Agenda Date: 08/18/10
Agenda Item: 9A

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

IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES N.J.A.C. 14:3-8.1 ET SEQ.	)	ORDER NON-DOCKETED MATTER

(SERVICE LIST ATTACHED)

BY THE BOARD[1]

The New Jersey Board of Public Utilities ("Board") will address issues arising from the Appellate Division decision In re Centex Homes, LLC Petition for Extension of Serv., 411 N.J. Super. 244 (App.Div. 2009) ("Centex Decision") relating to the Main Extension Rules at N.J.A.C. 14:3-8.1 et seq.

PROCEDURAL HISTORY

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

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

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

Under the Board's prior Main Extension Rules, if an extension would produce sufficient revenues over a specific period of time to justify the construction of it, the utility provided the extension free of charge or after the payment of a refundable deposit. Under the March 2005

[1] Commissioner Elizabeth Randall recused herself in this matter and did not participate in the discussion or vote.

rules, extensions to serve Designated Growth Areas continued to be addressed using these same basic principles although the criteria for determining if sufficient revenues would be produced was modified. However, in Areas not Designated for Growth, utilities were (with limited exceptions) now prohibited from contributing to the cost of a utility extension and therefore, applicants were required to pay the full cost of the extension as a non-refundable contribution in aid of construction.

On December 30, 2009, the Appellate Division issued a decision In re Centex Homes, LLC Petition for Extension of Serv., 411 N.J. Super. 244 (App.Div. 2009). In the Centex Decision, the Appellate Division agreed with Centex that the Board's interpretation of N.J.S.A. 48:2-27 is inconsistent with the function of that statute, as clarified in prior decisions, and is ultra vires. Significantly, the Court noted that where N.J.S.A. 48:2-27 confers a duty on the BPU to order that utilities pay for extensions, the Main Extension Rules prohibit voluntary payment where the project is within an Area Not Designated for Growth.

In light of the Centex Decision, the Board issued a Secretary's letter on March 24, 2010 advising that the Board will analyze all applications for main extensions made on or after December 30, 2009 pursuant to N.J.S.A. 48:2-27 by applying the applicable suggested formulae at N.J.A.C. 14:3-8.9 through 8.11, if all other statutory criteria are met. N.J.A.C. 14:3-8.1 et seq. The Board directed utilities to process an application for an extension as if it is in a Designated Growth Area[2] under N.J.A.C. 14:3-8.1 et seq.

On April 28, 2010, the Board issued an Order in In Re Centex Homes, non-docketed matter, directing that utilities shall calculate deposit agreements for that project as if it was located within a Designated Growth Area. The Board further directed the utilities involved to meet with Centex Homes within 30 days. Finally, Centex was required to notify the Board in writing whether any outstanding issues remained after seventy-five (75) days.

Furthermore, on May 3, 2010, the Board issued a Notice seeking comments on how the Centex Decision would be applied; and specifically whether the Centex Decision should be given retroactive effect. This Notice was published on the Board's website and forwarded to potentially interested parties, including the utilities, persons who had filed Main Extension petitions before the Board, the Division of Rate Counsel ("Rate Counsel") and the Office of Smart Growth. The Notice outlined five specific areas of inquiry for public input, accepting written comments until May 28, 2010. The five areas of inquiry were:

1 How should the Board treat matters filed with the Board pursuant to the Board's Main Extension Rules at N.J.A.C. 14:3-8.1 et seq. which were pending at the Board on December 30, 2009?

2. How should the Board treat matters filed and decided by the Board, prior to December 30, 2009, pursuant to the Board's Main Extension Rules at N.J.A.C. 14:3-8.1 et seq.?

3. How should the Board treat completed main extensions pursuant to the Board's Main Extension Rules at N.J.A.C. 14:3-8.1 et seq. where no matter was filed or pending with the Board prior to December 30, 2009?

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[2] In directing that any project be treated as if it is in a "Designated Growth Area" pursuant to N.J.A.C. 14:3-8.1 et seq. the Board is implementing those portions of the Board's Main Extension Rules that do not prohibit utilities from financially contributing to the cost of a main extension. The Board does not purport to make any judgment or change as to the State Development and Redevelopment Map or any planning area designation made by the State Planning Commission. Nor does this Order affect any statutory or regulatory obligations upon any party seeking a Main Extension.

4. How should the Board treat main extension deposit agreements between utilities and applicants pursuant to the Board's Main Extension Rules at N.J.A.C. 14:3-8.1 et seq. where no matter was filed or pending with the Board prior to December 30, 2009?

5. What are the costs to applicants and utilities associated with giving the Centex Decision retroactive effect?

The Board received comments from the following parties:

1. New Jersey Builders Association ("NJBA")
2. Toll Brothers, Inc. ("Toll Brothers")
3. New Jersey Future ("NJF")
4. CJS Investments ("CJS")
5. Amleed, Inc. ("Amleed")
6. Foxmoor Homes ("Foxmoor")
7. Gudz Realty LLC ("Gudz")
8. Richard and Nancy Galimi (the "Galimis")
9. William Jensen ("Jensen")
10. J & S Development ("J & S")
11. Mark and Cathy Esser ("Esser")
12. Jim Novick and Nicole Hagner ("Novick")
13. John Griffith ("Griffith")
14. Mark and Lina Gelvan ("Gelvan")
15. Division of Rate Counsel ("Rate Counsel")
16. The Utility Coalition ("Coalition")
17. Jersey Central Power & Light ("JCP&L")
18. New Jersey Natural Gas Company ("NJNG")
19. New Jersey American Water Company ("NJAW")

PUBLIC COMMENT

General Comments

NJF urges the State to enact legislation authorizing state agencies and state entities to use the state plan. Gudz's comments focus on confusion regarding the current state of the law and requests a ruling from the BPU regarding the application of the Centex Decision. William Jensen commented about the fact that he previously paid money for an extension that may have been subject to an agricultural exemption under the Board's prior rules. Mark & Cathy Esser indicate that their extension was paid for and completed after December 30, 2009.

Comments in Support of Retroactive Application of the Centex Decision

The New Jersey Builders Association, Toll Brothers, CJS Investments, Amleed, Inc., Foxmoor Homes, Richard and Nancy Galimi, J & S Development, Jim Novick & Nicole Hagner, John Griffith and Mark & Lina Gelvan submitted comments generally arguing that the Board should apply the Centex Decision to all projects retroactive to 2005 when the relevant portion of the Main Extension Rules became effective. These developers and/or homeowners specifically asked that the Board apply the Centex Decision to their project(s). Griffith notes that even though he replaced an existing structure, his extension costs included installation of a transformer. Additionally, NJNG submitted comments in support of retroactive application of the Centex Decision. NJNG asserts that the burden to request a refund should be placed on prior applicants, not the utilities.

In addition to providing general support for retroactive application of the Centex Decision, Toll Brothers argues that this matter should be analogized to cases where governmental entities improperly collected a fee rather than retroactivity in the context of civil litigation. In this regard, Toll Brothers cited cases that it believes support its position that it should receive a refund. Specifically, Toll Brothers argues that "when a tax already collected [is] set aside by judicial decision, the law raises an assumption to refund the money." (citing In re Fees of State Board of Dentistry, 84 N.J. 582, 585-86 (1980)). Finally, Toll Brothers argues that utilities would not be financially harmed by providing refunds as any monies can be recovered from ratepayers.

Comments in Opposition to the Retroactive Application of the Centex Decision

Rate Counsel submits that retroactivity would bring about inequitable results such as unjustified developer bonuses, the imposition of excessive expenses on ratepayers, and the undermining of public policies. Moreover, retroactively applying Centex would not advance the original intention for the Main Extension Rules. Rate Counsel cautions that reimbursement using a formula intended to promote Smart Growth developments maintains an incentive where the Board has no authority, thereby providing developers with undeserved rewards. In order to avoid such consequences, Rate Counsel requests that the Board amend its Main Extension Rules and calculate any reimbursement under its pre-2004 formulae.

Rate Counsel further submits that parties with pending matters should be required to show reasonable reliance (namely that a developer anticipated reimbursement from a utility for the cost of utilities and prepared financial projections for the project accordingly) and that they have not otherwise recovered the costs of utility infrastructure installation. If retroactivity is considered for parties who never applied for a reimbursement, these parties should have to prove reasonable reliance, economic damages, that they have not otherwise recouped their expenses, and that reimbursement would not have a significant impact on ratepayers.

Finally, Rate Counsel asserts that all parties relied upon the then existing Main Extension Rules, the rules were not challenged at the time of their promulgation, all parties made significant decisions in reliance on the then existent rules, and that developers likely otherwise recovered these infrastructure costs. Finally, Rate Counsel indicates that the Board was attempting to support important public policy considerations.

The Coalition asserts that significant legal, economic, operational and public policy concerns militate against applying the Centex Decision retroactively. The Coalition believes that the operative date for discussing retroactivity should be the Board's January 20, 2010 Secretary's letter. The Coalition cites the risk of developers double recovering refunds recouped through home sales. The coalition asserts that retroactive application of the Centex Decision could include a reduction in the recovery formula and require repayment by persons receiving refunds in Designated Growth Areas. The Coalition asserts that retroactively resetting the Board's formula for service extensions would also violate the "filed rate doctrine". The Coalition further asserts that retroactively applying the Centex Decision would create significant administrative hurtles, and could interfere with a vested right or cause manifest injustice. Additionally, the Coalition asserts that where no matter was filed before the Board, it would be difficult to fully understand the motivations behind a party's decision to sign a service extension agreement. Finally the Coalition notes that any costs associated with providing refunds would be borne by ratepayers through higher rates.

JCP&L opposes retroactive application of the Centex Decision. If the Board considers applying Centex Retroactively, JCP&L believes that the Board should reinstate the Main Extension Rules that were in effect prior to March 20, 2005. JCP&L further believes that any process to

implement retroactive application of the Centex Decision should require applicants to seek refunds from the utility and the Board should not impose an arbitrary deadline for providing refunds.

NJAW concurs with the Coalition's comments and further asserts that refunds to certain developments in Designated Growth Areas may have to be recaptured. Finally, NJAW expressed concern over the future application of the Main Extension Rules to the Water industry.

DISCUSSION AND FINDINGS:

In considering the retroactivity issue in light of the Centex Decision, the Board must consider the significant economic, legal, operational and public policy concerns involved. Although the Appellate Division declared that the Board's interpretation of N.J.S.A. 48:2-27 is inconsistent with the function of that statute and is *ultra vires*, it did not articulate curative instructions regarding the Board's Rules at N.J.A.C. 14:3-8.1 et seq. Further, the Board notes that in the Centex Decision the Appellate Division explicitly recognized that under N.J.S.A. 48:2-27 "[u]nquestionably , the BPU enjoys a measure of discretion to promulgate and enforce rules that regulate service extensions." Centex, Supra, 411 N.J. Super at 261.

In determining whether a judicial decision should be given retroactive effect, the NJ Supreme Court has followed the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), in adopting a three-factored test for determining retroactivity. That test requires consideration of (1) the purpose of the new rule and whether it would be furthered by retroactive application; (2) the reliance placed on the old rule by those charged with administering it; and (3) the effect that retroactive application would have on the administration of justice. Williams v. Bell Tel. Labs. Inc., 132 N.J. 109, 122 (1993) (citations omitted); See also Glukowsky v. Equity One, Inc., 360 N.J. Super. 1, 49 (App.Div. 2003) rev'd on other grounds by 180 N.J. 49 (2004). In civil cases, the general rule is that a new ruling shall apply to all cases that have not reached final judgment. Williams v. Bell Tel. Labs. Inc., 132 N.J. 109, 122 (1993) (citations omitted)

In this case, the Court's ruling has resulted in the Board directing utilities to eliminate its distinction between Areas Designated for Growth and Areas Not Designated for Growth in applying its main extension rules. Through its Secretary's letters, the Board has directed utilities to treat any extension since December 30, 2009 equally. The Board has advised all utilities to process main extension applications in areas not designated for growth as if they are located in a Designated Growth Area under N.J.A.C. 14:3-8.1 et seq. Until such time as the Board amends its rules utilities should process an application for an extension in areas not designated for growth, as if it is in a Designated Growth Area under N.J.A.C. 14:3-8.1 et seq The Board will subsequently amend its rules to reflect its current policy and the Centex Decision. Additionally, parties have relied upon the existence of the designated growth / non-designated growth distinction in various ways. Utilities have indicated that they relied upon these rules and that any retroactive application would result in an increase in costs to ratepayers. These rules may also have influenced whether a developer pursued a project in a particular area of the state. Additionally, as noted by Rate Counsel and the utilities, the costs paid by developers would be passed on to the purchaser when the property is sold. The result of refunding contributions in aid of construction that were not refundable prior to the Centex Decision would likely enrich the developer, not make a developer whole for expenses it incurred.

An additional factor that must be considered by the Board is the impact of retroactive application on the administration of justice. Were the 2005 amendments to the Main Extension Rules thrown out in toto, the utilities would be required to provide significant refunds, as well as collect inappropriately refunded money from certain parties. Even limiting the decision to the

designated growth / non-designated growth distinction in the rules, full retroactive application would seriously impact the administration of justice. In addition this would re-open numerous matters and private contracts which are long closed and on which no appeals were taken. Additionally, many new cases would be created, significantly impacting the administration of justice.

The Board notes that notwithstanding Toll Brothers' contention that service line costs are a fee, the Board's decision today does not address a fee paid to the Board or the State, but addresses Rules which impacted contracts between utilities and applicants seeking a main extension. Generally, these parties entered into a contract regarding the cost of the Main Extension. All moneys were paid to the utilities. Objections to these contracts and payments made there under could have been promptly made through petitioning the Board or other forum, including appellate review. Even if these costs constituted fees, an adoption of pipeline retroactivity by the Board is consistent with Board of Dentistry and its progeny, regarding the appropriateness of refunds where persons voluntarily complied and otherwise failed to protest or pursue redress. Those who pursued a claim or appeal which was pending will receive appropriate redress pursuant to pipeline retroactivity. The non-pending parties failed to take appropriate actions, instead voluntarily complying with the then existing rules. Unlike In re Fees of State Board of Dentistry, 84 N.J. 582, 585-86 (1980), no challenge or appeal was pursued by a representative body when the rules were adopted, nor did individuals pursue redress when the rules impacted a particular non-pending party.

As previously stated, a full retroactive application of the Appellate Division's opinion would result in significant re-opening of concluded matters and contracts. Additionally, full retroactive application of this decision could result in applications by utilities to recover monies refunded to applicants in rate base. While the success of this litigation is uncertain, such issues would be opened for the first time or concluded matters would be re-opened before the Board, notwithstanding the fact that these parties failed to pursue judicial relief.

Furthermore, there are certain practicalities which come into play should the Centex Decision be applied retroactively. Retroactive application include substantial legal, accounting and rate-making challenges with respect to just how previously collected deposits and contributions in aid of construction ("CIACs") would be recalculated. Most significantly, ordering utilities to refund CIACs to developers may cause some ratepayers to pay twice for developments—first, by purchasing a development property at a price which incorporated the main extension costs and second, by paying higher utility rates which may result if developer monies are refunded because utilities will likely seek to include the refunded amounts as utility plant in service, rather than CIACs, in their next rate cases and earn a return on this plant.

The Board seeks to move forward in a manner that accords due deference to the Centex holding in light of the independent business decisions made by developers, individuals and utilities as well as filed tariffs, prior Board Orders and other determinations in the service extension area. The Board also seeks to balance the interests of all parties, including ratepayers. On balance, the Board believes that any retroactive application has great potential for severe administrative problems and regulatory havoc. This would be particularly true were the Board to determine that retroactive analysis requires the re-evaluation of the refund formula. As stated in Rahway Hospital v. Horizon Blue Cross Blue Shield of New Jersey, 374 N.J.Super. 101,112 (App. Div. 2005), a regulation may apply retroactively only if the agency or Legislature has either explicitly or impliedly expressed such intent and retroactive application would not interfere with a vested right or cause a manifest injustice. Courts do not favor an administrative rule's retroactive application.

As such, the Board HEREBY FINDS that it is appropriate to apply limited or 'pipeline' retroactivity to the Centex Decision.

The Board currently has 18 matters before it seeking an exemption pursuant to the Main Extension Rules, N.J.A.C. 14:3-8.1 et seq. which were pending prior to December 30, 2009. A listing of these pending matters is attached hereto as Exhibit A. In light of the Centex Decision and this Order, the Board HEREBY FINDS that each of these pending matters shall be treated in accordance with the Board's March 24, 2010 Secretary's letter as if it were in a Designated Growth Area under the Main Extension Rules.[3] Therefore, the Board HEREBY ORDERS that the utilities in each matter shall recalculate the relevant deposit agreements as if the projects were located in a Designated Growth Area. In recalculating any deposit agreements, the utilities shall treat the application *as within time* and deposits shall be refunded based on service estimates prior to installation and refunds for subsequent years shall be paid based on actual usage. The utilities shall provide each petitioner with these estimates and meet with the relevant party within thirty (30) days of the date of this Order in an attempt to finalize deposit agreements. If an agreement cannot be reached within sixty (60) days of the date of this order, the petitioner in each matter shall notify the Board, in writing, and identify any outstanding issues. If the Board does not receive notice from the petitioner in each matter, identifying outstanding issues within seventy-five (75) days of the date of this Order, the matter will be administratively concluded by the Board.

The Board HEREBY FINDS that consistent with 'Pipeline' retroactivity, it is not appropriate to re-open concluded matters or otherwise disturb main extension agreements between applicants and utilities prior to December 30, 2009, except for pending matters identified in Exhibit A to this Order. The Board HEREBY ORDERS that for any person who applied for an extension, paid a deposit and the installation of an extension commenced (not including a temporary extension of service or design work) prior to December 30, 2009, the extension to serve that person shall be treated in accordance with the Board's then existent Main Extension Rules. Such persons shall not be entitled to a re-analysis of their deposit or refund of any amounts paid except as permitted by the then existing rules.

Additionally, the Board HEREBY REAFFIRMS its March 24, 2010 Secretary's letter, and incorporates its terms as if set more forth fully herein. Such letter shall remain in full force and shall apply to all Main Extension applications until such time as the Board modifies the Main Extension Rules at N.J.A.C. 14:3-8.1 et seq.

The Board is aware that since it issued its March 24, 2010 Secretary's Letter, there has been some confusion as to whether certain main extension applications to utilities pre-dated December 30, 2009 and whether they should be entitled to an analysis under the new regulatory scheme. In light of the Centex Decision and this Order, the Board HEREBY FINDS that the unless 1) an applicant has entered into a Main Extension Agreement prior to December 30, 2009, 2) the applicant paid a deposit prior to December 30, 2009; and 3) the utility has commenced the physical installation (not including installation of temporary service or design work) of the Main Extension prior to December 30, 2009, the applicant shall be subject to the Board's March 24, 2010 Secretary's letter and HEREBY ORDERS the utility providing the extension to treat the applicant as if their extension was built to serve a Designated Growth Area. The utilities providing the extensions to serve these applicants SHALL recalculate any deposit agreements entered into by these applicants accordingly and the utility providing the extension SHALL issue corresponding refunds accordingly pursuant to N.J.A.C. 14:3-8.7.

[3] This Order only addresses issues in the Centex decision as it relates to the Main Extension Rules at N.J.A.C. 14:3-8.1 et seq. Unless specifically identified herein, the Board is not ruling on issues relating to any other Board Programs.

Within sixty (60) days of the date of this Order the utilities SHALL refund to these applicants, 1) the total amount the applicant actually paid for their extension less the total amount the applicant would have paid for their extension if it served an Area Designated for Growth and 2) the amount the utility would have refunded to the applicant to date if their extension had been built to serve an Area Designated for Growth. The utilities SHALL make the remaining refunds to these applicants pursuant to the timeframes set forth in N.J.A.C. 14:3-8.7.

Finally, the Board HEREBY FINDS that relevant utilities are in the best position to initially identify any party who may have paid under protest pursuant to the Board's January 20, 2010 Secretary's letter or who the Board has now identified as being subject to the March 24, 2010 Secretary's letter. As such, the Board HEREBY ORDERS each utility to review Main Extension agreements which the Board has herein identified as subject to the January 20, 2010 and March 24, 2010 Secretary's letters and conduct a limited review of those applicants and modify as appropriate such agreements consistent with the Board's March 24, 2010 Secretary's Letter and this Order.

Additionally, the Board is aware that utility tariff's include reference to the Board's Main Extension Rules. To the extent not previously modified through a rate or other proceeding, the Board HEREBY ORDERS all utilities to file updated tariff pages, consistent with the Board's March 24, 2010 Secretary's Letter and this Order, within thirty (30) days of the date of this Order.

DATED: 10/22/10

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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

IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES
N.J.A.C. 14:3-8.1 ET SEQ. – NON-DOCKETED MATTER

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c/o Walter G. Reinhard, Esq.
Norris, MsLaughlin & Marcus
PA
721 Route 202-206
PO Box 5933
Bridgewater, NJ 08807-5933

J&S Development
Vincent Scordley LLC
PO Box 86
New Vernon, NJ 07976

Exhibit A

Pending Matters

I/M/O Edward L. Bennett: EO08121099
I/M/O Moto Business Park: AO07120953.
I/M/O The Rose House: EO08050317
I/M/O United Communities Phases II and III (Ft. Dix housing): EO09010039
I/M/O Bill and Missy Jensen: EO09040338
I/M/O Borough of Washington, Warren County: EO08090841
I/M/O Jim Novick and Nicole Hagner: Non-Docketted Matter
I/M/O Peter Wicki- Wicki Stone: EO08100939
I/M/O J. Wesley Properties- John Dozier: EW 09120988
I/M/O Asbury Farms at Hawk Pointe: AO09020138
I/M/O Bear Creek Estates (Afram Sawma): Non-Docketted Matter
I/M/O John and Jane Griffith: Non-Docketted Matter
I/M/O Paul and Lisa Ryan: EO09050361
I/M/O Gloucester County DREAM Park: EO09070521
I/M/O Julian Svedosh-Dimetrios Construction: EO09090768
I/M/O Pemberton School District Early Childhood Center (New Jersey Schools Development Authority): GW10010042
I/M/O Centex Homes Project Freedom in Mansfield: Non-Docketted Matter
I/M/O Clint Shontz: Non-Docketted Matter