Agenda Date: 7/13/22
Agenda Item: 5B

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF 68-72 FRANKLIN PLACE, LLC AND THE VILLAGE COURTYARD CONDOMINIUM ASSOCIATION Petitioner	)	ORDER ADOPTING INITIAL DECISION
	)	BPU DOCKET NO. WO20110723
V	)	OAL DKT NO PUC 05592-21
NEW JERSEY AMERICAN WATER COMPANY, Respondent	)	

Parties of Record:

Robert L. Podvey, Esq., Connell Foley LLC on behalf of Petitioners, 68-72 Franklin Place, and the Village Courtyard Condominium
Thomas J. Herten, Esq., and Josiah Contarino, Esq., Archer & Greiner PC on behalf of New Jersey American Water Company, Inc.

BY THE BOARD:

The within matter is a dispute between 68-72 Franklin Place LLC ("Petitioner") and its water utility, New Jersey American Water Company, Inc. ("NJAW", "Respondent" or "Company") that stems from the Petitioner's complaint alleging improper charges by NJAW to a condominium development of 12 units.[1] After the complaint was transferred to the Office of Administrative Law ("OAL"), NJAW filed a motion for summary decision seeking to dismiss the petition, which was granted by Administrative Law Judge ("ALJ") Gail Cookson via Initial Decision dated May 4, 2022. Having reviewed the motion record, the New Jersey Board of Public Utilities ("Board") now adopts the Initial Decision, pursuant to N.J.S.A, 52:14B-1 to -13 and N.J.S.A 52:14F-1 to 15, as the Board's final disposition of this contested case as follows:

[1] Petitioner originally filed its petition on behalf of itself and the residential development's condo association, Village Courtyard Condominium Association, Inc. During the course of the administrative litigation, counsel for the Village Courtyard Condominium Association, Inc. advised that the condo association was not actively participating in the litigation notwithstanding the fact that it was a party in interest.

BACKGROUND

Petitioner was the developer of condominium buildings located in the City of Summit, which consisted of 12 townhouse-style condominium units in two (2) multi-story buildings at the property known as 68-72 Franklin Place. The overall condominium project was completed on or around June 15, 2019, and contains individual water lines connecting the two (2) buildings where the condos are situated. Additionally, during the construction phase of the project, the developer installed Carlon water meters in closets in each unit's garage; these individual water meters were installed without NJAW's involvement, and appear to be used by the condo association to apportion water costs incurred by each individual unit.

In 2014, Petitioner's engineering representative began discussions with employees of NJAW to discuss the project's water service needs. NJAW informed Petitioner's representative that certain system upgrades would be necessary in order to provide water service to 68-72 Franklin Place, including upgrading the 4-inch water main situated under Franklin Place into an 8-inch ductile iron water main. Following some discussions between Petitioner and NJAW regarding the feasibility of proposed plans to extend water service to the property, including negotiations regarding utility easements, in September of 2017, Petitioner's plan for water service was for 68-72 Franklin Place to be serviced by an 8-inch main, into a 6-inch tap/connection line, into a 6-inch meter, into two (2) 6-inch service lines.

In November 2017, Petitioner's representative emailed NJAW to advise that fire officials from the City of Summit had directed Petitioner to provide an 8-inch tap/connection line off of the proposed new 8-inch upgraded water main into the backflow preventer, from which two (2) 6-inch service lines would branch off to supply the project. Following some discussion between Petitioner and Summit fire officials, Petitioner decided to amend its plan to include an 8-inch service line, as opposed to 6-inch. NJAW had no objection to this plan other than to note that use of an 8-inch service line would require use of an 8-inch industrial meter.

On or about November 29, 2017, Petitioner submitted a new service application with NJAW, which included a request to increase to an 8-inch tap/connection line from the previously-planned 6-inch tap/connection line. In the application, Petitioner marked "8-inch" as the size of meter it was requesting, and at the end of the application, represented that it understood that water service and rates were governed by NJAW's tariff, which is available on NJAW's website. The November 29, 2017 revised proposal ultimately formed the basis of the water service extension project, and Petitioner and NJAW signed an extension deposit agreement memorializing their collective understanding on December 19, 2017.

At the time the petition was filed, NJAW's water service fee for an 8-inch meter was $1,348, which has subsequently increased to $1,480 in accordance with Board-approved rate increases. Petitioner requested that the Board order NJAW not to enforce the provisions of its tariff applicable to 8-inch industrial water meters pursuant to N.J.A.C. 14:3-1.3(d). Petitioner alleged that applying NJAW's tariff to Petitioner results in unjust and unreasonable rates as to the prospective condominium unit owners, and requested that the Board order the application of special rates pursuant to N.J.S.A. 48:2-21. While the petition does not request any specific rate treatment, propose any specific mechanism to recover said rates, or set forth any facts which would support such rate treatment and mechanism, from their papers, it appears that Petitioner requests application of NJAW's 5/8" meter tariff rates as applied to individual unit owners, notwithstanding the 8-inch service line and meter.

PROCEDURAL HISTORY

On or about November 18, 2020, Petitioner filed the instant petition alleging that NJAW was improperly charging their utility account on the basis that they never should have been required to install and/or be charged for an 8" meter to this 12-unit condominium development to monitor water flow to the units.

NJAW filed a motion to intervene on or about December 14, 2020. NJAW withdrew its motion on December 16, 2020. On February 24, 2021, NJAW, the Petitioner, and the New Jersey Division of Rate Counsel ("Rate Counsel") met virtually in order to discuss a possible resolution of this matter. By letter dated May 24, 2021, the Petitioner advised the Board that it was unable to reach a settlement with Respondent and requested that this matter be resumed.

NJAW answered the complaint on June 23, 2021. The Board transmitted this matter to the OAL on July 1, 2021, for hearings as a contested case pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F-1 to -15. The matter was assigned to ALJ Gail Cookson on July 13, 2021.

ALJ Cookson convened a telephone prehearing conference on August 23, 2021. ALJ Cookson held several other telephonic status conferences over the succeeding months. NJAW filed a motion for Summary Decision on December 17, 2021. Petitioner filed opposition to NJAW's motion on January 14, 2022. NJAW filed a reply brief on January 28, 2022. ALJ Cookson held oral argument on NJAW's motion on March 22, 2022 and requested some limited additional briefing. These additional limited briefs were filed on May 4, 2022, and the record was closed.

ALJ Cookson issued her Initial Decision, granting NJAW's motion for Summary Decision on May 12, 2022.

On June 8, 2022, the Board approved a 45-day extension, until July 27, 2022, for Board Staff ("Staff") to review the record and Initial Decision, and for the Board to issue a Final Decision.

THE MOTION RECORD

NJAW'S MOTION FOR SUMMARY DECISION

In its motion for summary decision, NJAW set forth 15 paragraphs of facts, which it contended were undisputed. NJAW argued that under the undisputed facts, it was entitled to judgment as a matter of law on Petitioner's claims, and requested the OAL to dismiss the petition with prejudice.

NJAW noted that Petitioner received the water service installation that Petitioner requested, and contracted for. NJAW noted that, in November 2017, Petitioner wrote to NJAW stating that the City of Summit had directed Petitioner to provide an 8-inch tap/connection line instead of the previously-planned 6-inch line. The parties' pre-contract emails indicate that NJAW alerted Petitioner that using an 8-inch service line would require an 8-inch meter, which was subject to a higher charge. Additionally, as NJAW noted, alternative water service proposals were discussed between NJAW and Petitioner, with Petitioner ultimately rejecting the alternatives and requesting an 8-inch service line and meter for this project.

NJAW argued that there was no basis in law for the relief sought by the petition. NJAW argued that there was no allegation that it had failed to operate in accordance with its tariff, as it advised Petitioner of the higher tariff rate applicable to the 8-inc meter. Finally, NJAW argued that Petitioner was not entitled to relief under N.J.S.A. 48:2-21 as the rates Petitioner would be charged for water service were tariff rates approved by the Board.

PETITIONER'S OPPOSITION

Petitioner argued that summary decision was not appropriate in this matter as it contended that there were various factual disputes which had to be resolved. Specifically, Petitioner argued that the various pre-contract negotiations were verbal, which necessarily requires an evidentiary hearing. Additionally, Petitioner contended that there are factual disputes regarding the representations NJAW made regarding the necessity of the 8-inch meter and the billing consequences of using such a meter. Finally, Petitioner contended that the condominium already has meters in place to permit NJAW to bill unit owners under a lower charge.

NJAW'S REPLY BRIEF

In reply, NJAW argued that none of the Petitioner's arguments raised a genuine issue of material fact, as the Petitioner's own documents and statements generally admitted all of the facts relevant to the dispute. NJAW refuted Petitioner's argument that Petitioner should have been offered a different rate schedule. NJAW noted that a different rate schedule was unavailable as Petitioner had declined to grant the easement NJAW requested when the parties were negotiating alternative methods of providing water service. Additionally, NJAW pointed out that its relevant customer is not the individual condo owners, but instead the condo association itself. Finally, NJAW refuted Petitioner's contention that it could bill individual unit owners using the on-site water meters; NJAW noted that it did not own these meters, and that Petitioner had declined to issue NJAW the easement necessary for it to provide water service in the manner Petitioner suggests.

THE INITIAL DECISION

On May 12, 2022, ALJ Cookson issued her Initial Decision and granted NJAW's motion for summary decision, and dismissed the petition. ALJ Cookson began her opinion by outlining the procedural history of the case, and making factual findings based on the relevant documents and motion papers.

Turning to legal analysis, the ALJ first noted the standard applicable to motions for summary decision, and held that any facts introduced by Petitioner were not relevant to the underlying dispute regarding the application of NJAW's tariff to this project. The ALJ noted that Petitioner submitted a certification with exhibits, but that the effect of this certification and exhibits was merely to introduce parol evidence without proving that the underlying contract (the extension agreement executed by NJAW and Petitioner after years of negotiation) was ambiguous in fact or otherwise in need of outside context. The ALJ noted that both signatories to the contract were sophisticated businesses and represented by counsel and various professionals during the planning and construction process. Petitioner, the ALJ held, made a business decision to move forward with its project (including the 8-inch service line and meter) rather than incur the economic consequences of further delay. The evidence submitted by Petitioner, consisting of after-the-fact regret about the implications of Summit requiring Petitioner to use an 8-inch service line, was insufficient to prevent enforcement of the contract as negotiated.

The ALJ also rejected Petitioner's argument that it should be relieved from application of the tariff rates pursuant to N.J.A.C. 14:3-1.3, which the ALJ noted requires all regulated utility rates to be

approved by the Board. The ALJ held that she was without authority to impose a bargain on the parties that was more beneficial to Petitioner than the bargain Petitioner had negotiated for itself. The ALJ finally noted that the condo association (who is NJAW's customer, but not participating in this litigation) was free to negotiate with NJAW regarding its water service and submit any requested change in service or rates to the Board for approval. However, the ALJ held, she had no authority under the tariff or the Board's regulations to force NJAW to craft the solution requested by Petitioner.

No exceptions to the ALJ's initial decision were received by the Board.

DISCUSSIONS AND FINDINGS

After review of the initial decision set forth above, the Board **HEREBY ADOPTS** ALJ Cookson's initial decision granting NJAW's motion for summary decision. We accept the ALJ's factual findings; we agree that there were no genuine issues of material fact as to any of the facts that the ALJ set forth in her opinion; and we have summarized the ALJ's factual findings above.

The motion record shows that NJAW repeatedly informed the Petitioner of the potential impacts of its decision to move forward with its construction plan to install an 8-inch service line and meter. The record does not disclose any evidence of fraud in the inducement, misrepresentation, bad faith, or any other valid defense that Petitioner may raise to avoid the consequences of the choice it made to install the 8-inch service line and meter, or the bargain it struck with NJAW. The Board's review of the record indicates that there is no "genuine issue as to any material fact challenged," that the Board may summarily dispose of the petition, and that NJAW "is entitled to prevail as a matter of law." See N.J.A.C. 1:1-12.5.

In November 2017, Petitioner was advised by the City of Summit that Summit required Petitioner to install an 8-inch service line for fire suppression needs. After two (2) months of negotiations, Petitioner submitted an amended new service application requesting an 8-inch service line. Petitioner and NJAW ultimately executed an extension deposit agreement on December 19, 2017. That agreement, we note, contained a provision stating that the text of the contract represented the entire agreement of the parties, and that it superseded all prior understandings. The ALJ held that Petitioner was seeking to introduce evidence to create an ambiguity in the contract where none appears on the face of the contract. We agree. As the ALJ noted, the contracting parties were sophisticated entities who were represented by counsel during the planning, negotiation, and construction phases of this project. Once Petitioner's original development plan was rendered impractical by the City of Summit's demand for an 8-inch service line, Petitioner made a business decision to proceed with installation of the 8-inch service line and meter, and memorialized this decision in a contract which superseded all prior understandings. Petitioner is seeking to avoid the costs of the bargain it negotiated while receiving the benefits of the bargain it wished to negotiate. As the ALJ held, the Board has no authority to negotiate a different contract for the parties than the one the parties negotiated for themselves.

Petitioner argued that 68-72 Franklin Place already has sufficient metering infrastructure to permit individual unit owners to be billed as NJAW's customers of record. We reject this argument. During the planning phase of the project, Petitioner and NJAW explored various alternative proposals for the provision of water service to the property. One of these proposals would have involved NJAW running a service line through Petitioner's property, and feeding the individual unit owner meters. Petitioner rejected this proposal because it was unable to accommodate the easement that NJAW required in order to execute the plan; the parties ultimately agreed on a different plan and executed a contract memorializing the plan. Currently, NJAW has no easement

in the property, and it claims that it cannot run water lines to the on-site metered water system under property in which it has no control. We agree. We specifically reject the rate proposal advanced by Petitioner, which is impractical for NJAW as NJAW has no access to the property and has no knowledge of or control over the meters, which were installed in unit owner utility closets by the Petitioner.

Finally, the record indicates that NJAW was operating in compliance with its tariff in charging the proper rates and informing the Petitioner of the impacts of its construction choices. Accordingly, it is **ORDERED** that the petition of 68-72 Franklin Place, LLC seeking relief from certain tariff charges of New Jersey-American Water Company Inc. is **DISMISSED WITH PREJUDICE**.

This Order will take effect on July 20, 2022.

DATED: July 13, 2022

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

CARMEN D. DIAZ
ACTING 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 68-72 FRANKLIN PLACE, LLC AND THE VILLAGE COURTYARD CONDOMINIUM ASSOCIATION

BPU DOCKET NO. WO20110723
OAL DOCKET NO. PUC 05592-21

SERVICE LIST

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY DECISION MOTION

OAL DKT. NO. PUC 05592-21
AGENCY DKT. NO. WO20110723

IN THE MATTER OF THE PETITION OF 68-72 FRANKLIN PLACE, LLC AND THE VILLAGE COURTYARD CONDOMINIUM ASSOCIATION.

Robert L. Podvey, Esq., for petitioner 68-72 Franklin Place, LLC (Connell Foley, attorneys)

Thomas J. Herten, Esq., and **Josiah Contarino**, Esq., for respondent New Jersey-American Water Company, Inc. (Archer & Greiner, attorneys)

Record Closed: May 4, 2022 Decided: May 12, 2022

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about November 18, 2020, 68-72 Franklin Place, LLC ("Developer" or "Franklin Place") and the Village Courtyard Condominium Association ("Association") (jointly "Petitioners") filed a dispute with the Board of Public Utilities (Board) against New Jersey-American Water Company, Inc. ("NJAW" or "Respondent") alleging improper charges to their utility account on the basis that they should never have been required to install and/or be charged for an eight-inch (8") meter to this condominium development of twelve units. NJAW answered to the complaint on or about June 23, 2021. The matter

was transmitted by the Board of Public Utilities ("Board") to the Office of Administrative Law ("OAL") on July 1, 2021, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F-1 to 15. The matter was assigned to me on July 13, 2021.

I convened an initial case management conference with the parties telephonically on August 23, 2021, the earliest date all parties were available. At that time, counsel for the Developer explained that the transition of control over the management of the condominium development to the Association was just being undertaken.[1] I held several other status conferences with the parties over the succeeding months. Respondent indicated that it would be filing a Motion for Summary Decision and a briefing schedule was thereafter established. I held oral argument on the motion on March 22, 2022, during which I also requested some limited additional briefing. The record closed with the receipt of those submissions on May 4, 2022. Accordingly, the motion is now ripe for determination.

MOTION UNDER CONSIDERATION

Respondent NJAW has filed a motion for summary decision on the basis that the Developer not only agreed to the installed meter but requested it and knew of the water service fee associated with it before proceeding with its water service application. NJAW has simply applied its tariff rates to the condominium project as designed by the Developer. Insofar as NJAW asserts that there can be no genuine dispute about the development project, judgment should be entered on its behalf.

Petitioner Franklin Place opposes the application and asserts that a plenary hearing is necessary because there are genuine issues of material fact in dispute; specifically, whether it was forced to enter into utility agreements under duress; whether the utility had an obligation to insist that the project be designed differently; whether the

[1] An attorney for the Association participated in the one status conference convened on September 9, 2021, but never filed an appearance or a motion to substitute as counsel in this matter. As discussed herein below, I raised the question of whether the Developer could stand in the shoes of the Association in seeking prospective relief from NJAW bills to the latter.

utility must apply a different tariff or rate for the condominium owners than the currently applicable one.

STATEMENT OF UNDISPUTED FACTS

Based on a review of the relevant documents and motion papers, I **FIND** as **FACT**:

1. Petitioner is the developer of condominium buildings located in the City of Summit, consisting in pertinent part of twelve (12) townhouse-style condominium units situated in two (2) multi-story buildings at the property known as 68-72 Franklin Place, as designated by the Summit Tax Assessment Map as Block 3401, Lot 4.01 (the "Property"). [Certification of Gary W. Szelc ("Szelc Cert."), Exhibit A at ¶¶ 1-2, 4-6.] Those condominium units combine with two (2) duplex homes situated across the street from the Property (on parcels designated by the Summit Tax Map as Block 2614, Lots 26.01 and 26.02) to form "The Village Courtyard Condominium Association, Inc." ("Association"). [Id.]

2. In 2014, NJAW's Joseph Davignon began regular communications with petitioner's engineering representative, Gary W. Szelc, regarding the Project's water service needs, including the existing water system servicing the Property and the regulatory process for obtaining water service for the Condominium Project. [Szelc Cert. at ¶ 5; Certification of Joseph N. Davignon ("Davignon Cert."), ¶ 2).]

3. Davignon informed Szelc that the Property was serviced by NJAW's 4-inch water main situated on or under Franklin Place, and that certain system upgrades and extensions would be required to adequately service the Condominium Units, including an upgrade to an 8-inch ductile iron water main. [Szelc Cert. at ¶ 9; Exhibit A at ¶¶ 27-29; Exhibit C.]

4. Szelc was of the opinion that the most efficient design for this type of project was to install two separate 6-inch lines down each driveway of the Property,

such that each of the Condominium Unit buildings had an individual house meter. [Szelc Cert. at ¶ 10.]

5. As of September 2017, it was intended that Franklin Place would be serviced by an 8-inch main, into a 6-inch tap/connection line, into a 6-inch meter, into two 6-inch service lines. [Davignon Cert., Exhibit 1.]

6. On November 16, 2017, however, Szelc emailed Davignon to advise that the "City of Summit fire officials" had directed Franklin Place "to provide an 8-inch tap [connection line] off of the proposed new 8-inch street main upgrade into the backflow preventer, from which two 6-inch services would branch off to supply to project." [Davignon Cert., Exhibit 2; Szelc Cert. at ¶ 28; Exhibit H.]

7. When Davignon asked why the 8-inch tap/connection line would be installed instead of the planned 6-inch tap/connection line, Szelc explained that "running that short section of 8-inch [tap/connection line] across the street and then branching into the 6-inch service would alleviate any concerns" of the municipality as to the number of units services by each fire hydrant.[2] [Davignon Cert., Exhibit 2 at 2.]

8. The Developer and its counsel discussed the tap size increase and the resulting increase in fees of $408 per month. Insofar as Franklin Place and its consultants were "on the same page" with the tap increase, it anticipated NJAW agreeing, and the fire officials being so advised. [Davignon Cert., Exhibit 3.] [Petition ¶ 62 ("NJAW's representatives were consulted regarding the Fire Code Official's proposal and had no objection other than to note that the use of an 8-inch service line would require an 8-inch industrial meter.").]

9. Further, internal email communications from the Project's fire consultant, Jerry Naylis, confirmed, "From a fire protection point of view that works. They may want

[2] Franklin Place alleged that NJAW wanted an exclusive easement over the driveways, which could not be accommodated. [Szelc Cert. at ¶ 11.] I note, however, that the issue of easements, and any scope of such, was not set forth in the Petition. Further, there are no documents presented by either party on this issue.

a separate fire hydrant on each six-inch line. That may be a small price compared to additional delay." [Davignon Cert., Exhibit 3.]

10. After Franklin Place's discussions in November 2017 and its request to NJAW to increase to an 8-inch tap/connection line from a 6-inch tap/connection line, Franklin Place submitted a New Service Application on November 29, 2017. [Davignon Cert., Exhibit 5.]

11. The Developer completed the New Service Application designating "8-inch" as the size meter it was requesting. Franklin Place also confirmed at the end of the New Service Application that it "underst[ood] that these services are subject to the rates and conditions of the Water Company Tariff which is available for me on the water company's website." [Davignon Cert., Ex. 5 at 2.]

12. The Revised Proposal ultimately became the final version of the water service "Extension Project" that served as the basis of the Extension Deposit Agreement that was signed by Petitioner and NJAW on December 19, 2017. [Szelc Cert. at ¶ 22; Exhibit E.]

13. In submitting the Extension Deposit Agreement, Franklin Place confirmed the modification to paragraph one of the Extension Deposition Agreement: "As discussed, in paragraph one, the 6 inch service stub has been changed to an 8 inch stub." [Davignon Cert., Exhibit 9.]

14. The project was completed on or around October 25, 2018, and the construction of the overall Condominium was completed on or around June 15, 2019. [Szelc Cert. at ¶ 38; Exhibit A, Petition at ¶ 18.]

15. The current "As-Built" plans prepared by Casey & Keller Inc., last revised on June 19, 2020, show the on-site utility systems, including individual water lines connecting the two (2) buildings wherein the units are situated. [Szelc Cert. at ¶ 39; Exhibit J.]

16. The condominium units are equipped with individual Carlon Water meters, which were installed by the Developer, without NJAW involvement, in a utility room/closet within each unit's garage. [Szelc Cert. at ¶ 40.]

17. At the time of the filing of the Petition, the water service fee for an 8-inch meter was $1,348, which was subsequently increased to $1,480 in accordance with Board approved tariff rate increases. [Davignon Cert. ¶ 15.] The 5/8" charge set forth under NJAW's Tariff would be $18.50/month. [Szelc Cert., Exhibit B.]

18. Depending on the size of the meter, NJAW's tariff also includes a "Distribution System Improvement Charge (DSIC)," which varies from $3.25 for a 5/8" meter to $260.10 for an 8" meter. [Szelc Cert. at ¶ 43.]

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

As an initial matter, I sought supplemental briefing on the issue of whether the Developer has standing to assert the claims for relief on behalf of the Association. While the Petition was filed by the Developer's current counsel on behalf of both petitioners, in the responsive submission of Franklin Place to NJAW's motion, that counsel noted: "Although the caption of the Petition also includes The Village Courtyard Condominium Association (the "Association") as a co-Petitioner, the Association has retained separate counsel and has not participated in these proceedings." [Franklin Place Letter-Brief at n.1, dated January 14, 2022.]

It is not disputed that counsel for the Association participated in one off-the-record, telephone case conference and confirmed to all of us that it would not be participating. Counsel for the Association never filed an appearance in substitution of representation originally filed jointly by counsel for the Developer. I **CONCLUDE**, therefore, that the Association acknowledged that it was an interested party but has chosen not to prosecute its interests herein. It will likely be bound by the conclusions reached herein, if affirmed by the Board in its Final Decision, because it had a full and fair opportunity to participate. See, e.g., In re Xanadu Project at Meadowlands

Complex, 415 N.J. Super. 179, 202 (App. Div. 2010). Accordingly, I **CONCLUDE** that I must address the merits set forth in this motion by NJAW for summary decision.

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a full evidentiary hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." NJAW has filed cross-motions for summary decision. In an administrative proceeding, the administrative law judge (ALJ) must consider whether the pleadings are sufficient to allow a rational fact finder to conclude that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Zaza v. Marquess and Nell, Inc., 144 N.J. 34, 54 (1996); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). It is the movant's burden to exclude any reasonable doubt as to the existence of a genuine issue of material fact. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Where there are no material facts in dispute and the only issue before the court is a matter of law, summary decision may properly be entered. Ibid. Here, I **CONCLUDE** that any facts introduced by Petitioner are immaterial to the application of utility regulations and laws.

Petitioner has submitted a supporting certification with exhibits for consideration on this motion; however, I concur with respondent that those papers failed to address all the relevant communications and conveniently conflated decisions made by NJAW with those required by fire officials in Summit. [Szelc[3] Cert. at ¶¶ 7, 28-31; Exhibit D at 5; Exhibit H; cf. Petition at ¶¶ 53-63.] Essentially, Franklin Place tries to insert ambiguity into the contractual agreements through parol evidence without proving that they are in fact ambiguous or in need of outside context.

> In general, the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document. Restatement (Second) of Contracts §

[3] Szelc is apparently unfamiliar with how tariffs are set, the regulatory approval process for rate increases, or the distinction between "fixed" and "variable" rates. [Szelc Cert. ¶¶ 34-37.]

> 213 (1981). Although the parol evidence rule is easily framed, it "is attended with confusion and obscurity which makes it the most discouraging subject in the whole field of evidence." 9 Wigmore on Evidence § 2400, at 4 (Chadbourn rev. 1981). Not only is the parol evidence rule difficult to apply, it is a misnomer because it applies to documentary as well as oral evidence. See id. at 5. Moreover, we have noted that the parol evidence rule is a rule of substantive law, not a rule of evidence. Atl. Ne. Airlines v. Schwimmer, 12 N.J. 293, 302, 96 A.2d 652 (1953); Restatement (Second) of Contracts § 213 cmt. a (1981).
>
> Under Professor Williston's restrictive view, parol evidence may only be admitted if the language of the writing is unclear. See E. Allan Farnsworth, Contracts § 7.12, at 502-03 (1982) (citing Williston on Contracts § 95 (3d ed. 1957)); Restatement (First) of Contracts § 230 cmt. a. Professor Corbin has advanced a more expansive view of the parol evidence rule, which was adopted in the Second Restatement of Contracts. That view provides that "[a]ntecedent and surrounding factors that throw light upon . . . [the meaning of the contract] may be proved by any kind of relevant evidence." 3 Corbin on Contracts § 579 (West 1960); see also Restatement (Second) of Contracts § 214 ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated.")
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> [Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268-69 (2006).]

Here, both sides were sophisticated businesses, and both were represented by counsel and professionals during the pre-construction negotiations. The executed documents and supporting written communications undermine any argument that the Developer was forced to enter into revised plans and agreements. Plainly, it made a business decision to move forward with the Project, rather than to incur the economic consequences of further delay. Even giving Franklin Place the benefit of any doubts, there is no proffered testimony that raises anything other than after-the-fact regret for the implications of Summit's requirements on the homeowners.

In sum, there are no genuine issues of material fact and therefore summary decision should be granted to NJAW. Petitioners received the water service installation

that Franklin Place requested and contracted for, and that the municipality required. "If an agreement is reached through an offer and acceptance and is sufficiently definite so that the performance to be rendered by each party can be ascertained with reasonable certainty, a contract arises." Graziano v. Grant, 326 N.J. Super. 328, 339 (App. Div. 1999) (citing Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992)). "If the parties agree on essential terms and further manifest an intention to be bound by those terms, they have created an enforceable contract." Id. at 339-40. To be sure, "it is not the function of the court to make a better contract for the parties." Id. at 352 (internal citations omitted); accord Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 561 (App. Div. 2007).

Franklin Place also relies upon a partial reading of a Board regulation on the issue of whether NJAW can apply something other than its tariff to the Project's utility service.

> (d) Each utility shall operate in accordance with its tariff at all times, unless specifically authorized in writing by the Board to do otherwise.
>
> [N.J.A.C. 14:3-1.3.]

The Developer omits the next subsection which makes it clear that the lawful utility charge is based upon either a tariff or an agreement subject to BPU approval:

> (e) If a gas, electric, water or wastewater utility plans to enter into a contract or agreement with a particular customer or group of customers, for service at rates different from those authorized under the utility's Board-approved tariff, the utility shall file a petition for approval, which shall include four copies of the contract or agreement, at least 30 days prior to the effective date of the agreement or contract. If a telephone utility enters into a contract or agreement with a particular customer or group of customers, for service at rates different from those provided for under the utility's Board-approved tariff, the telephone utility shall make all individual case contracts (ICCs) available for inspection by Board staff upon request.
>
> [Id.]

NJAW, as a regulated utility, cannot just decide with a developer to vary the terms and conditions of providing water service to a new project; nor does the Board create the terms and conditions for the parties without an application supported by an executed agreement. The Board, like this forum, cannot make a better agreement for the parties than one they negotiate between themselves. Nor can the properly invoiced tariff charges be retroactively erased as if such an agreement or different connections had already been put in place.

Furthermore, I note that the Petition did not make any allegations about the easement discussions or disagreements, nor did it specifically seek relief in the form of mandatory connection of the private individual meters to the NJAW system, although it did seek such unstated and broad relief. If there is interest and the wherewithal to prospectively arrange individual metering between the Association and NJAW, then those parties are free to engage in such negotiations, with their attendant construction cost considerations, and submit same to the Board, if a tariff provision would not thereafter apply. **I CONCLUDE** that there is no authority under the tariff or the Board regulations for me to force NJAW to craft a solution just for Franklin Place unless and until the parties enter into an agreement.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the motion for summary decision filed by New Jersey-American Water Company, Inc., is **GRANTED**. It is further **ORDERED** that the petition of 68-72 Franklin Place, LLC, and the Village Courtyard Condominium Association for relief from certain tariff charges of New Jersey-American Water Company, Inc., is hereby **DENIED**.

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 (45) 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.

Gail M. Cookson

May 12, 2022
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 5/12/22

Date Mailed to Parties: 5/12/22

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