



Agenda Date: 12/19/17
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/

WATER

IN THE MATTER OF THE PETITION OF SUEZ WATER)
NEW JERSEY INC. FOR APPROVAL OF THE SALE)
AND CONVEYANCE OF APPROXIMATELY 1.69+/-)
ACRES OF LAND IN THE TOWNSHIP OF NORTH)
BERGEN, COUNTY OF HUDSON AND THE)
GRANTING AND TRANSFER OF CERTAIN)
EASEMENTS IN CONNECTION THERETO,)
PURSUANT TO N.J.S.A. 48:3-7 AND N.J.A.C. 14:1-5.6)

DECISION AND ORDER

DOCKET NO. WM17050462

Parties of Record:

Bryant Gonzalez, Esq., SUEZ Water New Jersey Inc.
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:¹

On May 5, 2017, SUEZ Water New Jersey, Inc. ("SUEZ," "Petitioner," or "Company"), a public utility of the State of New Jersey, subject to the jurisdiction of the New Jersey Board of Public Utilities ("Board"), filed a verified petition pursuant to N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6, seeking approval to sell real property owned by the Company, transfer the necessary easements to be located on the property, and receive a waiver of the otherwise applicable advertising and bidding requirements of N.J.A.C. 14:1-5.6(b).

SUEZ provides water service to approximately 200,000 water customers in portions of Bergen, Hudson, Passaic, Morris, Hunterdon and Sussex Counties. SUEZ also supplies water service to municipalities, including the Township of Saddle Brook, the Borough of Fairlawn, the Borough of Saddle River, the Borough of Allendale, the Borough of Mahwah, the Village of Ridgewood and the Borough of Ramsey.

DESCRIPTION AND HISTORY OF THE PROPERTY

The Property being sold is known and designated as 5900 Tonnelle Avenue in the Township of North Bergen (or "North Bergen"), County of Hudson, New Jersey. The Property is comprised of approximately 8.94 acres of land. The Company seeks approval to sell an approximate 1.69+/- acre subdivided portion of Block 185, Lot 3 to the Township of North Bergen. The

¹ Commissioner Upendra J. Chivukula did not participate.

improvements on the Property include equipment and facilities for an active pump station. The pump station equipment and facilities will remain on the Property and will be retained by SUEZ and will not be part of the 1.69+/- acre land sale. The sale price is \$1,600,000.

Petitioner further requests approval of the transfer of certain access and maintenance easements to be located on the Property. The Company entered into a Construction, Operation and Reciprocal Easement Agreement ("COREA") with the Township of North Bergen that will be signed by North Bergen and SUEZ at the time of closing. The COREA will allow North Bergen access over a small portion of the Property to be retained by SUEZ in order to access the North Bergen Parcel for parking. The COREA will also allow North Bergen to maintain its storm sewer facilities partially located on the Property to be retained by SUEZ. SUEZ will obtain an easement to provide a secondary access through the North Bergen Parcel to reach portions of the Property utilized by SUEZ for its utility operations. The COREA will further provide SUEZ with four (4) parking spaces to be used primarily during the construction phases of the proposed pump station upgrades. The proposed pump station improvements are not part of this Petition.

The Property was originally acquired by the Hackensack Water Company (today SUEZ) in 1908 to construct an open reservoir (Reservoir) and pump station, for the purpose of providing drinking water to water utility customers. The reservoir was eventually drained and no longer serves as a drinking water storage source. The pump station continues to be active and is a key component of SUEZ's water distribution infrastructure for the immediate area. The Property is not being used for the provision of utility service, but instead has been used "gratuitously" as a parking area by the Township of North Bergen for several years.

The proposed subdivision of the Property is subject to the review of the North Bergen Planning Board. On October 4, 2016 the North Bergen Planning Board conducted a public hearing on SUEZ's proposed subdivision of the Property as well as its proposed site plan improvements in relation to the planned pump station upgrades. The Planning Board approved the subdivision of the Property on December 6, 2016.

The Company entered into a Contract of Sale on September 28, 2016 to subdivide 1.69 +/- acres of the total 8.94 acres of Property to the Township of North Bergen.

SUEZ further states that this Contract of Sale constitutes a sealed bid pursuant to N.J.A.C. 14:1-5.6(b). SUEZ further states that this Contract of Sale is an arms-length transaction and there is no relationship between the parties other than that of the proposed buyer and seller. The Company will provide copies of the journal entries that record the transaction. The Township of North Bergen has paid a ten percent (10%) cash deposit of \$160,000 that is being held in escrow by Main Street Title & Settlement Services, an agent for Old Republic National Title Insurance Company.

According to SUEZ, there will be no immediate rate impact on rates as a result of the transaction.

BACKGROUND FOR BOARD-REQUESTED RELIEF

SUEZ is requesting a waiver of the advertising and public bidding requirements regarding the sale of utility property pursuant to N.J.A.C. 14:1-5.6(b). N.J.A.C. 14:1-5.6(i) states:

Upon written request by a utility and in accordance with the general purposes and intent of this section, the Board shall grant said utility a waiver to the advertising requirement set out in (b) above if:

1. The waiver shall not adversely affect the public interest;
2. The subject property is no longer used or useful for utility purposes;
3. There is no prospective use of the property for utility purposes or no other likely prospective purchaser;
4. The sale of the property shall not affect the ability of the utility to render safe, adequate and proper service;
5. The selling price represents the fair market value of the property to be sold based on a current independent appraisal;
6. There is no relationship between the parties other than that of transferor and transferee, or lessor and lessee; and
7. The request states the reasons of the utility in seeking the waiver which may include, but are not limited, to the following:
 - i. The subject property is unique and requires an unusual sales contract or represents an unusual transaction;
 - ii. The advertising and bidding shall not result in a higher sales price;
 - iii. The advertising and bidding shall be detrimental to the sale of the property;
 - iv. The unlikelihood of the existence of other bona fide purchasers who could meet the requirements of the proposed sales contract;
 - v. The development of the property for private use will require extensive environmental permitting due to an existing contamination condition; and
 - vi. The inability of any other bidder to obtain the necessary permitting authorization to develop the property.

SUEZ did not advertise the Property for sale or open it up for public bidding. SUEZ entered into a contract for sale with the Township of North Bergen, who has been using the Property gratuitously for several years. The request for a waiver of the advertising requirements was made due to the unique and difficult circumstances surrounding the condition of the Property.

The North Bergen parcel of land contains fill material brought to it by North Bergen. The fill material is present both underneath areas of the Property that were paved by North Bergen as well as within the former reservoir structure. The proposed subdivision approved by the North Bergen Planning Board would allow for SUEZ to convey most, if not all, of the Property containing fill material to the Township of North Bergen via creation of the North Bergen Parcel. As part of the purchase and sales agreement, North Bergen will indemnify and hold SUEZ harmless for all fill material present on the North Bergen Parcel. This aspect of the transaction is unique and works to resolve potential issues between the parties regarding the condition of the Property.

The Parties to this matter are SUEZ, the New Jersey Division of Rate Counsel ("Rate Counsel") and Board Staff. Rate Counsel and Board Staff served numerous interrogatories on the Company, and the Parties held several meetings to discuss the Company's responses to interrogatories and to explore the possibility of settlement.

RATE COUNSEL'S COMMENTS

By letter dated November 3, 2017, Rate Counsel submitted comments ("Initial Comments"). Rate Counsel stated that based on its review of the petition and discovery, it does not object to the sale of the Property. Rate Counsel stated that the Company has complied with the requirements of N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6(i) in connection with the request for Board approval of the sale of real property.

Rate Counsel objects to the Company's proposed accounting treatment for the gain on the sale.

Rate Counsel asserted that the Board must determine whether the Company put forth sufficient evidence for the Board to fully evaluate the criteria set forth in In re Erie-Lackawanna Ry. Co., 75 P.U.R. 3d 246 (N.J. Bd. of Pub. Util. 1968) ("Erie-Lackawanna") as follows:

- 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.

(Initial Comments at 4-5, citing In re Atl. City Elec. Co., 2013 Super. Unpub. LEXIS 1775, *30-31 (App. Div. 2013) ("Atlantic City Electric") and Erie-Lackawanna, supra, 75 P.U.R. 3d at 247.)

Rate Counsel stated that it does not object to the Company's request for a waiver of the advertising and bidding requirements. According to Rate Counsel, SUEZ submitted two appraisals of the property, one that reflected a market value of \$1,700,000 and another that reflected a market value of \$1,440,000. The appraised value of \$1,440,000 includes the easements that the Company will be retaining and therefore appears to be the more accurate of the two appraisals. Rate Counsel stated that the sales price of \$1,600,000 appears reasonable in light of the appraisals submitted. Rate Counsel is satisfied that the sales price of \$1,600,000 represents fair market value for the property given the environmental issues surrounding the property. The Company requests the waiver due to what it believes are difficult circumstances

surrounding the property. These circumstances involve the environmental concerns with the fill material, the easements being retained by SUEZ, the existing utility operations on the adjacent property and the split zoning which may be a hindrance to sale to a developer. The fill material on the property will likely impede the Property's future use for utility purposes and will negatively impact the marketability of the property. Further, North Bergen has agreed to indemnify Suez for all fill material present on the Property. (Initial Comments at 1-3.)

Rate Counsel stated that SUEZ appears to have met the requirements under the Erie-Lackawanna test, as the Property is currently being used by the Township of North Bergen and is not being used for utility purposes. Rate Counsel noted that the sale of the property will not adversely affect the ability of SUEZ to render safe, adequate and proper service to its customers. (Initial Comments at 4.)

Rate Counsel further stated that the Company's proposed accounting treatment does not conform to the Board's long-standing policy of splitting the gains on sales of utility property 50/50 between shareholders and ratepayers. The Company estimates that the proposed gain on sale on the Property will be approximately \$1,350,000, before income taxes. The Company's Petition proposes to book the entire net gain on the sale to retained earnings (Petition, Exhibit G). This would allow the Company to flow the entire gain on the sale through to its shareholders. The Company wishes to keep a share larger than 50% of the profits from the sale, with the exact amount to be determined in the next rate case. Rate Counsel objects to the Company's proposal to book 100% of the gain on sale to retained earnings. Rate Counsel states that the Board should direct the Company to record 50% of the gain to Regulatory Liability account 253 to be distributed to ratepayers in the next base rate case. Rate Counsel further states that the Board has long held that the net gains on the sale of real utility property must be split 50/50 between shareholders and ratepayers. (Initial Comments at 1-3.)

Rate Counsel stated that the Board has rejected prior proposals by utilities for the same accounting treatment that SUEZ seeks in this Petition – to book 100% of the gain to retained earnings. (Initial Comments at 5.) Rate Counsel stated that the Board had rejected similar proposed treatment for a sale of property by New Jersey American Water Company in the City of Ocean City. (Initial Comments at 5, citing I/M/O Petition of N.J. Am. Water Co. for Approval to Sell Real Property Located in the City of Ocean City, County of Cape May, BPU Docket No. WM00070507 April 27, 2001). According to Rate Counsel, the Board rejected that petitioner's proposal to allow the entire gain to flow through to shareholders. Instead, the Board ordered New Jersey American to record one-half of the gain in Account 253 as a regulatory liability. (Initial Comments at 5-6). Rate Counsel also stated that the Board has rejected similar proposals when electric and gas utilities sought to flow all gains on property through to shareholders, but the Board determined that the net gain must be shared equally between customers and stockholders. (Initial Comments at 6, citing I/M/O Pub. Serv. Elec. & Gas Co. for Approval of An 80' Wide Distribution Right-of-Way in the Town of Kearny, BPU Docket No. EM05070650 (August 22, 2008); I/M/O Petition of Jersey Cent. Power & Light Co.'s Sale of Certain Property Situated in the Township of Bernards, Somerset County to Visiting Nurse Assoc. of Somerset Hills, Inc., BPU Docket No. EM04111473 (November 14, 2005).

Rate Counsel stated that there is no basis in the present case for the Board to award shareholders more than 50% of the gain on the sale. The Company seeks a larger portion because "[i]f it were not for the actions of the Company no money would have been received." Initial Comments at 6, citing the Company's response to discovery request RCR-4(c). Rate Counsel noted that this is exactly why SUEZ is allowed to keep 50% of the gain – in order to encourage the Company to sell unused property. Absent this enticement, ratepayers would be

entitled to 100% of the profits because ratepayers have been supporting the property in rates for the last 109 years. (Initial Comments at 6.)

Rate Counsel stated that SUEZ acknowledges the Board's long-standing policy to sharing gains on land sales equally between ratepayers and shareholders, because "[t]he Company is aware that absent unique circumstances, gains on sale of land that was previously in rate base is shared 50/50% between the company and the ratepayers." (Initial Comments at 6-7, citing the Company's response to discovery request RCR-4(e).) The Company believes this property has "unique circumstances" that somehow entitle it to a greater share of the net gain. However, SUEZ fails to offer any explanation as to what these alleged unique circumstances are. (Initial Comments at 7.) Rate Counsel discredited the alleged unique circumstances, arguing that the only unique circumstances in this case involve the fact that SUEZ allowed the Township of North Bergen to use ratepayer-supported property for free, to dump seemingly toxic substances on the site, and to then pave over these substances, creating a potential environmental liability. (*Ibid.*) Also, according to Rate Counsel, if there is to be a deviation from the Board's 50/50 policy, the Company's inaction in protecting this ratepayer-funded property would warrant it receiving less than a 50% share of the gain, rather than more; the Company's inaction in preventing the Township of North Bergen from dumping fill material on the Property likely lowered the market value of the Property and limited its marketability; and the Company's request for a greater than 50% share of the net gain on the Property is meritless. (*Ibid.*)

DISCUSSION AND FINDINGS

The Board is required to review the proposed sale of the property at issue here under N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6. N.J.S.A. 48:3-7(a) provides in pertinent part:

[N]o 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.

Also, pursuant to N.J.A.C. 14:1-5.6(b), the Company was required to advertise the property for bid. And, the Board, in reviewing the sale of utility property under the authority given to it by N.J.S.A. 48:3-7(a), must consider the three factors of Erie-Lackawanna, specifically:

- 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.

See Erie-Lackawanna, *supra*, 75 P.U.R. 3d at 247. Also, the court in Atlantic City Electric recognized that when a utility is disposing of property and multiple offers have been made, the Board's determination of which offer is the best price obtainable requires more than a comparison of the offers; rather, the Board must consider risk factors of the offers with an eye towards which truly in the best price obtainable. 2013 N.J. Super. Unpub. LEXIS 1775, at *34-35.

The Board has reviewed the record, including Rate Counsel's Initial Comments, and **HEREBY FINDS** that the Erie-Lackawanna test has been satisfied: the sale will not adversely affect the public interest; the subject property is no longer useful for utility purposes; there is no relationship between the buyer and seller; the sale of the property will not jeopardize the Company's ability to continue to render safe, adequate and proper utility service; and the selling price is the best price obtainable and represents fair market value.

The Board further **FINDS** that the Property is not used for the protection of a public water supply and is not subject to the jurisdiction of the Watershed Property Review Board.

The Board **HEREBY APPROVES** the waiver of the advertising requirements regarding the sales for the Property as set forth in N.J.A.C. 14:1-5.6(b). The 1.69 +/- acres of the North Bergen Property is no longer used or useful in the provision of utility services. There is no relationship between the Township of North Bergen and SUEZ. The agreed upon sales price is an arm's length transaction. It is unlikely that a higher sales price will be achieved or that another buyer will be found if the advertising provisions were not waived. The potential sale may not materialize if the advertising requirements are not waived. Finally, the Board **NOTES** that the Township of North Bergen has obtained the necessary approval from the North Bergen Planning Board to subdivide 1.69 +/- acres of the total 8.94 acres of SUEZ's North Bergen parcel. The Board further notes that Rate Counsel did not object to the sale of the Property. Nor did it allege that the price was less than fair market value or that the Property was sold for less than the best price obtainable.

The Board **HEREBY APPROVES** the sale and conveyance of the Property and property interests as more fully described in the petition.

The Board **HEREBY ORDERS** that the Company's request for a greater than 50% share of the net gain on the sale of the Property be addressed in the Company's next base rate case and therefore **HEREBY REJECTS** the proposed journal entries submitted by Petitioner in Exhibit G to the petition. The Board **HEREBY ORDERS** the Company to defer on its books and records the net proceeds of the sale of the Property until such time as the ratemaking treatment of the net proceeds is determined by the Board. The Board **HEREBY DIRECTS** SUEZ to submit revised journal entries to the Board and the Parties which are consistent with the terms of this Order.

Having considered the record and the applicable law, the Board **HEREBY APPROVES** the sale of the Property and the transfer of the necessary easements as being in the public interest subject to the following conditions:

1. This Order is based upon the specific and particular facts of this transaction and shall not have precedential value in future land transactions that may come before the Board and shall not be relied on as such.
2. This Order shall not affect or in any way limit the exercise of the authority of the Board, or of the State, in any future petition, or in any proceeding with respect to rates, franchises, service, financing, accounting, capitalization, depreciation or in any matters affecting the Company.
3. This Order shall not be construed as directly or indirectly fixing for any purposes whatsoever any value of any tangible or intangible assets or liabilities now owned or hereafter to be owned by the Petitioner.

4. Within thirty (30) days of the date of the closing of this transaction, the Petitioner shall file with the Board proof of the closing, net transaction costs, and the final journal entries along with a detailed calculation, including selling expenses, of the sale.

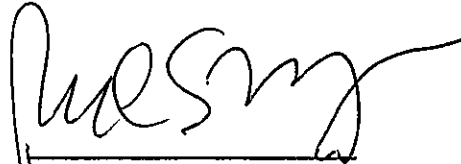
This Order shall be effective on December 29, 2017.

DATED: 12/19/17

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
COMMISSIONER



RICHARD S. MROZ
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER

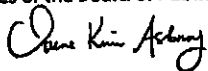


DIANNE SOLOMON
COMMISSIONER

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 THE PETITION OF SUEZ WATER NEW JERSEY INC. FOR
APPROVAL OF THE SALE AND CONVEYANCE OF APPROXIMATELY 1.69 +/- ACRES OF
LAND IN THE TOWNSHIP OF NORTH BERGEN, COUNTY OF HUDSON, AND GRANTING
AND TRANSFER OF CERTAIN EASEMENTS IN CONNECTION THERETO,
PURSUANT TO N.J.S.A. 48:3-7 AND N.J.A.C.14:1-5.6**

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