



Agenda Date: 8/23/17
Agenda Item: 5A

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

DIVISION OF WATER

CHANY HALPERN,
Petitioner

v.

NEW JERSEY AMERICAN WATER COMPANY,
Respondent

) ORDER ADOPTING
) INITIAL DECISION
)

) BPU DOCKET NO. WC16121143
) OAL DOCKET NO. PUC 02556-2017S

Parties of Record:

Chany Halpern, Pro Se
Mitchell Waldman, Esq. on behalf of Respondent, New Jersey American Water Company
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel¹

BY THE BOARD:

By this Order, the New Jersey Board of Public Utilities ("Board") adopts the Initial Decision of Administrative Law Judge Carl V. Buck, III ("ALJ Buck"), who found that the Petitioner did not meet her burden of proof by a preponderance of the evidence; that the relief sought by the Petitioner should be denied; and that the action filed by the Petitioner should be dismissed.

BACKGROUND AND PROCEDURAL HISTORY

On November 25, 2016, Chany Halpern ("Petitioner") filed a petition with the Board against the New Jersey American Water Company ("NJAW"), regarding a sewer main extension at the property located on Astor Drive in Lakewood, New Jersey ("the Property"). The petition claims that the Property is owned by her husband, Baruch Halpern and herself. Baruch Halpern has been the signatory for BHC Construction & Developers, LLC ("BHC"), which is developing the Property and is the applicant for the Extension Deposit Agreement ("EDA") with NJAW. The Petitioner requested that the proposed sewer main extension project ("the Project"), be subject

¹ The New Jersey Division of Rate Counsel submitted a letter to the Board on July 7, 2017, which indicated that it elected not to participate in this matter and therefore defers to the Board in rendering a Final Order.

to the previous main extension deposit refund formula based on a ten times ("10X") multiplier instead of the current multiplier of two and one-half times ("2.5X") for water and sewer, as found in the Board's Main Extension Rules, N.J.A.C. 14:3-8 ("Extensions to Provide Regulated Services"). The current Main Extension Rule changing the refund formula multiplier from 10X to 2.5X became effective on December 21, 2015. N.J.A.C. 14:3-8.10(d) ("Suggested formula for allocating extension costs- multi-unit or nonresidential development"). The Petitioner also requested to be allowed to bid out the construction of the extension to an outside contractor on the Petitioner's behalf apart from NJAW, or participate in NJAW's contractor bidding process for an outside contractor to install the main extension.

NJAW is a Board regulated public utility organized and operating under the laws of the State of New Jersey. NJAW currently provides water service to approximately 620,000 water and fire service customers and to approximately 41,000 sewer service customers in all or part of 188 municipalities in 18 of the State's 21 counties.

After the filing of the petition in this matter, on February 22, 2017, the Board transferred the formal petition to the Office of Administrative Law ("OAL") as a contested case. The matter was assigned to ALJ Buck.

On May 4, 2017, a hearing was held before ALJ Buck which was transcribed. The parties did not reach a settlement, and the record was closed.

During the course of the testimony, Petitioner testified that she had never signed the necessary EDA that was required for there to be a binding agreement between the parties. See 1T84:4-11² (stating that there was never an EDA that was signed on the water main extension); 1T84:23-25 (agreeing that an EDA was never signed and returned); 1T88:2-5 (the EDA attached to a letter from NJAW was not signed and returned to NJAW); 1T93:11-14 (the EDA sent to Petitioner in 2016 was not ever signed and returned). The Petitioner also acknowledged in her testimony that any required monetary deposit due to NJAW was never paid. See 1T85:1-4; see also 1T87:23-88:1; see also 1T93:15-19. These facts were undisputed and consistent with the testimony from NJAW. See 1T:107:14-23 (testimony of Scott Segal of NJAW confirming that the Petitioner never signed an EDA or paid the required deposit). While NJAW moved for an involuntary dismissal on the basis of these undisputed facts at the close of plaintiff's testimony, ALJ Buck reserved on the motion until the termination of the case. See 1T75:5-8; see also 1T102:20-103:1.

At the close of Petitioner's testimony, NJAW also moved for dismissal of the petition due to a lack of standing. NJAW argued that Petitioner lacked standing to bring the action because she was not the owner of the Property and was not the applicant in any of the applications that were submitted to NJAW to extend water and sewer service to the Lakewood Property. In response, Petitioner asserted that she was permitted to represent her husband. 1T62:7-14; 1T66:4-7. She also acknowledged that the applications for water and sewer service to the Lakewood Property were made to NJAW in the name of "B.H.C." or "Halkal Holders," and claimed that she is a principal of those entities and an "official in the business B.H.C. Construction." 1T64:21-65:7. Petitioner also testified that she was unsure whether the Lakewood Property was owned by her and her husband, and stated that was an issue she would have to look into further. 1T60:3-73:16.

² 1T is a reference to the transcript of the May 4, 2017 hearing in this matter.

At the close of these arguments, ALJ Buck took a brief recess, after which he reserved on NJAW's motion to dismiss. Later during the hearing, ALJ Buck indicated his office had received a fax from Petitioner's husband, Baruch Halpern, in which Mr. Halpern indicated he authorized Petitioner to represent him at the hearing.³ NJAW's motion to dismiss for lack of standing was raised again during NJAW's closing remarks; however, ALJ Buck did not make a ruling on the record. 1T194:21-195:1.

On June 19, 2017, ALJ Buck rendered the Initial Decision in this matter, denying the relief sought by the Petitioner and dismissing the case. Specifically, ALJ Buck found:

- An original Extension Development Agreement (EDA) would have been valid and binding upon NJAW only at the time it was executed by its duly authorized representative, and the form of the EDA could have been altered, changed, replaced or superseded at any time prior thereto. The fact that NJAW provided the Petitioner with a draft of an EDA prior to execution has no binding or legal effect on NJAW. An EDA is invalid if it was not executed by both parties on or before September 30, 2012.
- On or about December 3, 2012, BHC submitted a second application for main extensions. This application was for installation of "619 of 8" PVC," and was for a sewer main extension. BHC did not submit the deposit, nor execute the EDA prepared by NJAW in response to this application in order to move forward on this application.
- On or about June 26, 2013, BHC submitted a third application for main extensions. This application was for installation of "619 of 8" PVC". This application was also for a sewer extension. BHC did not submit the deposit, nor execute the EDA prepared by NJAW in response to this application in order to move forward on this application.
- Petitioner is not entitled to participate in the bidding or award process for construction associated with any NJAW project, as Petitioner provided no evidence as to why Petitioner should be allowed to bid the contract to perform work on behalf of NJAW, in contravention of NJAW's accepted business practices;⁴
- Petitioner knew or should have known the changes dealing with the multiplier in question. In NJAW's letter to BHC of January 22, 2015, the Petitioner was given specific notice as to potential changes to the main extension refunds stating: "This agreement are (sic) being offered with the understanding that the current court ruling associated with Superior Court of NJ Appellate Division-Docket # A-2207-07T3 may have an impact on both whether or not refunds for this project can be offered by NJAW in the future as well as the actual calculation for

³ It does not appear that this document was made part of the record and it was not provided to the Board.

⁴ The Main Extension Rules state that the regulated entity constructs the extension, not the applicant. N.J.A.C. 14:3-8.3 ("General requirements to provide extensions").

determining such refunds. Once a final conclusion has been made by the court(s) and the BPU provides instruction regarding refunds, NJAW will calculate refunds as directed and provide such back to the executing party of this agreement if and when appropriate.”

- NJAW was under no duty, affirmative or otherwise, to provide the Petitioner any information which it may have had regarding any pending changes to N.J.A.C. 14:3-8.10;⁵
- Communication (verbal and written) between the Petitioner and NJAW regarding various iterations of the Project began on or about February 18, 2011, and continued until the Hearing date of May 4, 2017. The Petitioner admitted and the NJAW verified that at least two (2) Extension Deposit Agreements (“EDA”) were provided to BHC by NJAW for sewer main extensions at the property during that period, both prior to the Rule change. BHC did not submit the required construction deposit to NJAW, nor execute the EDAs.⁶

Numerous exhibits were discussed and marked for identification during the hearing. The transcript reflects that only two were moved into evidence. 1T187:10-11. The final page of the Initial Decision identifies fewer exhibits than were introduced at the hearing, but more than were moved into evidence. In addition, the descriptions of the exhibits found in the Appendix to the Initial Decision are inconsistent with the descriptions of the exhibits in the transcript. The Board did not receive any exhibits when the file was returned to the Board from the OAL. Because the parties discussed providing the court reporter with all exhibits, the Board contacted the court reporter and obtained what was in the court reporter’s possession.

On July 5, 2017, the Petitioner filed an Exception to ALJ Buck’s Initial Decision, claiming that NJAW was in violation of its legal obligations as a public utility.

On July 10, 2017, the NJAW filed a Reply to the Petitioner’s Exception maintaining that the Petitioner’s “exceptions” should not form the basis for any modification to the Initial Decision, as the Petitioner’s new arguments were not made during the hearing and/or are unfounded.

Although additional exceptions and replies are not permitted under the Rules, on July 19, 2017, the Petitioner responded, again claiming that NJAW was in violation of its legal obligations as a public utility.

On July 25, 2017, NJAW responded, arguing that Petitioner’s correspondence should not be considered, and further maintaining that Petitioner failed to state a basis for any modification to the Initial Decision.

At its July 26, 2017 Board Meeting, the Board received a 45-day extension of time to September 18, 2017, for issuing its final decision in order to adequately review the record in this matter.

⁵ The Company is required to provide the main extension applicant with a copy of the current main extension rules in effect pursuant to N.J.A.C. 14:3-8.3(a) “General requirement to provide extension”

⁶ As of May 4, 2017, BHC had still not executed the EDA.

DISCUSSION AND FINDINGS

After review of the Initial Decision and the record in this matter, the Board **HEREBY FINDS** the following:

- ALJ Buck correctly concluded that the Petitioner is not entitled to obtain their own contractor to construct the sewer main extension through the bidding process, as the Company constructs the extension not the applicant, per regulation;
- ALJ Buck correctly concluded that the Petitioner is not permitted to participate in the contractor bidding process to obtain a contractor to construct a main extension;
- ALJ Buck correctly concluded that the Petitioner should have known or been able to ascertain that the Main Extension Rules could potentially change due to a pending court action, and the court's decision could subsequently effect the Company's main extension refund policies;
- ALJ Buck correctly concluded that the Petitioner did not execute an EDA with the Company or submit the required construction deposit prior to the Rule change, nor did the Petitioner provide any evidence as to why the 10X refund multiplier in effect before December 21, 2015, should be extended. Therefore, any EDA executed at this juncture will be subject to the current Main Extension Rules and deposit refund formula in force at the time of its execution; and
- The Petitioner's Exception Filing provided no evidence to support any modification to ALJ Buck's findings and decision.

Although there is confusion regarding which exhibits were moved into evidence, there is testimony supporting the crucial and ultimate finding that the petition should be dismissed. Significantly, neither the Board nor the OAL received any evidence indicating that an EDA was executed or any deposit monies paid for sewer extensions to the NJAW by the Petitioner, perfecting an agreement. The testimony in the record is undisputed that there were no signed or delivered agreements. The testimony in the record is undisputed that no deposit monies were ever paid by Petitioner.

By ruling on the merits of the matter, it may be assumed that the ALJ effectively denied, without prejudice, the motion to dismiss for lack of standing. Accordingly, the Board makes no specific findings on that issue, and the Board **FINDS** that the Initial Decision disposes of the issue in controversy, and is consistent with the law. Accordingly, the Board **HEREBY ADOPTS** the Initial Decision in its entirety; **HEREBY ORDERS** that the Parties comply with the Initial Decision; **HEREBY DENIES** the action filed by the Petitioner; and **HEREBY DISMISSES** the within Petition.

This Order shall be effective on September 2, 2017.

DATED: 8/23/17

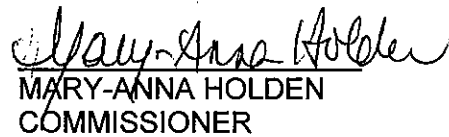
BOARD OF PUBLIC UTILITIES
BY:



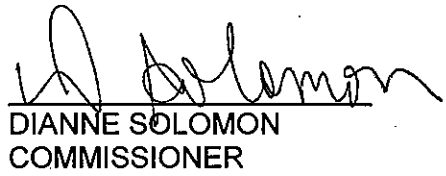
RICHARD S. MROZ
PRESIDENT



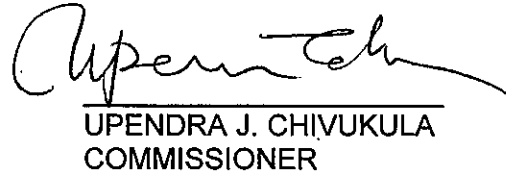
JOSEPH L. FIORDALISO
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MARY-ANNA HOLDEN
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COMMISSIONER

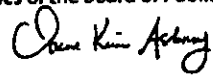


UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST: 

IRENE KIM ASBURY
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 CHANY HALPERN v. NEW JERSEY AMERICAN WATER COMPANY
BPU DOCKET NO.: WC16121143
OAL DOCKET NO. PUC 02556-2017S

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. PUC 02556-17
AGENCY DKT. NO. WC16121143

CHANEY HALPERN,

Petitioner,

v.

NEW JERSEY AMERICAN

WATER,

Respondent.

Chaney Halpern, petitioner, pro se

Mitchell Waldman, Esq., for respondent (Hurvitz & Waldman, LLC, attorneys)

Record Closed: May 4, 2017

Decided: June 19, 2017

BEFORE CARL V. BUCK, III, ALJ:

STATEMENT OF THE CASE

Petitioner, Chaney Halpern, (Halpern) requests that respondent, New Jersey American Water (NJAW), be bound by the payment multiplier, contained in N.J.A.C. 14:3-8.10, which was in effect until December 21, 2015 and as contained in a draft Sewer Main Extension Agreement (EDA) between the parties. Petitioner also requests she be allowed to bid the underlying project.

PROCEDURAL HISTORY

The Board of Public Utilities transmitted this matter to the Office of Administrative Law (OAL) by letter dated February 21, 2017, where it was filed on February 22, 2017, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for May 4, 2017 which was held on that date, after which I closed the record.

FACTUAL DISCUSSION AND FINDINGS

Petitioner has, for several years, been in communication with NJAW regarding various iterations of a construction project located at 120 Astor Drive, Lakewood Township, Ocean County, New Jersey. In fact, the applicant in such communiques has been "BHC Construction & Developers, LLC", with signatory being Baruch Halpern (husband of petitioner). The owner of the property, per the deed dated July 5, 2010, recorded July 9, 2010, in the Ocean County Clerk's office is "Baruch Halpern." (R-4).

The communications (verbal and written) between petitioner and NJAW began on or about February 18, 2011 and continued until the date of the hearing in this matter, May 4, 2017.

An intrinsic part of the discussions (dealing with the more recent iterations of the project) between the parties dealt with pertinent sections of the EDA, specifically section:

8. Refunds.

Determination of Refunds

The Company will refund to the Depositor a one time payment for each Bona Fide Customer (Category I or Category II) directly served by infrastructure installed as part of the Project in an amount equal to the multiplier set forth in N.J.A.C. 14:3-8.10 times the Revenue from such Bona Fide Customer.

At the inception of discussions between the parties this multiplier was ten (10 x).

During the time the parties were in discussion, regulatory changes were in process of being made by the BPU; specifically, changes to the multiplier. Such changes would be made through the normal process of amending the existing Administrative Code section(s) pursuant to the Administrative Procedure Act (APA), which Act includes all public notice requirements of the APA. The public notice requirements include, but are not limited to, posting on the Board's website, notice to interested parties, publication in the New Jersey register, etc. On December 21, 2015 publication of revisions to the regulations for N.J.A.C. 14:3-8.10 was made and such revisions took effect on that date. Specifically involved in this case is the section of the regulation regarding the refunding multiplier to be utilized by utility companies in an Extension Deposit Agreement (EDA) generated by a water or sewer purveyor (in this instance – NJAW) for specific project(s) as detailed in the EDA between an applicant and the utility company.

Per the amendment process, on December 21, 2015, the multiplier was changed from ten (10 x) to two and one-half (2.5 x).

After that date (December 21, 2015) petitioner asserted [through a petition to the State of New Jersey, Board of Public Utilities (BPU)] that NJAW should be liable to utilize the 10x multiplier in place before December 21, 2015. Such petition was forwarded by the BPU to NJAW by letter, dated December 6, 2016. NJAW demurred and the BPU transmitted this matter to the Office of Administrative Law (OAL).

Certain facts are undisputed. Accordingly, I **FIND** as **FACT** the following:

1. On or about March 9, 2011, BHC submitted an application for main extensions. The application was for installation of "500 +/- LF of 8" DIP water main". (R-2A).
2. A response from Brad Cole, Project Manager, Developer Services South of NJAW, to this application was sent by date of September 22, 2011. This letter contained additional information regarding the water main extension

process, provided details of a deposit of \$62,796 required to move forward with the process and provided a copy of the EDA containing a provision, #11, that:

- a. **11. Execution by the Company.** This agreement shall be valid and binding upon the Company only at the time it is executed by its duly authorized representative and the form of this Agreement can be altered, changed, replaced or superseded at any time prior thereto, and the fact that Company has provided the Depositor with a draft of this Agreement prior to that time shall have no binding or legal effect on the Company. This Agreement shall be considered invalid if not executed by both parties on or before September 30, 2012. (Emphasis in original). (R-2B).
- b. The EDA also contained paragraph # 16 **Waiver; Amendment**. Either party may waive compliance by another with, amend, supplement or modify any provision of this Agreement. No waiver, amendment, supplement or modification of any provision shall be construed as a waiver, amendment, supplement or modification of any other provision. Any waiver, amendment, supplement or modification of this Agreement must be in writing and shall be deemed effective only with respect to the part that executes and delivers such writing.

BHC did not move forward on this application.

3. On or about December 3, 2012, BHC submitted a second application for main extensions. This application was for installation of "619 of 8" PVC". (R-2C), and was for a sewer main extension. BHC did not submit the deposit, nor execute the EDA prepared by NJAW in response to this application in order to move forward on this application.
4. On or about June 26, 2013, BHC submitted a third application for main extensions. This application was for installation of "619 of 8" PVC". (R-2F). This application was also for a sewer extension. BHC did not submit the deposit, nor execute the EDA prepared by NJAW in response to this application in order to move forward on this application.

5. A response from Scott Segal, Project Manager, Developer Services South of NJAW, to these sewer application(s) was sent by date of January 22, 2015. This letter, although correctly containing the recipient address of "Baruch Halpern", contained an incorrect salutation to "Mr. Smildzins:". This letter contained additional information regarding the sewer extension process, provided details of a deposit of \$181,789 required to move forward with the process and provided a copy of the EDA containing the same provision #11 referenced above with the only alteration being a change to the date to January 22, 2016.
6. This letter of January 22, 2015 further stated:
 - a. This agreement are (sic) being offered with the understanding that **the current court ruling associated with Superior Court of NJ Appellate Division-Docket # A-2207-07T3 may have an impact on both whether or not refunds for this project can be offered by NJAW in the future as well as the actual calculation for determining such refunds. Once a final conclusion has been made by the court(s) and the BPU provides instruction regarding refunds, NJAW will calculate refunds as directed and provide such back to the executing party of this agreement if and when appropriate. (Emphasis supplied). (R-2D).**
7. A letter from Scott Segal, Project Manager, Developer Services South of NJAW, was sent by date of February 4, 2016. This letter contained additional information regarding the sewer extension process, provided bidding estimates under the deposit of \$181,789, and notified BHC of additional information required to move forward. This letter provided a copy of the EDA containing the same provision #11 referenced above with the only alteration being a change to the date to February 4, 2017. (R-2E)
8. As of May 4, 2017 Appellant had not executed the EDA nor provided any deposit for construction to EDA.

Testimony

Chany Halpern (Halpern)

Halpern testified as to the sequencing of BHC's contact with NJAW. Initially it should be noted that the applicant on all documents and in all correspondence to NJAW is from Baruch Halpern and/ or BHC. Chany Halpern, the petitioner, is the wife of Baruch Halpern and provided proof of the ability to speak on Baruch Halpern's behalf at the time of trial.

Halpern testified that that the first application (for water service) was not pursued as BHC had decided to acquire water on site from a well.

As to the application(s) for sewer connection, she testified that BHC had originally planned to extend an existing line from a nearby synagogue to Astor Drive. However, NJAW decided that that plan would not be feasible.

BHC then planned to connect to a sewer line in the "Coventry Square" (Coventry) development. This would result in a 444' line from Coventry to Astor Drive. During these processes, BHC had retained the services of Charles Surmonte, P.E. & P.L.S. (Public Engineer and Public Land Surveyor). This alternative would require obtaining an easement from Coventry to run this line. To that end Halpern produced a letter from Stuart J. Lieberman, Esq. dated June 26, 2014 (with the second page of the letter dated June 20, 2014) and a copy of a check payable to "Lieberman & Blecher" (attorneys for Coventry) in the amount of \$20,000 from BHC Construction LLC dated June 21, 2014 (P-4) The cover letter detailed terms and conditions of a proposed agreement with Halkal Builders (not BHC) and refers to four houses being built (not three duplexes). Also, the attachment was a copy of the check, not a copy of a cancelled check, nor proof that the check had been deposited.

She also testified that she had been told by Segal, that having neighbors sign confirmations/ acknowledgements of connection were a prerequisite to submitting

BHC's application. She testified that when she had obtained these signatures, she sent them to Segal.

Halpern's testimony acknowledged that there were many changes to the sewer extension plans and at least two EDAs for these plans; neither of which were executed by BHC, nor were any deposits as called for in the EDAs sent to NJAW. An application fee to NJAW was paid; however, payments or documents relating to impacts to a the number of other parties that would be involved in this project, i.e. Lakewood Township, Ocean County Municipal Utilities Authority, State of New Jersey, Department of Environmental Protection, Treatment Works Approval (TWA) were not documented.

Scott Segal (Segal)

Segal is employed by NJAW. He is a Project Manager, Developer Services South of NJAW. His job entails, among other things, assisting applicants through the process of application through project bidding to project installation. Segal testified that the first application (for water) was sent to his predecessor Brad Cole. (R-2B).

The second application (for sewer) on July 10, 2013 (R-2F) was assigned to Segal. Segal testified that he had not told petitioner that having neighbors sign confirmations/acknowledgements of connection were a prerequisite to submitting an application.

Segal testified that application #2 (the first application for sewer) was to service to 120 Astor Drive. When NJAW received the application and the proposed plan was vetted by the construction section of NJAW and was found to be a problem due to the inability of vactor trucks to access manholes servicing the extension. An alternative was discussed which would entail creation of a "dog house" manhole but ultimately this proposal was deemed not feasible to due access issues.

Segal testified that application #3 (the second application for sewer) showed the main running along the rear of the property and turning into an 8" sewer main on the Coventry property. This plan was deemed not feasible as NJAW subsequently discovered that the 8" line was owned by Coventry, not NJAW.

The plan shown in R-2C, received by NJAW on December 14, 2014, anticipated 619' of 8" pvc pipe and had a "jog" at the intersection of Coleman and Astor. An EDA for this plan was sent by NJAW on January 22, 2015. This plan, however, conflicted with an existing storm sewer at that intersection.

Segal also testified to the project planning and bidding process including construction. After acceptable conceptual plans were submitted to NJAW, those plans would have to be made formal plans to enable bidding and construction. NJAW, as a public utility, is required to publicly bid contracts to guarantee that appropriate standards as to qualification, insurance, capacity for contraction, prior history, etc. are met. Such planning and bidding process is only undertaken after a signed EDA and project total estimated cost of the construction anticipated is received by NJAW.

Segal testified that he was aware that the regulations changed on December 21, 2015, to alter, among other things, the multiplier contained within the regulations. He testified that he had been aware that changes to the regulations were anticipated but he did not know when such changes would occur.

He further testified that on December 21, 2015, he received a plan showing an additional 160' of sewer main and 2 additional properties for connection on Astor Drive and on February 4, 2016 an EDA revised to show changes made to accommodate the changes in the rules was sent to BHC (R-1E)

He also testified that if the EDA had been signed by BHC before December 21, 2015, BHC would have been entitled to the 10% multiplier and that any changes could have been made by addendum per the authorization of paragraph 16 of the EDA.

Based on the testimony of the witnesses and the exhibits presented, and having had an opportunity to observe the witnesses and assess their credibility, I **FIND** the following additional **FACTS**:

1. Petitioner is not entitled to participate in the bidding or award process for construction associated with any NJAW project;

2. Petitioner knew, should have known, and was able to ascertain the potential to changes dealing with the multiplier in question;
3. Respondent, was under no duty, affirmative or otherwise, to provide petitioner of any information which it may have had regarding any pending changes to N.J.A.C. 14:3-8.10
4. Petitioner had not, as of May 4, 2017, executed the EDA nor had petitioner forwarded the construction deposit called for in the EDA to NJAW

LEGAL DISCUSSION

In this administrative proceeding, the petitioner bears the burden of proof by a preponderance of the competent, credible evidence as to those matters which are justifiably before the OAL. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the facts alleged and generates reliable belief that the tended hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.), certif. denied, 31 N.J. 75 (1959).

This petition concerns the issues of whether petitioner is:

1. Entitled to participate in the bidding process so as to retain a contractor to perform work on behalf of NJAW; and
2. Entitled to avail herself of the 10x multiplier in place under N.J.A.C. 14:3-8.10 in effect before December 21, 2015.

Petitioner has acknowledged that NJAW is responsible to its rate payers and to conform to its accepted business practices thought its bidding process. It is not feasible, practicable, or legal for a private individual or company to insert itself into the bidding process of a public utility.

Petitioner has acknowledged that she was made aware of the pending changes to the multiplier "...3 days before it was changed..." (R-1). However, petitioner was also placed on notice through the procedures dictated through the APA and given specific notice as to potential changes as contained in NJAW's letter of January 22, 2015:

This agreement are (sic) being offered with the understanding that **the current court ruling associated with Superior Court of NJ Appellate Division-Docket # A-2207-07T3 may have an impact on both whether or not refunds for this project can be offered by NJAW in the future as well as the actual calculation for determining such refunds. Once a final conclusion has been made by the court(s) and the BPU provides instruction regarding refunds, NJAW will calculate refunds as directed and provide such back to the executing party of this agreement if and when appropriate. (Emphasis supplied). (R-2D).**

And paragraph 17 of the EDA:

Changes in Law. In the event that the Company determines that the adoption after the date hereof of any tax or other law, rule or regulation does or shall have the effect altering the terms of this Agreement, the Company shall have the right to change the terms of this agreement to reflect such change in law, rule or regulation...

Thus giving petitioner 11 months to perfect BHC's plan between January 22, 2015 and what would become the date of adoption of these modifications by the BPU, December 15, 2015.

CONCLUSION

Petitioner has provided no evidence as to why petitioner should be allowed to bid the contract to perform work on behalf of NJAW in contravention of accepted business practices by NJAW.

Petitioner provided no evidence as to why the provisions of N.J.A.C. 14:3-8.10 should be extended, in contravention of applicable regulations issued by the BPU, by the respondent beyond December 21, 2015.

Petitioner argues that she should have been told by NJAW about the pending changes to N.J.A.C. 14:3-8.10. This argument is specious as respondent was under no obligation to inform petitioner what it may or may not have known; petitioner had, at the very least, constructive notice of the pending changes; and petitioner had from December 3, 2012 to December 15, 2015 to perfect a plan to the satisfaction of NJAW and execute the EDA. Even if the plan had not been perfected, paragraph 16 of the EDA would have allowed the parties to negotiate any needed modification(s).

I **CONCLUDE** that petitioner has not met her burden of proof and did not prove by a preponderance of the evidence that her petition should be granted.

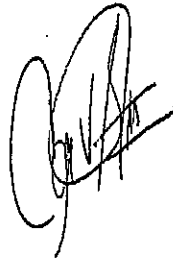
ORDER

It is therefore **ORDERED** that the relief sought by petitioner is **DENIED** and the action filed by petitioner is **DISMISSED**.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



June 19, 2017
DATE

CARL V. BUCK, III, ALJ

Date Received at Agency:

June 19, 2017

Date Mailed to Parties:

June 19, 2017

lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

Chaney Halpern

For Respondent:

Scott Segal

LIST OF EXHIBITS

Court Exhibit:

47 N.J.R. 3133-3150

For Petitioner:

- Exhibit-1 First Plans in 2012 with privately owned asset
- Exhibit-2 Second Plans and Request for Easement
- Exhibit-3 Requirement from NJAW for access from Coventry
- Exhibit-4 Check to Sam Brown-Attorney for Coventry Square Condominium Easement
- Exhibit-5 Check to Lieberman & Blecher for Coventry Square Easement
- Exhibit-6 Email from Scott indicating additional customers need to sign agreement prior to my signing the sewer extension agreement to qualify for refund
- Exhibit-7 Email from Ryan Scerbo and Mr. Bishop trying to work out settlement

For Respondent:

- R-1 Petition, dated November 8, 2016
- R-2 Petitioner's Response to Request for Admissions
- R-3 Petitioner's Answers to Interrogatories