upon the Board. The Court recognized the authority and regulatory power of the Board in Marlboro v. Village Water Co., 72 N.J. 99, 107 (1976), when it stated "on numerous occasions we have acknowledged 'that the Legislature in Title 48 intended to delegate the widest range of regulatory power over the public utilities' to the Board." Thus, the Court believes that the Board can and will thoroughly review matters such as this and the Court will rely on the Board's expertise.

N.J.S.A. 48:3-7(a) requires a utility to seek and receive Board approval prior to selling, leasing, mortgaging, or otherwise disposing of its property. The three criteria necessary for receiving Board approval were established in In re Erie-Lackawanna Railway Company, 75 P.U.R.3d 246 (New Jersey Board of Public Utility Commissioners 1968) and are: (a) the property must no longer be used or useful, presently or prospectively for utility purposes; (b) the sale or conveyance for the property under the terms proposed will not adversely affect the ability of the utility to render safe, adequate and proper service; and (c) the proposed sale price is the best price obtainable and represents fair market value for the property. Id. at 247. Some of the parties have asserted, and I agree, that a "public interest" criteria also exists.

The parties agree that only one of the Erie Lackawanna criteria is at issue in this matter - (c) the finding that the proposed sale price is the best price obtainable and represents fair market value. The Board, in its majority decision, found that the Company's decision on the best price obtainable was reasonable and should serve as the "final word" on the issue. I disagree. The Board's conclusion that the Board should be hesitant to replace the utility's business judgment in this case is incorrect. I believe this is one of those rare situations where the Board's judgment must supersede that of the utility. In the past, the Board has, when necessary, reviewed the business judgment of a utility. See In the Matter of Hackensack Water Company, OAL Docket No. PUC 8172-81, BPU Docket No. 815-447 (January 12, 1983), at 9. where the Board ordered "...that the present circumstances warrant the continuation of the freeze on the salaries of Directors and senior executive staff, on the hiring of additional employees and on charitable contributions until further notice of the Board." The Board has and should step in to review business/management judgment of a utility when necessary to protect the ratepayers and the public interest.³ The contract before us presents such a circumstance - it is unique (for a utility), certainly rare, and possibly unreasonable.

² ACE is a subsidiary of Pepco Holdings (PHI) a Delaware Corporation.

³ The public interest issue will be discussed at length later in this dissent.

In the 18 years I have worked at the Board of Public Utilities, as Regulatory Officer, Division Director, Chief of Staff, Commissioner, and President, I have not seen or heard of a situation such as this. Here, a regulated utility intends to sell an environmentally unique piece of property for development, despite that property being sought by the State of New Jersey,⁴ and with two distinct state agencies, the New Jersey Department of Environmental Protection ("DEP") and the New Jersey Public Advocate Office of Rate Counsel ("RC"), also expressing concerns and objections. Due to the importance of this property to the State of New Jersey, and the questionable viability of this development deal, I have carefully reviewed the evidentiary record, including the voluminous economic reports, appraisals, testimony, briefs and reply briefs, to fully understand this petition and the positions put forth by the Parties before the Board.

Likewise, I have never seen a contract for sale of utility property structured like this where an offer to purchase has been executed providing small payment(s) up front with most of the money as a balloon payment paid years after closing. Even R.W.V.'s consultant, Mr. John Guastella, when asked at the September 23, 2009 evidentiary hearing if he had seen a contractual arrangement for the sale of utility property similar to this one, testified that although he had been involved in a number of contractual arrangements, involving sale of utility property, he could not "...recall any in terms of a scheduled payout." September 23, 2009 Evidentiary Hearing transcript, P. 46 line 23 through P. 47 line 10. Several of the other experts who submitted reports for this matter agree with Mr. Guastella's assessment. Quite simply, this contract is highly unusual for the sale of utility property.

Thus, despite the arguments put forth by the Board in the Order, I believe the majority did not fully consider two issues in analyzing this petition: 1) the failure of the sale to achieve the best price obtainable and represents fair market value, and 2) the effect of the sale on the public good. Further review of these issues will, in my opinion, argue for a different result.

Failure of the sale to achieve the best price obtainable and represents fair market value

At the January 23, 2009 pre-hearing conference, all parties concurred that the disagreement revolved around the economic evaluation of the offer to purchase the property. The parties were directed to submit updated economic data though supplemental economic reports and/or appraisals and an evidentiary hearing was scheduled for September 23, 2009. The majority of the evidentiary hearing testimony focused on the economic value of the property as evaluated through risk factors specific to this transaction and their effect on determining the discount rate and the monetary compensation.

In March 2009, after having the property reappraised⁵, the DEP reaffirmed its continuing interest in the property and, based on that appraisal, submitted a letter indicating an all-cash purchase offer of \$3,500,000. The 2009 economic analyses and reports submitted by the parties in this matter reviewed and evaluated the R.W.V. offer and the 2009 DEP offer to purchase the property. In response to the allegation by R.W.V. regarding DEP's inability to close the deal quickly, DEP subsequently submitted a certification that the funds were available for closing and that they were prepared to close within four months.⁶

⁴ I would like to note that if ACE was selling to the DEP, a government entity, the BPU would not be required to review the sale of the property. N.J.S.A. 48:3-7(a)

⁵ DEP policy is to have a property appraised by a contract appraiser prior to offering to purchase for Green Acres or other state open space programs.

⁶ Certification of Judeth Piccinini Yeany, Administrator of the DEP Green Acres Program, dated December 4, 2009 submitted by the DEP Deputy Attorney General.

Each party submitted appraisals and/or economic reports and supplemental economic reports. The expertise, training and experience of these economic experts is disparate. ACE submitted appraisals by Conover and Associates but no economic reports. R.W.V. submitted economic reports prepared by Guastella Associates, Inc. Mr. John Guastella testified at the evidentiary hearings that he has a mechanical engineering background with no training or education in economics, finance, accounting, land development approvals, financing land development purchases or financing construction of residential projects or environmental science but has limited experience with residential real estate development in regards to establishing water and waste water utilities and in determining the effect of utility rates on in developing real estate. September 23, 2009 Evidentiary Hearing Transcript, Pages 19 to 21.

In addition to several appraisals, the DEP, through its Deputy Attorney General submitted economic analysis reports by Gold Gocial Gerstein LLC, Certified Public Accountants and Business Valuation consultants. Mr. Stanton Meltzer testified on behalf of Gold Gocial Gerstein at the evidentiary hearing. Mr. Meltzer's curriculum vitae,⁷ reveal his degree in economics from the Wharton Business School, 40 + years in practice as a certified public accountant in New Jersey and Pennsylvania with professional accreditation in business valuation and financial forensics with substantial experience with development of residential real estate, golf courses, office buildings, and apartment complexes. Id. P. 87, lines 23-25 and P. 88 line 1.

The Environmental Intervenors submitted economic analysis reports by Gabel Associates; Mr. Steven Gabel testified at the evidentiary hearings. Mr. Gabel's curriculum vitae⁸ identifies a bachelors degree in Economics from the University of Pennsylvania and a Masters degree in Economics from Rutgers University with a public service work history as a BPU economist, BPU Bureau Chief of Electric Rates and Tariffs, BPU Director of the Electric Division and Solid Waste Division, and DEP Director of the Solid Waste Division. He is currently in private practice as an economist providing economic and technical advice and analysis regarding energy, solid waste and environmental issues along with analysis and implementation of business ventures.

It is clear that the experts produced by the DEP and the Environmental Intervenors have stronger credentials and experience directly related to the specific factors involved in this particular transaction and are better able to analyze the best price obtainable and fair market value of the property.

The Board's arguments for approval of the sale fail to recognize the strength of the economic arguments evaluating best price obtainable and fair market value produced by the DEP, Environmental Intervenors and Rate Counsel. These arguments are part of the record in the various economic reports filed and were allowed into evidence by the Board at the Evidentiary Hearing held September 23, 2009. The Board must consider these arguments in relation to its duty to review this proposed contract of sale to ensure that ACE has achieved the criteria set forth in Erie Lackawanna. As the Hearing Officer for the Evidentiary Hearing in September 2009, I heard the direct and cross examination testimony from experts, including Stanton L. Meltzer, for the DEP, and Steven Gabel, on behalf of the Environmental Intervenors, that clearly demonstrated the proposed contract does not present the best value for the property and is not the true market value and that both the original and current DEP offers to purchase the property do.

⁷ Found in the Report of Economic Benefit prepared by Gold Gocial Gerstein dated January 22, 2002 and the report's update dated January 2, 2002,

⁸ Found in the Supplemental Economic Analysis prepared by Gabel Associates dated May 1, 2009

The testimony and/or reports prepared by the contract purchaser and/or developer confirm the fact that the R.W.V. offer is neither the best price obtainable nor fair market value. Testifying on behalf of R.W.V., Mr. Guastella, stated at the evidentiary hearing that "...market value is established by a seller or buyer, both knowledgeable acting in their own best interest to negotiate a price" and that the market value was established through the typical negotiation process, which is exactly the definition of market value." Id. P. 22 lines 9-16. Yet when questioned further he testified that one of the five factors of in determining market value, specifically factor # 5, reads "The price represents a normal consideration for the property sold, unaffected by special creative or financing or sales concessions granted by anyone associate with the sale". Id. P. 22, line 25 and P. 23 lines 1-3. He then went on to testify that he "...can't answer whether it is special or creative" in response as to whether taking back a four year no interest mortgage for \$3.3 million of the purchase price was a special or creative financing or sales concession. Id. P.23 lines 24-25 and lines 11-14. He also testified as previously noted that he had never seen a utility land sale using a structured payout.

Determining market value is one of the factors in analyzing validity of this proposed real estate sale. Yet, as will be discussed below, this is not a normal utility contract sale but is a "special creative financing" that does not necessarily represent fair market value.

In addition, in 2009, ACE'S appraisers, Conover Appraisal Consultants, which has provided three appraisals on the property, found the contract offer by R.W.V. below market value and the project "no longer financially feasible under current conditions."⁹ These current economic conditions identified by ACE's appraisers include a major national and statewide economic downturn, an abundance of senior residential properties available with a decline in the residential housing market and a downturn in the golfing industry resulting in golf courses throughout New Jersey being sold or closed due to lack of profitability.

The Conover report concluded that the proposed sale to R.W.V.

"has an estimated 'cash equivalent' sale price of about \$3,000,000¹⁰ due to the no interest seller financing for four years. The project still has a variety of approvals to obtain and infrastructure improvements prior to the 'first shovel' going into the ground. Most notably, the General Development Plan ("GDP") approvals require Sub-division and Site Plan Approvals for each of the eight phases in the proposed ten year development. The developer said he anticipates additional law suits from environmental groups opposing the project for each of the phased approvals required... the NJDEP has indicated that the subject property should not be included in the updated water and sewer service area plan. Lastly the economy is in a severe recession...our market research indicates that developers are "walking away" from proposed development projects, as well as those already under construction." Ibid.

⁹ Environmental Interveners Brief dated October 30, 2009 paraphrasing the Summary Report of a Complete Appraisal for ACE dated February 10, 2009 by Conover Appraisal Consultants

¹⁰ In 2009 the DEP offered \$3.5 million cash to purchase the property.

Economic experts Steve Gabel and Santon Meltzer concur with the utility appraiser's assessment of the current declining market for residential homes and golf courses.¹¹ The success of the proposed project is speculative at best, and in fact ACE's appraiser Conover and Associates also found the Use of the property to be as a "Speculative Investment".¹²

Both the New Jersey Department of Environmental Protection and the New Jersey Public Advocate, Division of Rate Counsel¹³ recommended against approving the sale of the land by ACE to R.W.V. Specifically, Rate Counsel emphasized that several of R.W.V. and Millville 1350 arguments for approving the sale are neither on point nor germane. These arguments include 1) that if a petition is filed with the Board and meets the bare requirements set forth in the statute, the Board has no discretion to approve the petition; 2) that there is no basis for the Board to second guess ACE's business judgment and 3) the Board should recognize the substantial commitment of expense and effort in meeting the Purchase Agreement contingencies are neither accurate nor relevant arguments in favor of the Board approving the Petition. Rate Counsel argues that "To accept that reasoning would be to ignore the statutory authority charging the Board with the responsibility to examine and insure the integrity of the sale process of utility property for the public benefit. Requiring a petition to be filed, examined by the Board and as in this instance contested, insures ratepayer and New Jersey interests are protected."¹⁴

Secondly, in regards to the business judgment argument, Rate Counsel states to accept this argument "...would be to admit the Board has no jurisdiction or authority under the statute to review the Petition and determine if the proposed sale serves the public interest." *Ibid.* Lastly Rate Counsel argues that considering R.W.V. or Millville 1350's expenses is inappropriate as they do not inure to the public benefit and were not spent in the public interest. R.W.V. and/or Millville 1350 were fully aware that the Offer to Purchase was contingent upon Board approval and that the DEP was keen to purchase and preserve this land; thus, and expenses were taken entirely at their own risk. *Id.* at 4. Any expenses related to the developer seeking land use approvals were for the benefit of the developer. Additionally, Millville 1350 is not a party to the purchase agreement.

In fact, in the West Jersey and Seashore Railroad Company case, the NJ Superior Court agrees with the premise that purchasers of utility land contingent upon BPU approval cannot use their expenses as a hardship to require the purchase be approved nor should the utility accept the first bid if it is not the best price obtainable. The court stated "The railroad's adherence to its 'moral obligation' to appellant, in view of his expenditures in clearing title to the property, in no way mitigates to the interest of the public..." I/M/O Application of West Jersey and Seashore Railroad Company for Approval of the Sale of Land Situate in the City of Camden, Camden County, New Jersey, supra, 46 N.J. Super. at 549 (denying railroads request to sell property to the first, but lower bidder of railroad property).

¹¹ See Gabel and Associates Supplemental Economic Analysis dated May 1, 2009, page 2 and Gold Gocial Gerstein Supplemental Report of Economic Benefit dated September 1, 2009 page 11 and 12.

¹² Summary Report of a Complete Appraisal for ACE dated February 10, 2009.

¹³ The mission of Rate Counsel is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory.

¹⁴ RC Reply Letter Brief December 4, 2009 page 3.

I agree with Rate Counsel's argument and conclusion:

Rate Counsel believes the evidence before the Board demonstrates that the highest monetary value that can be obtained by the utility for the property is the offer by the NJDEP. In addition to the monetary value, the offer by the NJDEP represents additional value to the ratepayers resulting from the environmental benefits in adding to the existing greenway. Therefore, Rate Counsel requests that the Board reject the offer contained in the Petition and order the Sale to the NJDEP on the terms outlined in its most recent offer.¹⁵

This argument is further buttressed by the discussion of risk and the appropriate discount rate. As previously stated, the sale criteria used by the Board arises from the Public Utility Reports case Erie Lackawanna Railway Company¹⁶, a 40 year old case involving regulation of a railway company. That criterion includes 1) property that is no longer used and useful for utility purposes, 2) the transfer having no detrimental impact upon provision of utility service and 3) *the best price obtainable and represents fair market value*.

I find that R.W.V.'s contract is neither the best price obtainable nor fair market value for the property and therefore it is not the best option for Atlantic City Electric Company, its shareholders and ratepayers. The contract is highly speculative due to the number of serious risk factors and time delay involved. The value of the property is determined using a discount rate which analyzes the case specific risks.

Economic expert Stanton Meltzer identified a number of risk factors utilized to analyze and determine the discount rate for this property.¹⁷ The case specific risk factors still relevant are listed below.

The Major still relevant Risk Factors Associated with the RWV Contract¹⁸

1. Atlantic receives \$100,000 at the end of each of the three years following closing and a balloon payment of \$3,300,000 at the end of the fourth year - all with no interest.
2. In the event of default by the buyer prior to final payment, Atlantic retains monies previously paid and does not get the balloon payment from the buyer (\$3,300,000). The balloon payment represents 82.5% of the purchase price.
3. The land is being acquired by the buyer for a specific project and is subject to zoning, site plan and subdivision approvals, required state and local permits and a payment of \$1,175,000 in lieu of constructing affordable housing. Many financial, financing, economic and market driven factors could diminish the feasibility of the project during the timeframe of the installment payments or at the time of the final balloon payment.

¹⁵ RC Letter Brief to the Board dated October 30, 2009, P. 10.

¹⁶ In re Erie Lackawanna Railway Company, 75 P.U.R.3d 246 (1968)

¹⁷ Gold Gocial Gerstein Report of Economic Development dated January 22, 2002, page 7.

¹⁸ Mr. Meltzer's factors 1-3 have been removed as they are no longer relevant. The list of factors has been renumbered.

4. Buyer, a limited liability company, may or may not have the financial capability to make the required payments at their due dates. The contract does not provide for personal guarantees of the individual principals of R.W.V. The developer is a different entity, Millville 1350, LLC.
5. Allowance grace periods reflected in the contract could extend the time of the payments due under the contract with no interest.
6. Eighty-two and one-half percent of the purchase price is not payable until four years after closing with no interest.
7. In the event of default by the buyer, the costs incurred by Atlantic may be significant.
8. Any attempt to sell the mortgage held by Atlantic would command a high discount since the mortgage bears no interest and 82.5% of the mortgage is a balloon payment.

Major Risk Factor Associated with the Offer by the DEP

1. Appropriation of the funding for the project which is relatively certain.

In regards to the only DEP risk factor, it should be noted that the DEP Deputy Attorney General submitted a Certification to the BPU on December 4, 2009 that the appropriation for this purchase had been approved and the funds are deposited in an earmarked account and will not be dispersed from the account "...until the outcome of these proceedings is final and non-appealable." ¹⁹

The Original DEP offer has a greater maximum benefit and is the best price obtainable and represents fair market value

Using a discount rate determined with these factors, Mr. Meltzer opined that the *original* August 1999 DEP offer of \$2,553,000 for the property had a greater maximum economic benefit to ACE than the \$4,000,000 offer made by R.W.V. In fact, the discount rate of DEP's original offer of \$2,467,000 represented a higher price offer to ACE by \$206,178, compared to the discount rate offer of \$2,260,822 by R.W.V.

Mr. Gabel also concluded that the original DEP offer was the best price obtainable in his December 2003 report stating that based upon the DEP offer of \$2,553,000, the net present value of the Millville 1350 offer was \$1,850,000 or approximately \$700,000 less than the existing DEP offer. ²⁰

The discount rate was calculated by both Mr. Meltzer and Mr. Gabel using the pertinent risk factors identified above. R.W.V. expert Mr. Guastella did not consider the numerous risk factors specific to this particular transaction and seems to have utilized a utility discount rate without any supporting foundation, I believe it is inappropriate to use any discount rate without taking into account the major risk factors explicitly related to the terms of the contract of sale. The developer is not a utility and should not be utilizing the utility discount rate. There is certainly more risk here than with a typical utility investment. The risk here is with the purchaser and its speculative investment.

¹⁹ December 4, 2009 DEP Certification, Page 2.

²⁰ Gable Associates Economic Analysis December 1, 2003, Page 2.

In analyzing the offers available to ACE in 2009, it is clear from the briefs submitted that all the parties, regardless of the discount rate applied, agree that the offer by the DEP represents the highest monetary value for the property of ACE. Rate Counsel noted that "In rendering an opinion regarding a Comparison of the Millville 1350/Atlantic Transaction with DEP's Offer 'the Guastella Associates Supplemental Economic Analysis offered evidence by Millville 1350 admits that the offer by then NJDEP is 2.8% more than that offered by its client using a 5% discount rate. The Environmental Interveners prepared Table 3 (p. 19, Environmental Interveners Brief) that compares the three expert opinion reports and constitutes evidence before the Board demonstrating that then NJDEP offer represents the highest monetary value for the property.'" ²¹

Source	"As of" Date	Value of DEP's offer	Value of RWV's contract	Difference
Gable 2009	May 1, 2009	\$3,500,000	\$2,187,000	DEP higher by \$1, 313, 000
Meltzer Supp.	September 1, 2009	\$3,408,202	\$2,638,377	DEP higher by \$769,825
Guastella 2009	Current Date	Approx. \$3,300,000	\$2,666,000 \$3,375,000	From DEP higher by \$634,000 to RWV higher By \$75,000

Table 3: Net Present Values of R.W.V.'s offer as compared to DEP's 2009 Offer ²²

As previously stated, the original DEP offer was the best price obtainable at that time; however the DEP current cash offer of \$3.5 million made on March 23, 2009 and currently pending is the best offer for the property. The R.W.V. offer of \$4 million contains numerous contingencies such as a payment schedule that allows for a few small payments over several years, allowing the buyers the option to walk away from the project prior to making the balloon payment; and no provision that R.W.V. would have to restore the property back to its original state or provide funds for ACE to do so ²³ if it reneged.

The property purchaser is R.W.V. and the developer which has sought and received preliminary land use approval is Millville 1350. Both companies are Limited Liability Companies whose principals are not identified in the record and are companies whose financial stability cannot be determined. Mr. Gable noted that "the Buyer is a private company that has been formed as a Limited Liability Corporation. The level of financial risk is uncertain since we were unable to obtain a Dun & Bradstreet report on the subject organization. ...We note that a different entity, Millville 1350 LLC, has claimed that it is the purchaser and is the applicant for local planning board approvals, so it appears the R.W.V. is not able or willing to pursue the development itself." ²⁴

²¹ RC Reply letter Brief dated December 4, 2009,

²² Environmental Interveners Brief, P. 19.

²³ Once the land is cleared it loses considerable value to the DEP as a second potential buyer.

²⁴ Gable and Associates Economic Analysis dated December 1, 2003, P. 3.

Millville 1350 is not a party to the agreement to purchase and given the poor economic climate for residential developments, the possibility exists that it may walk away from the transaction with no penalty. As an LLC, there is no data as to either company's financial soundness to allow the Board to ascertain whether the assets exist to purchase the property or construct the proposed development. And the special structure of the agreement leads me to the conclusion that it will probably be necessary for the developer to build and sell homes over the first four years before being able to make the \$3.3M payment (82.5% of purchase price).

R.W.V. is not contractually obligated to ACE to complete the development project. The developer's contract offer to purchase transfers the risk of the real estate developer business to ACE and its ratepayers. This sale is unique for, and atypical of, utility company land sales in that the full payment is not made at closing, the deferred payment is without interest, the buyer has the option to walk away from the deal anytime and ACE has no legal recourse if they walk after the closing and before the final \$3.3 million payment four years later.

The DEP offer is \$3.5M cash at closing to be held in four months. ACE could collect the money at closing and obtain 4 years worth of interest without taking the speculative risk of relying on the current real estate market.

The contract price, discounted over a 4 year period, is lower than the fair market value of the property and is not the best price obtainable, as noted by the utility's experts, Brian and Patrick Conover.²⁵ The DEP economic expert, Stanton Meltzer, states in his supplemental economic report "Based on the discussion, assumptions and calculations contained in this report, it is our opinion that the economic benefit to be derived by Atlantic City Electric as of September 1, 2009 from R.W.V. and from the DEP is: from R.W.V. Land and C.M. Livestock LLC - \$2,638,377; from the DEP \$3,408,202.00."²⁶ The Environmental Interveners economic expert Steve Gabel concluded that "the offer for an upfront payment for the property from the NJDEP Green Acres Program is clearly a better value for Atlantic and its customers than the risky payment stream contained in the R.W.V. proposal."²⁷

The standard for review of a petition for sale of utility property is not simply that the sale price reflects the fair market value of the property but that it also be the best price obtainable. The Atlantic petition does not meet this standard.

The recent March 23, 2009 offer of \$3.5 million from the Department of Environmental Protection, Office of Green Acres is a better value than the proposal to sell the property to R.W.V. Land & C.M. Livestock, LLC because it yields more value and is considerably less risky. The DEP offer is an upfront payment with little or no contingency, while the Buyer's offer has significant contingencies and is paid, at best, over a four year period after closing."²⁸

²⁵ A Summary report of a Complete Appraisal of The Proposed Preserve at Holly Ridge..., by Conover Appraisal Associates, LLC, dated February 10, 2009, P. 4.

²⁶ Gold Gocial Gerstein LLC Supplemental Economic Report dated May 2009, Conclusion P. 13.

²⁷ Gabel and Associates Supplemental Economic Analysis filed in May 2009, P. 6.

²⁸ Ibid.

The approved City of Millville General Development Plan is for 900+ age-restricted housing units and a golf course.²⁹ ACE's own appraiser, Conover Associates, clearly indicated in 2009 a decline in the residential market, particularly in the age-restricted housing arena. Conover opined "Our market research indicates that developers are 'walking away' from proposed development projects, as well as those already under construction."³⁰ Their report then highlights two large residential projects, one a 614 unit "Active Adult" or senior housing single family residential project, that have been abandoned in the Millville area after development and even construction had begun.³¹

In 2009, the NJ Legislature's recognition of the state-wide declining senior housing market led to the adoption of N.J.S.A. 45:22A-46.3. This statute allows for developers to convert their finished but unsold senior housing developments to open residential developments if 20 percent of the development is dedicated to affordable housing, bypassing the local municipal land use board approvals. In addition, the news has been rife with accounts of golf courses being closed or sold statewide due to non-profitability. These New Jersey land use issues clearly are pertinent to this transaction and significant risk factors affecting the Millville 1350 development.

From the record, I find it clear that the R.W.V. contract's net present value – or the actual economic benefit – is substantially lower than its face value and lower than the other offer on the table. R.W.V.'s "contract" is really more of an option to purchase and results in the transfers the risk of the real estate development business onto ACE and its ratepayers.

One of the primary purposes of the BPU is to monitor and ensure the utility companies for fiscal soundness and ratepayer protection. Although this property was determined no longer used and useful to Atlantic City Electric and therefore no longer included in rate base calculations, the Board must evaluate the fiscal soundness of the utility's decision. Certainly the deal struck by ACE and R.W.V. raises questions because of the highly unusual offer to purchase with special creative financing granted to R.W.V. by the Seller, ACE including an open ended contingency to allow a withdrawal without penalty by the developer purchaser after the purchaser significantly alters the physical topography of the property. The end result would be an altering of the property value to future potential purchasers should the deal fall through.

After reviewing the economic analyses, and as set forth above, it is apparent the actual economic benefit is greater for the outstanding DEP cash offer. If the Board considers only the 1st DEP offer, the Board should consider the public good factors as well as those factors in the best interests of the public at large, the utilities and ratepayers. It is clear that the DEP offer is the better offer.

Board must consider Public Good and what is in the Public Interest

The sale of this property to developers directly affects the public good now and for future generations. The Board in In Re Jersey Central Power and Light Co., Docket No. 795-427 (June 18, 1979), declared that in a utility managerial matter,

"Because utility property remains private property, a regulatory commission is often precluded from exercising its authority in a way which would interfere with those important rights and

²⁹ The General Development Plan also requires Planning Board sub-division and site plan approvals for each of eight phases of the 10 year development.

³⁰ Complete Appraisal prepared by Conover Appraisal Associates dated February 10, 2009, P. 3.

³¹ Ibid

incidents of private ownership vested in management: nevertheless wherever the policy of a utility company's management collides with the public interest, such rights and incidents of private ownership must yield to the paramount concerns of the state."

N.J.S.A. 48:2-23 states the Board may require a public utility to furnish service that "tends to conserve and preserve the quality of the environment and prevent the pollutions of waters, land and air of this State". Additionally the Court has determined that the BPU has a responsibility to ensure that utility transactions consider and serve the public good. In Board of Public Utilities v. Valley Rd. Sewerage Co., 154 N.J. 224, 240 (1998), the court stated "Unlike other corporations, however, utilities are subject to a special obligation to serve the public interest....the Legislature has entrusted the BPU with the responsibility of assuring that utilities fulfill that obligation."

In its 1999 offer, the DEP clearly outlined its position that the public interest was best served by purchasing this property, particularly when "...the State of New Jersey, in partnership with private conservation organizations, [has] created a continuous greenway which now includes NJDEP's Menantico Ponds and Peaslee Wildlife management Areas, as well as The Nature Conservancy's Menantico Creek and Manumuskin River Preserves." ³² The offer went on to highlight that purchase of the property represented an opportunity to balance environmental and economic interests by using the conference center as an environmental education center and the site as an ecotourism draw. The DEP reiterated its position when it stated in the 2009 offer that the purchase "...would result in the permanent preservation of the property and would help achieve a number of Department priorities including the protection of critical wildlife habitat and water resources, and providing for public use and enjoyment." ³³

This property is located in a pristine area identified by the New Jersey State Planning Commission as a Planning Area 5 or "environmentally sensitive area". The attributes of this environmentally sensitive area were described by former DEP Assistant Director Jose Fernandez.

"The Maurice River runs through this property which sits between two National Wild and Scenic Rivers, the Manumuskin River and Menantico Creek and has State Critical and Endangered and Nongame Species Habitat on either side of the Maurice River. These habitats are used for foraging, living, and nesting, for 71 species of breeding birds and 9 species of migratory birds, including several endangered or threatened species of birds and amphibians, including the Bald Eagle, the Barred Owl, Cooper's Hawk, Red-Headed Woodpecker, Pine Barrens Tree Frog and Northern Pine Snake. Seven protected plants are also found on the property." ³⁴

The DEP has wanted to buy the property for Green Acres for over 10 years, covering several administrations, because it connects these two environmentally sensitive properties. This area is unique in New Jersey as it is "the missing link of a larger national preserve". ³⁵ In 2007, then

³² DEP 2009 \$3.5M offer to purchase dated March 2009.

³³ Ibid.

³⁴ Jose Fernandez, former Assistant Director of the NJ DEP Division of Fish and Wildlife Declaration submitted in 2003 at pages 1-5.

³⁵ Ibid.

DEP Commissioner and current Administrator of the Environmental Protection Agency, Lisa Jackson wrote:


[T]he permanent preservation of this key site would permanently provide recreation opportunities, protect water quality and quantity and sustain exceptional flora and fauna for the citizens of New Jersey. In contrast, the development of this site would represent a loss to the public that would be felt for generations to come.³⁶

It is my belief that sister state agencies should coordinate their activities and be supportive of the interests, policies and regulations of other NJ state agencies who are also responsible for the public interest. Protecting a resource of this caliber is important to the state, especially when a sister agency feels strongly about it and clearly the DEP does. The DEP Green Acres program, which wants to purchase the property, was established as a specific public good for the residents of the state of New Jersey and has been continuously supported by the public, most recently in November 2009. Thus, preservation of this extraordinary habitat is clearly in favor of the public good and in the best interests of the public. This compliments the Board's mission to protect the ratepayer's interests in such matters.

Conclusion

I find that, based on the record, the current 2009 DEP offer is the best price obtainable and represents fair market value for this property. While there is no statutory or case law to support the majority's finding that the Board review of this matter should be confined to the offer as it existed in 2002, the 2002 DEP offer was still better than the developer's offer based upon the record. As presiding Commissioner and Hearing Officer, I dissent from the Board's decision in this matter, and believe instead the Board should have denied the petition of Atlantic City Electric to complete the offer to sell the property to R.W.V. ACE would then have been able to accept the better cash offer of the DEP.

As is often said, "A bird in the hand is worth two in the bush." Here, cash in hand, without the risk of significant contingencies such as the City of Millville Planning Board approvals, future DEP applications for permits and sewer approvals and the contingency that the R.W.V. may walk away from the deal leaving the property in some unknown condition, is more valuable to ACE, its ratepayers and, in this particular case, the public good for all New Jersey residents.


JEANNE M. FOX
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

³⁶ Letter from Commissioner Lisa Jackson to Jeanne Fox, President of the Board, August 9, 2007.