Agenda Date: 8/14/24
Agenda Item: 5C

STATE OF NEW JERSEY

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

WATER

BRENDA CASTRODAD, ROBERT HARRIS, ROBIN JANELL, LINDA PACK, LOIS SILVERMAN, AND ALL SIMILARLY SITUATED,	)	ORDER ADOPTING INITIAL DECISION
Petitioners,	)	
v.	)	BPU DOCKET NO. WC22120730
VEOLIA WATER NEW JERSEY, WOODMONT PROPERTIES, TOLL NJ I, LLC AND TOLL BROTHERS, INC.	)	OAL DKT NO. PUC 00701-23
Respondents.	)	

Parties of Record:

Carlos M. Valentin, Esq., on behalf of Petitioners, Brenda Castrodad, Robert Harris, Robin Janell, Linda Pack, Lois Silverman and all similarly situated
Chad Klasna, Esq., on behalf of Respondent, Veolia Water New Jersey
Jennifer L. Alexander, Esq., on behalf of Respondent, Woodmont Properties
Antimo A. Del Vecchio, Esq., on behalf of Respondent, Toll NJ I, LLC and Toll Brothers, Inc.

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board" or "BPU") following an Initial Decision issued by Administrative Law Judge ("ALJ") Gail M. Cookson on March 5, 2024 ("Initial Decision"). By this Decision and Order, which is the Final Decision in this matter pursuant to N.J.S.A. 52:14B-10(c), the Board now **ADOPTS** the Initial Decision in its entirety.

BACKGROUND AND PROCEDURAL HISTORY

On December 8, 2022, Brenda Castrodad, Robert Harris, Robin Janell, Linda Pack, Lois Silverman and all similarly situated residents of certain units constructed in River Vale, Bergen County, New Jersey ("Petitioners") contained within the Fairways at Edgewater Country Club condominium complex ("Complex") filed a petition with the Board for relief, alleging improper water facility charges and improper water meter rental rates invoiced by Veolia Water New Jersey ("VWNJ," "Respondent," or "Company"), a public utility corporation located at 461 From Road, Suite 400, Paramus, New Jersey subject to the jurisdiction of the Board. The Complex consists

of 225 units, of which 193 are contained within multi-level units, known as "Carriages." The remaining thirty-two (32) units are single-level condominium units, all of which are housed in eight (8) buildings in the Complex known as "Cottages." Of the thirty-two (32) single-level units in the Cottages, sixteen (16) are on the first floor and sixteen (16) are on the second floor. VWNJ provides water service to the Complex and charges a "Water Facility Charge" to each unit based on the size of the meter that is installed. The Cottages units have one-and-one-half-inch water meters installed at a rate of $2.8932 The Cottages have a larger meter to facilitate their equipped fire sprinkler system, which requires the use of a one-and-one-half-inch meter.

Petition

By the Petition, the Petitioners alleged that the WFC is improper because it far exceeds the cost charged to the typical residential water customer using a one-inch meter. Additionally, the Petitioner argues that the retail cost of the one-and-one-half-inch meters is approximately $1,000 on average and, assuming the Respondent changes the meters every eight (8) years, the Company "is pocketing $8,448.15" per meter over their respective lifetimes. The Petitioners further alleged that the high charge is not justified by the existence of the fire sprinkler system because the sprinkler system is rarely used, does not consume any water each month, and "does not serve as an excuse to add . . . [a] disproportionate charge to the monthly bill." The Petitioners requested the Board issue an Order precluding VWNJ from charging the WFC to the Petitioners and credit the Petitioners the excess charges. In the alternative, the Petitioners requested that the Board issue an Order directing the Company to charge the Petitioners for the cost of a new meter in a monthly amount equal to the cost to the Company over a thirty-six (36)-month period and charge builders the cost of the meter in the case of new construction.

Answer

On December 28, 2022, VWNJ filed an Answer to the Petition denying the allegations contained within the Petition and requesting that the Petition be dismissed and that the requested relief be denied.

This matter was transmitted to the Office of Administrative Law ("OAL") on January 13, 2023 as a contested case where it was assigned to ALJ Cookson.

ALJ Cookson held a case management conference on March 23, 2023, at which time she investigated whether there might be an engineering solution that would address the service line and meter sizing.

First Amended Petition

On May 5, 2023, the Petitioners filed an amended petition explaining that, while the service line is one-and-one-half inch, the lines split into two (2) lines, one (1) for the unit and one (1) for the fire sprinklers, each with a reduced one (1)-inch diameter ("First Amended Petition"). The Petitioners further alleged that VWNJ is in violation of N.J.S.A. 40:62-127, pertaining to municipal utilities, which requires that no rate include any fire protection system charges for residential customers served by a meter less than two (2) inches in diameter. The Petitioners further argued that that using a one-and-one-half-inch meter is unnecessary because the Building Department of the Township of River Vale does not require such meter sizing for the fire sprinkler system and the Respondent knew that the Fire Sprinkler System worked hydraulically with a one (1) inch meter, but forced the developer to install a one-and-one-half-inch meter. The Petitioners therefore asserted that the Respondent installed the larger meter with the intent of creating an adhesion

contract and charging Petitioners the corresponding higher meter rates. As such, the Petitioners requested that the Board issue an Order deeming VWNJ in violation of N.J.S.A. 40:62-127, precluding the Company from charging the Petitioners the previously-approved one-and-one-half-inch meter rates, and instructing the Respondent to charge Petitioners one (1) inch meter rates pursuant to the Company's tariff and credit the Petitioners for the excess charges. In the alternative, the Petitioners requested that the Board issue and Order instructing the Respondent to change the configuration and piping to install one (1) inch meters in the Petitioners' units, bear all associated costs, and charge the Petitioners the corresponding one (1) inch meter rate according to the Company's tariff.

Answer to First Amended Petition

On May 24, 2023, VWNJ filed an Answer to the First Amended Petition ("Answer"), requesting that the First Amended Petition be denied for alleging "completely new and unsubstantiated claims." By the Answer, the Company noted that N.J.S.A. 40:62-127 applies only to Municipally Owned Public Utilities, not private utility companies like VWNJ, and any claim based upon N.J.S.A. 40:62-127 should therefore be denied.

The Company further noted that the Petitioners should be barred from bringing the claim that VWNJ knew one-and-one-half-inch meters were unnecessary and forced the developer to install such meters because the claim is not based upon a factual foundation upon which relief can be granted. The Respondent explained that the Petitioners' claim is conclusory; the Petitioners are not parties to the "alleged 'adhesion contract'" and therefore do not have standing to challenge it; and that the developer, Woodmont Properties ("Woodmont"), is one (1) of the largest regional property developers in New Jersey and the claim that "this sophisticated business entity was forced into a contract of adhesion be Respondent is incredulous."

Reply to Answer

On June 5, 2023, the Petitioners filed a Reply to the Answer, arguing that the First Amended Petition conforms the allegations to the facts of the case according to documents provided by the Respondent ("Reply"). The Petitioners further argued that the Respondent's claim that N.J.S.A. 40:62-127 does not apply to this case fails to cite any precedent upon which to ground its claim and that N.J.S.A. 40:62-127 applies to the Company because it concerns public safety that is "not a matter of municipal versus private companies offering water service" and therefore is a matter to be determined by the court.

By the Reply, the Petitioners further argued that it has facts upon which to base its claims as supported by documents provided by the Company and third-party vendors and that further discovery is unnecessary to support its claims.

Finally, the Petitioners argued that, pursuant to N.J.S.A. 2A:15-2, they are third-party beneficiaries to the "adhesion contract" and therefore have standing to sue based upon a cause of action stemming from the purported contract.

By Order dated June 7, 2023, ALJ Cookson granted the Petitioners' Motion to amend the Petition.

Second Amended Petition

On November 14, 2023, Petitioners filed a second amended petition, seeking to add Woodmont; Toll NJ I, LLC; and Toll Brothers, Inc. as respondents in this matter (together with VWNJ, "Respondents"), and hold them jointly and severally liable for the damages alleged to the Petitioners, citing their respective roles in sizing the Complex's water meters as the reason for their inclusion ("Second Amended Petition"). Additionally, by the Second Amended Petition, the Petitioners provided additional information they believed would support the claims enumerated in the First Amended Petition, including Expert Witness Affidavits in support of their contention that the one-and-one-half-inch meters were unnecessary and that the Company could have used a one-inch meter.

Answer to Second Amended Petition

On November 28, 2023, VWNJ filed an answer to the Second Amended Petition denying all allegations of the Second Amended Petition ("Second Answer").

Toll NJ I, LLC and Toll Brothers' Answer

On December 14, 2023, Respondents Toll NJ I, LLC and Toll Brothers (together, "Toll Brothers") filed an answer to the Second Amended Petition denying all claims made against the Respondents in the Second Amended Petition and requesting that the Second Amended Petition be dismissed with prejudice.

VWNJ Motion for Summary Decision

On December 15, 2023, VWNJ filed a Motion for Summary Decision as to the Petitioners' claims that VWNJ unnecessarily requested the developer and contractor to install one-and-one-half-inch meters in the Complex, arguing that the Second Amended Petition does not raise any new allegations as to the Company and summary decision is therefore warranted, regardless of the inclusion of new respondents.

VWNJ argued that there is no genuine issue of material fact in this matter because it is undisputed that the Company is a public utility company regulated by the Board and obligated to abide by its Board-approved tariff. Additionally, VWNJ argued that the Petitioners offered no evidence to support the assertion that the Company "forced" the developer to install one-and-one-half-inch meters and that the Company, Woodmont, and Toll Brothers are all "sophisticated business entities with access to counsel and numerous professionals" and the claim that VWNJ forced such sophisticated entities to install unnecessary meters is unfounded. Additionally, VWNJ identified that the obligation to identify that the Cottages came equipped with larger water meters and sprinkler systems would have fallen upon Woodmont, Toll Brothers, and the Petitioners as parties to the purchase transaction and the Petitioners were therefore presumably aware of the larger meters at the time of purchase.

VWNJ finally argued that, as a matter of law and public policy, the Petitioners cannot claim that a contract for water and utility services, made pursuant to Board-approved tariff, constitutes an adhesion contract and any claim thereto is "facially invalid."

Woodmont Motion to Dismiss

On December 21, 2023, Woodmont filed a Motion to Dismiss, arguing that the Second Amended Petition should be dismissed against Woodmont because Woodmont is an improper party to this proceeding. Woodmont argued that they had no authority to enter into any agreement for a tariff filing or negotiate the terms of service for utilities and, because the issues in controversy in this matter are in connection with utility fees, the issues contained herein "lie with the [Board] charged with enforcing its utility fees."

Woodmont additionally argued that the Second Amended Petition should be dismissed because the court does not have jurisdiction over the matter, noting that the Board is the proper venue before which this matter should be resolved and this matter should only appear before the courts when, and if, all administrative remedies have been exhausted.

Petitioners' Opposition to VWNJ Motion for Summary Decision

On December 28, 2023, the Petitioners filed opposition to the Company's Motion for Summary Decision, arguing that any request for dismissal of any claim about the water utility charge or rate is irrelevant because the Petitioners' "core allegation" is that Woodmont's request for, and VWNJ's approval of, the one-and-one-half-inch meters was unnecessary and unnecessarily required. The Petitioners noted that the rate associated with the meters is not in dispute, only the type of meter for which the Petitioners are charged. The Petitioners further asserted that VWNJ offered the material evidence necessary to support the Petitioners' claims and, regardless of the entities' sophistication and access to counsel, the undisputed facts show that VWNJ forced and adhesion contract upon Woodmont and Toll Brothers. Therefore, considering the evidence in a light most favorable to the non-moving party, the Petitioners argued that there exists a genuine issue of material fact and the Company's Motion for Summary Decision should be denied.

Petitioners' Motion for Summary Decision

On December 28, 2023, the Petitioners filed a Motion for Summary Decision, arguing that there is no genuine issue of material fact in this matter and that the court should find in favor of the Petitioners as a matter of law because VWNJ does not contest the issues of (1) whether there is an engineering solution that would address the service line and meter sizing and (2) whether the larger meters were unnecessary.

Petitioners' Opposition to Woodmont's Motion to Dismiss

On December 28, 2023, the Petitioners filed an opposition to Woodmont's Motion to Dismiss, arguing that, because VWNJ's standard tariff terms and conditions govern contracts between the Company and Woodmont, Woodmont is a "'real and proper party'" to VWNJ and Woodmont's contract and therefore a party to this proceeding.

The Petitioners further argued that the court has jurisdiction to hear this matter because the Petitioners need not exhaust their administrative remedies in this case, which is heard initially and finally by the Board upon review of ALJ Cookson's Initial Decision in this matter.

Toll Brothers' Opposition to Motion for Summary Decision

On January 3, 2024, Toll Brothers filed an opposition to the Petitioners' Motion for Summary Decision and in support of Woodmont's Motion to Dismiss or, in the alternative, for Summary Decision arguing that the Second Amended Petition should be dismissed for lack of jurisdiction or, in the alternative, Toll Brothers' Cross-Motion for Summary Decision should be granted because Toll Brothers is not a public utility that the Board has authority to regulate pursuant to N.J.S.A. 48:2-13(a). Toll Brothers argued that it is a publicly owned company that develops luxury homes in multiple states and that it is not an entity that owns, operates, manages, or controls any water plant or equipment for public use. Therefore, Toll Brothers argued it does not meet the definition a public utility for the purposes of Board jurisdiction.

Toll Brothers further argued that the Petitioners failed to demonstrate that they are entitled to Summary Decision as a matter of law because multiple genuine issues of material fact exist such as whether Toll Brothers is jointly and severally liable for the alleged damages because, according to the Petitioners' statement of facts, VWNJ had sole discretion to install the one-and-one-half-inch meters at issue. Toll Brothers further argued that the Petitioners failed to prove, as a matter of law, that Toll Brothers holds any responsibility for the water service and related charges at the Complex, that Toll Brothers is a third-party beneficiary to the alleged adhesion contract, or that such contract was ever formed. As such, Toll Brothers argued that the Petitioners' Motion for Summary Decision should be denied.

Toll Brothers finally argued that it complied with the Planned Real Estate Development Full Disclosure Act by filing an accurate public offering statement for the Cottages and therefore properly disclosed that the purchasers of the Cottages must pay the cost of any utilities that are individually metered and utilized for a particular unit. As such, Toll Brothers argued that the Petitioners failed to meet their particular burden with respect to their claims, their Motion for Summary Decision should be denied, and their claims against Toll Brothers should be dismissed or, in the alternative, Toll Brothers should be granted summary decision.

Woodmont Opposition to Petitioners' Motion for Summary Decision and Reply to the Petitioner's Opposition to Woodmont's Motion to Dismiss

On January 5, 2024, Woodmont filed a brief in opposition to the Petitioners' Motion for Summary Decision and in reply to the Petitioners' opposition to Woodmont's Motion to Dismiss, arguing that the Petitioners' Motion for Summary Decision should be denied because the facts presented are immaterial to utility regulation. Woodmont explained that the Petitioners' argument that Woodmont should bear any cost to configure pipes fails because there existed a prior arrangement which established the placement and size of the pipes and water service. Additionally, Woodmont argued that the court cannot change the prior agreement made at the property by the developers, VWNJ, and the Board and can therefore not grant the Petitioner's request as a matter of law.

Woodmont further argued that the Petitioners failed to introduce any evidence that supports the contention that Woodmont is responsible for tariff charges at the Complex, therefore the Petitioners' argument as to tariff charges fails and the related request for summary decision should be denied.

Woodmont additionally argued that the Petitioner's opposition to Woodmont's Motion to Dismiss should be denied because Woodmont had no involvement in the creation of the Cottages' fire sprinkler system design and cannot be held responsible for any damages arising therefrom.

Woodmont further argued that the Petitioners did not consider that the Board previously approved all applications for tariffs and utilities and that the proper avenue by which the Petitioners should seek remedy is through a request to the Board for tariff changes. As such, Woodmont argued that its Motion to Dismiss should be granted.

Woodmont further argued that it is not a proper party to this action because it is not able to negotiate for tariff changes and has no authority to enter into any agreement with the Board and cannot negotiate the terms of service for utilities. Woodmont further argued that any tariff-related relief, such as that sought in this case, should be sought before the Board.

VWNJ's Reply to Petitioner's Opposition to VWNJ's Motion for Summary Decision

On January 10, 2024, VWNJ submitted a reply to the Petitioners' opposition to VWNJ's Motion for Summary Decision and in opposition to Petitioners' Motion for Summary Decision, arguing that the Petitioners failed to demonstrate entitlement to Summary Decision as a matter of law and failed to raise any genuine issue of material fact which would preclude the Company's request for Summary Decision. VWNJ argued that the Petitioners' statement of facts is inconsistent because it both alleges that Woodmont made the decision to include the larger meters in the Cottages but later claims the decision was made in the sole discretion of VWNJ. VWNJ therefore argued the Petitioners' apparently inconsistent statements of fact demonstrate that the Petitioners failed as a matter of law to demonstrate they are entitled to summary decision.

VWNJ further argued that the Petitioners' claim that the larger meters were unnecessary is without evidence in the record to support it, noting that the Petitioners misunderstood the Court's finding that the Petitioners asserted enough of a factual predicate to amend their complaint as a dispositive finding of fact that the larger meters were unnecessary. VWNJ further explained that the Company never admitted the larger meters were unnecessary or unnecessarily required of the Complex, despite the Petitioners' reliance on this claim as undisputed fact.

Lastly, VWNJ argued that Petitioners' submitted affidavits in support of the claim that the larger meters were unnecessary came from individuals not qualified as experts to submit such testimony and, even if they were qualified as experts, the affidavits show the larger meters were necessary contrary to the Petitioners' assertion. VWNJ further noted that the Petitioners failed to show that the "Preliminary Application for Water Services" by Woodmont created an adhesion contract because they failed to cite any legal authority in support of the argument and failed to submit any admissible evidence to show such an agreement could constitute an adhesion contract.

Petitioners' Cross-Motions for Summary Decision

On January 23, 2024, the Petitioners filed a consolidated Cross-Motion to VWNJ's reply brief in support of its Motion for Summary Decision and in opposition to Petitioners' Motion for Summary Decision; Cross-Motion to Toll Brothers' opposition to Petitioners' Motion for Summary Decision and Toll Brothers' Cross-Motion; and Cross-Motion to Woodmont's opposition to Petitioners' Motion for Summary Decision. The Petitioners argued that this case has been narrowed to the issues of (1) whether there is an engineering solution that would address the Petitioners' claims and (2) whether the larger meters were unnecessary and unnecessarily required. The Petitioners argued that all of the Respondents' arguments are flawed because the Respondents have treated this matter as an issue regarding Board-approved rates, which the Petitioners claim is untrue. The Petitioners therefore argued that the key issue for the court to decide is whether the larger water meter was unnecessary and unnecessarily required.

In their Cross-Motion to VWNJ's response to the Petitioner's opposition to VWNJ's Motion for Summary Decision, the Petitioners denied all claims made in VWNJ's response, arguing that they are entitled to summary decision as a matter of law because the uncontested facts demonstrate that VWNJ did not give Woodmont or Toll Brothers any choice as to the size of the meters installed and therefore an "adhesion contract" was formed. The Petitioners further argued that VWNJ mischaracterized the affidavits submitted in support of the claim that the larger meters were unnecessary and, when taken in their totality, the affidavits support a finding that this claim is undisputed fact. Therefore, the Petitioners argued that they are entitled to summary decision as a matter of law and that VWNJ's Motion for Summary Decision should be denied.

In their Cross-Motion to Toll Brothers' opposition to the Petitioners' Motion for Summary Decision and in support of the Respondents' Cross-Motion to Dismiss and/or for a Summary Decision, the Petitioners requested that its Motion for Summary Decision be granted and that Toll Brothers' Motions be denied, arguing that Toll Brothers directed Woodmont to change the one-inch meters to one-and-one-half-inch meters, and therefore, Toll Brothers is jointly and severally liable for the alleged damages. The Petitioners further argued, contrary to Toll Brothers' claims, there is no lack of clarity over whether any, or all, of the Respondents is responsible for the decision to install the larger meters. The Petitioners explained that each party participated in the agreement and plans to install larger meters in the Cottages and, as such, Toll Brothers is necessarily implicated as a liable party in this matter. Lastly, the Petitioners argued, contrary to Toll Brothers' claims, the Petitioners adequately cited legal authority requiring Toll Brothers to disclose that the Cottages are subject to a different tariff rate than the remaining units in the Complex.

In their Cross-Motion to Woodmont's opposition to the Petitioners' Motion for Summary Decision and Cross-Motion to the Petitioners' opposition to Woodmont's Motion to Dismiss, the Petitioners requested that their Motion for Summary Decision be granted and that Woodmont's Motions be denied, arguing that there is no genuine issue of material fact and that, because Woodmont followed Toll Brothers' directive to install the larger water meters, the Petitioners are entitled to prevail as a matter of law.

INITIAL DECISION[1]

On March 5, 2024, ALJ Cookson issued her Initial Decision in this matter, thereby granting VWNJ's Motion for Summary Decision, denying the Petitioners' Motion for Summary Decision, and ordering that Toll Brothers and Woodmont be dismissed from this action. Initial Decision at 8.

A. Findings of Fact

Based on a review of the relevant documents and motion papers, ALJ Cookson found the following as established facts:

1. The Petitioners are residents of the Cottage condominiums in the Fairways at Edgewater Country Club development ("Fairways") in River Vale, New Jersey.

[1] Although summarized in this Order, the detailed findings and conclusions of ALJ Cookson's Initial Decision control, subject to the findings and conclusions of this Order.

2. The Fairways consists of 225 residential units, of which 193 are multi-level units known as Carriage units and thirty-two (32) are single-level condominium units known as the Cottages.

3. The Fairways were developed by Toll NJ I, LLC and Toll Brothers, which purchased the property from Woodmont in or about August 2020. Woodmont was then contracted by Toll Brothers to undertake the site work.
4. VWNJ is a public utility company which provides water services at the Fairways.

5. The Cottages were constructed with fire sprinkler systems in each unit and one-and-one-half-inch water meters, as compared to the Carriages which were constructed without individual fire sprinkler systems and with one inch (1") water meters.

6. On or about April 23, 2021, Woodmont Properties submitted a "Preliminary Application for Water Service" to Suez Water New Jersey, which was subsequently acquired by the Respondent.[2]

7. Toll Brothers did not select the one-and-one-half-inch water meters that were installed for the Cottage units. Toll Brothers does not assess or collect water service fees, and Toll Brothers was not a party to any contract with Suez or VWNJ in connection with water services for the Fairways.

8. Woodmont Properties was apparently directed by Toll Brothers to change the one-inch lines to one-and-one-half-inch service as they were going to have individual fire sprinkler systems for each unit rather than the fire sprinkler systems for each building. Woodmont Properties did not prepare or have any involvement with the creation of the building fire sprinkler system engineered design. Woodmont did file the Preliminary Application for Water Service with Suez on April 23, 2021.

9. The Plumbing Sub-Code Official for River Vale has stated that the Cottages were able to support two (2) meters, and that in theory, the fire suppression system could have been designed differently; however, any changes now would require new permits and new plans. While the official's responsibilities include "recommend[ing] modifications and adjustments as necessary," no such recommendations were made in this case.

10. The Fire Sub-Code Official for River Vale filed the same affidavit.

11. David Romao is a designer with Quick Response Fire Protection, the entity responsible for the design and installation of the fire suppression system at the Cottages. Romao asserted that the design specifications were provided to Quick Response by Suez Water but there is no factual underpinning for this statement.

[2] At the time of application, water services were provided by Suez Water New Jersey, which was later acquired and merged with Veolia Water New Jersey in a transaction approved by the Board of Public Utilities on December 15, 2021, Docket No. WM21060909.

12. After the Cottages were completed, occupied, and this administrative action filed, Romao was asked by the Petitioners if the system could have been designed with one (1)-inch meters. In theory, that would have hydraulically functioned.

13. The Standard Terms and Conditions for the Water Service Agreement between VWNJ (then Suez) and Woodmont Properties were set forth in the tariff approved by the Board of Public Utilities.

14. Both at the time of installation and at the time of the filing of the Petition, the water service fee for a one-and-one-half-inch meter was $2.8932 per diem, or $88.00 per month, in accordance with the established tariff approved by the Board.

[Id. at 4-6.]

ALJ Cookson found that all parties acknowledged that River Vale approved and Suez (and/or its successor VWNJ) installed one-and-one-half-inch meters as directed on the plans designed by Quick Response and requested by Woodmont and/or Toll Brothers. Id. at 6. ALJ Cookson further found that, even if a one (1) -inch service would have also been hydraulically feasible, that does not make the designed use of one-and-one-half-inch service unreasonable. Ibid.

B. Legal Analysis and Conclusions of Law

ALJ Cookson first concluded that the issues in dispute are governed by the application of utility regulations and laws. Ibid. ALJ Cookson noted that the primary issue in this matter concerns whether VWNJ is charging current water service rates correctly based on the construction specifications that included fire suppression sprinklers in each individual unit. Id. at 7. As set forth above, VWNJ, or its predecessor Suez, merely assessed tariff charges consistent with the Application for Water Services submitted by the builder and as designed by Quick Response. Ibid. ALJ Cookson found that damages against Toll Brothers or Woodmont are not cognizable in this administrative forum, and any determination of a private right of action against them must abide a different forum and jurisdiction, namely the Superior Courts of New Jersey. Ibid. ALJ Cookson noted that even giving the Petitioners the benefit of any doubt, there is no proffered testimony that raises anything other than after-the-fact regret for the implications of the developer's design and installation of these individual condominium unit fire suppression systems on the ultimate purchasers of the Cottages. Ibid. ALJ Cookson therefore found that there are no genuine issues of material fact and therefore summary decision should be granted to the Respondents, reasoning that the Petitioners received the water service installation that the developer requested and contracted for, and that the municipality approved. Ibid. In fact, the Petitioners admit that it was not the public utility that selected the service size. Ibid.

ALJ Cookson held that the law and regulations governing water service are clear that the lawful utility charge is based upon either a tariff or an agreement subject to BPU approval. Id. at 8 [citing N.J.A.C. 14:3-1.3(d)-(e)]. ALJ Cookson further held that the Board cannot create the terms and conditions of a different rate for the parties without an application supported by an executed agreement.[3] Ibid. ALJ Cookson further explained that the Board, like the courts, cannot make a better agreement for the parties than one they negotiate between themselves. Ibid. Nor can the properly invoiced tariff charges be retroactively erased as if such an agreement or different connections had already been put in place. Ibid. ALJ Cookson concluded that there is no authority under the tariff or Board regulations to force VWNJ to create a solution exclusive to the Cottages unless and until the parties enter into, and present to the Board for approval, a mutual agreement. Ibid.

C. Order

ALJ Cookson ordered that VWNJ's Motion for Summary Decision be granted. ALJ Cookson further ordered that the cross-motion for summary decision filed by Petitioners for relief from certain tariff charges of VWNJ be denied. ALJ Cookson finally ordered that Toll Brothers and Woodmont be dismissed from this action. Ibid.

EXCEPTIONS TO THE INITIAL DECISION

Petitioners' Exceptions

By letter dated March 18, 2024, the Petitioners filed exceptions to the Initial Decision ("Petitioners' Exceptions"), arguing that ALJ Cookson previously indicated during a case management conference that this matter is the same as one (1) decided by Order dated July 13, 2022, wherein the petitioner was a developer that entered into a service contract with a public utility and later tried to renegotiate better terms of the contract ("Franklin Place Matter"), and ALJ Cookson therefore indicated at a case management conference she was inclined to dismiss the instant matter.[4] Petitioners' Exceptions at 1. The Petitioners argued that this matter differs from the Franklin Place Matter because they are "end users" who were not part of the contract at issue and came to the picture upon closing on their units after Woodmont and Toll Brothers submitted the preliminary application for water service on April 23, 2021. Id. at 2. Therefore, Petitioners asserted that these two (2) cases are completely different and distinguishable and that here, unlike the Franklin Place Matter, (1) there is an engineering solution that would address the meter sizing issue and (2) the main issue to be decided is whether the larger meters were unnecessary. Ibid.

According to the Petitioners, if the larger meters were unnecessary and unnecessarily required and Petitioners were not a party to the service contract, then the court must order the Respondents to change the piping to accommodate a one (1) inch meter. Ibid. Additionally, the Petitioners stated that they submitted affidavits of three (3) expert witnesses to the effect that there is an engineering solution to change the one-and-one-half-inch meter to a one (1) inch meter

[3] Based upon the lack of any contract between Suez/VWNJ and the developers, ALJ Cookson did not address the Petitioner's adhesion contract arguments. ALJ Cookson noted that this water utility service is premised upon a tariff, not a negotiated contract.

[4] In re the Petition of 68-72 Franklin Place, LLC and the Village Courtyard Condominium Association v. New Jersey American Water Company, Order dated July 13, 2022, BPU Docket No. WO20110723 and OAL Docket No. PUC 05592-21 N.

because the fire suppression system works sufficiently with a one (1) inch meter. Ibid. The Petitioners further alleged that ALJ Cookson failed to distinguish this case from the Franklin Place Matter by ruling exactly as she did in the Franklin Place Matter, even when the two (2) cases are completely different. Ibid.

The Petitioners took further exception with ALJ Cookson's explanation that the Petitioners had "after-the-fact regret" over the implications of the developer's design. Id. at 3-4. The Petitioners identified that they are not a party to any contract and, therefore, could not have "after-the-fact regret." Id. at 4. The Petitioners further identified that ALJ Cookson disregarded that the Petitioners are not a party to the contract by and between Woodmont, Toll Brothers, and VWNJ as well as uncontested evidence submitted by the Petitioners showing that the one-and-one-half-inch water meter installed was unnecessary and unnecessarily required. Ibid.
In their second exception to the Initial Decision, the Petitioners argued that ALJ Cookson contradicted herself by finding that there was not a contract between the parties and Suez/VWNJ, as "[t]his water utility service is premised upon a tariff, not a negotiated contract." Ibid. The Petitioners further argued that the only possible outcome of this case is to order the Respondents to change the Cottages' piping to accommodate a one (1) inch water meter. Id. At 6. Additionally, the Petitioners argued that ALJ Cookson erred in her conclusion of law that "[t]his water utility service is premised upon a tariff, not a negotiated contract" and by disregarding the Petitioners' uncontested evidence showing that the one-and-one-half-inch water meter installed was unnecessary and unnecessarily required. Ibid.

In their third exception to the Initial Decision, Petitioners addressed the "reasonableness test." Ibid. Specifically, the Petitioners noted ALJ Cookson's finding that "[e]ven if a [one inch] service would have been hydraulically feasible, that does not make the designed use of [one-and-one-half-inch] service unreasonable." Ibid. According to the Petitioners, the Respondents did not submit proof that the designed use of a one-and-one-half-inch water meter was reasonable. Id. at 7. The Petitioners further argued that the uncontested proof shows that the one-and-one-half-inch water meter installed was unnecessary and unnecessarily required, thus unreasonable. Ibid. Therefore, the Petitioners concluded that the Initial Decision should be rejected in its entirety and the proposed exceptions in lieu of the Initial Decision be granted. Ibid.

REPLY EXCEPTIONS

VWNJ Reply

By letter dated March 19, 2024, VWNJ filed its reply to the Petitioners exceptions to the Initial Decision Pursuant to *N.J.A.C.* 1:1-18.4(d) ("VWNJ Reply"), arguing that the Petitioners' initial determination should be rejected for lacking merit. VWNJ Reply at 2. VWNJ argued that the Petitioners' first exception is based upon a clear misunderstanding of ALJ Cookson's decision, noting that ALJ Cookson's statement that Petitioners have "after-the-fact-regret" is clearly in reference to Petitioners' purchase of the Cottage units from the developers, not to any contract for water services. Ibid. VWNJ further disputed the Petitioners' claim ALJ Cookson was unfairly prejudiced because the facts of the case are similar to the Franklin Place Matter, which ALJ Cookson also decided. Ibid. VWNJ argued that the Petitioners point to similar language both cases' initial decisions as evidence of this unfair prejudice, however the fact that the Court used similar language and citations in its decisions on two (2) factually similar cases, both of which dealt with the effect of property developers' construction decisions on water usage rates, should be expected and is not evidence of bias or prejudice. Ibid.

VWNJ asserted it is difficult to ascertain the rationale of the Petitioners' second exception, other than it appeared that the Petitioners object to the finding that the water usage rates were set by the Board-approved tariff. Ibid. VWNJ further explained that the Petitioners appear to suggest that they should not have been subject to the public utility regulatory scheme when they purchased their condominiums. Ibid. However, VWNJ notes that the Petitioners' disagreement with the developers' decision to install fire suppression systems and one-and-one-half-inch water meters in the Cottages units, a decision they failed to investigate in their due diligence prior to purchasing their condominiums, does not entitle them to avoid the publicly approved water usage rates. Ibid. VWNJ identified that this would be the "after-the-fact-regret" that Judge Cookson referred to in her decision. Ibid.

VWNJ argued that the Petitioners' final exception, that they disagreed with the Judge's finding that they failed to prove that the developers' decision to install one-and-one-half-inch water meter was unnecessarily or unnecessarily required, was based upon no cited case law and the Petitioners provided "no real arguments to explain why the [ALJ]'s determination on this issue should be set aside" beside their disagreement with the decision. Ibid. VWNJ argued the Petitioners appeared to disagree that ALJ Cookson rejected their proposed standard of necessity and instead evaluated the facts using a reasonableness standard, but the Petitioners' disagreement does not provide any basis to set aside or modify the Initial Decision. Ibid.

Toll NJ, I, LLC, and Toll Brothers Reply

On March 21, 2024, the Respondents Toll NJ, I, LLC, and Toll Brothers, Inc. filed their reply to the exceptions to the Initial Decision Pursuant to *N.J.A.C.* 1:1-18.4(d) ("Toll Brothers Reply"), arguing that the Petitioners' exceptions failed to address the issue of jurisdiction with respect to the claims against Toll Brothers as explained in the Initial Decision and, accordingly, Toll Brothers argued they were never a proper party to this proceeding and the Petitioners erred in bringing their claims against Toll Brothers in this forum. Toll Brothers Reply at 2.

Toll Brothers argued that the Petitioners' first exception "misapprehends [the] Initial Decision" because there is nothing actionable regarding a meter and sprinkler system upgrade and, even if the same were not required, Judge Cookson appropriately found that the larger meters were not unreasonable even if one-inch meters were feasible. Ibid. Toll Brothers asserted that it is simply not responsible for Petitioners' lack of due diligence and apparent buyers' remorse. Ibid.

Toll Brothers further identified that the Petitioners' first exception also "fails to appreciate what legal precedent is," noting that the Petitioners argued they were prejudiced by ALJ Cookson's ruling in a prior case with analogous facts but basing later decisions on those prior is "exactly what Judges are supposed to do." Ibid. Toll Brothers therefore argued that no prejudice arose from ALJ Cookson's reliance on language and citations from her prior decision. Ibid.

Toll Brothers further identified that the Petitioners' second exception, that Judge Cookson erred by finding that the water usage rates were premised on a BPU approved tariff and not a contract, fails because the Petitioners made an "illogical leap" to the conclusion that the "purported contract give rights to the Petitioners to have different water service infrastructure installed." Ibid. Toll Brothers asserted that ALJ Cookson found that "'[t]he Standard Terms and Conditions for the Water Service Agreement between VWNJ (then Suez) and Woodmont Properties were set forth in the tariff approved by the Board of Public Utilities" and, despite Petitioners claim that Toll Brothers was a party to this "contract," Judge Cookson's findings of undisputed fact are clear that Toll Brothers was never a party to any agreement for water services at the Fairways and there was no basis to support Petitioners' arguments as they pertain to Toll Brothers. Id. at 2-3.

Toll Brothers lastly argued that the Petitioners' third exception, that ALJ Cookson should have found that installation of the larger water meters was unnecessary and unnecessarily required, fails because the Petitioners offered neither proof nor legal authority to support this claim. Id. at 3. Toll Brothers further explained that the Petitioners failed to clarify how Toll Brothers is responsible for the decision to install the larger meters. Ibid. Toll Brothers additionally noted that the Petitioners did not contest ALJ Cookson's undisputed findings that Toll Brothers did not select the larger meters for the Cottages and that the decision to install one-and-one-half-inch meters was not unreasonable. Ibid. Toll Brothers concluded that the Petitioners' arguments to support this exception are insufficient as a matter of law to overturn or modify ALJ Cookson's Initial Decision, that their exceptions should be rejected, and that the Board should adopt ALJ Cookson's Initial Decision. Ibid.

Woodmont Reply

By letter dated March 25, 2024, Woodmont filed its reply to the Petitioner's Exceptions ("Woodmont Reply"), arguing that the Petitioners' claim that the court's use of precedent in explaining the outcome of a factually similar cases points to bias and prejudice, rather than the standardization of legal principles is erroneous because ALJ Cookson correctly identified a similar case that involved similarly requested relief and determined that their respective outcomes should also be similar. Woodmont Reply at 2.

Woodmont explained that the Petitioners' second exception, that a contract exists between the Respondents that the court should amend, is erroneous because the Petitioners "simply disagree with a reasonable and legal judgment made by the builders before the Petitioners even lived in the units." Ibid. Woodmont explained that, pursuant to N.J.A.C. 14:3-1.3, all water utility charges by VWNJ must be based upon either a tariff or an agreement subject to BPU approval. Ibid. Woodmont argued that, as the Court affirmed in its decision, any claim by the Petitioners contesting the water utility charge amount or rate is improper. Ibid. Woodmont further argued that, even if a contract exists among the Respondents, such a contract cannot be altered by the courts and therefore the Petitioners' requested relief cannot be granted as a matter of law. Ibid. (citing Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992).

Woodmont lastly argued that the Petitioners' third exception, that the Court incorrectly determined that the Petitioners failed to prove the installation of the larger water meters was unnecessary, is not supported by any case law, legal argument, or evidence. Ibid. Woodmont explained that the affidavits from Sub-Code Officials that the Petitioners submitted demonstrated the Cottages required one-and-one-half-inch meters for fire suppression. Ibid. Woodmont further explained that the affidavits provide no other relevant information, such as who decided to install the larger meters. Ibid. Woodmont noted that, even if this allegation were supported by evidence, unnecessarily installing larger meters does not make the practice illegal. Id. at 2-3. Woodmont argued that at all times, Respondents acted legally and reasonably, and Petitioners have provided no evidence to the contrary. Id. at 3.

Woodmont asserted that Petitioners were aware at the time of purchase that their units were serviced by VWNJ and had the opportunity to do their own assessments regarding costs or other concerns. Ibid. Woodmont further asserted that failure to consider one's own concerns prior to moving into an apartment, disagreement with a court's decision, or anger about an outcome is insufficient to support an overturning of an initial decision, nor is ignorance a defense to the law. Ibid. Woodmont explained that Judge Cookson clearly reviewed all the evidence presented and found that the Petitioners' claims lacked merit as reasoned above and none were of the sort upon which relief could be granted. Ibid. Given the above analysis and lack of substantial evidence in

support of the Petitioners' arguments, Woodmont requested that the Board affirm the Initial Decision in its entirety as a final determination. Ibid.

Petitioners' Objections to Reply Exceptions

By letter dated April 18, 2024, the Petitioners objections to the Respondents' replies to Petitioners' Exceptions to the Initial Decision ("Petitioners' Objections"). The Petitioners first argued that they agree that this matter is factually similar to the Franklin Place Matter and the deciding rationale should therefore have been the contract between the developer and the water service utility. Ibid. The Petitioners argued, however, that ALJ Cookson reached a completely different legal conclusion by finding that "[t]his water utility service is premised upon a tariff, not a negotiated contract." Ibid. Therefore, Petitioners argued that VWNJ's argument must be dismissed. Ibid. Next, the Petitioners argued that VWNJ's argument, that the Petitioners' first exception is based on a clear misunderstanding of ALJ Cookson's statement that Petitioners have "after-the-fact regret", is not only "*ad hominem*", but self-serving and thus meritless. Id. at 3.

The Petitioners addressed VWNJ's argument that the Petitioners merely disagree with ALJ Cookson's finding that the Petitioners failed to prove the decision to install larger water meters was unnecessary or unnecessarily requested, arguing that they provided uncontested proof showing that the meters were unnecessary and unnecessarily required. Ibid. The Petitioners further argued that ALJ Cookson disregarded the facts under the umbrella of a "reasonableness standard" which not even the party that benefits from such a standard can define and explain and, as such, this argument should be dismissed. Ibid.

The Petitioners responded to Toll Brothers' arguments, noting that Toll Brothers argued that the Court does not have jurisdiction to address the dispute between Petitioners and Toll Brothers, and this issue should be handled administratively for the Board to address Petitioners' requests. Ibid. According to the Petitioners, ALJ Cookson then granted Toll Brothers' Motion to Dismiss "based upon a nonsensical reason which was not presented nor argued by Toll Brothers" and that "[d]amages against Toll Brothers or Woodmont are not cognizable in this administrative forum . . ." Id. at 4. The Petitioners argued that ALJ Cookson misrepresented a citation from the Petitioners' briefs, as Petitioners were not seeking damages from Toll Brothers or Woodmont. Ibid. Rather, the Petitioners explained that they petitioned the Board to impose responsibility upon them for having designed and requested the installation of an unnecessary larger meter. Ibid. The Petitioners further argued that the Initial Decision creates a "jurisdictional orphan" out of Petitioners because if this matter was taken to the Superior Court of New Jersey, Toll Brothers and Woodmont would argue that Petitioners have to abide by the doctrine of primary jurisdiction and let the Board decide. Ibid.

The Petitioners further argued that Toll Brothers' argument that the Petitioners "completely misapprehended" ALJ Cookson's use of the phrase "after-the-fact regret is erroneous because their purchase of the Cottages was not at issue in this case and that they do not have buyer's remorse. Ibid. The Petitioners noted that asking the Board to correct a wrong has nothing to do with "after-the-fact regret", but to hold the parties accountable for their unnecessary installation of larger meters. Id. at 5. Therefore, Petitioners argued that this argument is not only "*ad hominem,*" but self-serving and thus meritless. Ibid.

The Petitioners explained that they agree with Toll Brothers' that ALJ Cookson's reliance on the Franklin Place Matter as an analogous case was proper. Ibid. However, the Petitioners argued that ALJ Cookson reached a completely different legal conclusion than in her decision from the Franklin Place Matter by finding that "[t]his water utility service is premised upon a tariff, not a

negotiated contract." Ibid. Specifically, the Petitioners questioned why ALJ Cookson found there existed a contract between the parties in the Franklin Place Matter but not in this matter. Ibid. Therefore, the Petitioners argued that this claim must be dismissed. Ibid.

The Petitioners next addressed Toll Brothers' argument that Petitioners made an "illogical leap" to the conclusion that the purported contract would give the Petitioners rights to have different water service infrastructure installed, arguing that neither the Petition nor briefs argued that the contract between Woodmont, Toll Brothers, and VWNJ gives rights to the Petitioners to have a different water service infrastructure installed. Id. at 5-6. The Petitioners further refuted Toll Brothers' suggestion that Petitioners offered no proof to substantiate the claim that the larger water meters were unnecessary. Id. at 6.

The Petitioners finally argued that Woodmont's claim that the Franklin Place Matter is sufficient legal precedent fails similarly to the same claim made by Toll Brothers: that the Franklin Place Matter is a distinguishable case, thus the doctrine of precedent does not apply. Id. at 7. The Petitioners also refute Woodmont's argument that "[f]ailure to consider one's own concerns prior to moving into an apartment, disagreement with a Court's decision, or anger about an outcome is insufficient to support an overturning of an initial determination, nor is ignorance a defense to the law," arguing that none of these issues were in question in this matter, so they are irrelevant and must be dismissed. Ibid. For these reasons, the Petitioners requested that the Initial Decision be rejected in its entirety and the proposed exceptions in lieu of the Initial Decision be granted. Ibid.

On April 17, 2024, the Board approved a forty-five (45)-day extension of time for Board Staff ("Staff") to review this matter, until June 3, 2024, to review the record and Initial Decision, and for the Board to issue a Final Decision.[5]

On May 22, 2024, the Board approved a second forty-five (45)-day extension of time for Staff to review this matter, until July 18, 2024, to review the record and Initial Decision, and for the Board to issue a Final Decision.[6]

On June 27, 2024, the Board approved a third forty-five (45)-day extension of time for Staff to review this matter, until September 3, 2024, to review the record and Initial Decision, and for the Board to issue a Final Decision.[7]

[5] In re Brenda Castrodad, Robert Harris, Robin Janell, Linda Pack, Lois Silverman, and All Similarly Situated, Petitioners, v. Veolia Water New Jersey, Woodmont Properties, Toll NJ I, LLC and Toll Brothers, Inc., Respondents, BPU Docket No. WC22120730, OAL Docket No. PUC 00701-23, Order dated April 17, 2024.

[6] In re Brenda Castrodad, Robert Harris, Robin Janell, Linda Pack, Lois Silverman, and All Similarly Situated, Petitioners, v. Veolia Water New Jersey, Woodmont Properties, Toll NJ I, LLC and Toll Brothers, Inc., Respondents, BPU Docket No. WC22120730, OAL Docket No. PUC 00701-23, Order dated May 22, 2024.

[7] In re Brenda Castrodad, Robert Harris, Robin Janell, Linda Pack, Lois Silverman, and All Similarly Situated, Petitioners, v. Veolia Water New Jersey, Woodmont Properties, Toll NJ I, LLC and Toll Brothers, Inc., Respondents, BPU Docket No. WC22120730, OAL Docket No. PUC 00701-23, Order dated June 27, 2024.

DISCUSSION AND FINDINGS

The Board, following thorough review of the record in this proceeding including the pleadings, motions and responses, Initial Decision, and all exceptions and reply exceptions thereto, **HEREBY ADOPTS** ALJ Cookson's Initial Decision, granting VWNJ's motion for summary decision, denying Petitioners' cross-motion for summary decision and granting Woodmont and Toll Brothers' motions to dismiss. The Board's determination is explained below.

The Board agrees that VWNJ was entitled to summary decision. A motion for summary decision may be made upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). In an administrative proceeding, summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b); Zaza v. Marquess and Nell, Inc., 144 N.J. 34, 54 (1996); Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). A determination of whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidentiary materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the dispute in favor of the non-moving party. Brill, 142 N.J. at 540.

In determining which party, if any, is entitled to prevail as a matter of law, the Board is guided by relevant legal authority. A public utility's filed tariff is not a mere contract, it has the force of law. In re Application of Saddle River, 71 N.J. 14, 29 (1976); Essex County Welfare Board v. New Jersey Bill Telephone Co., 126 N.J. Super. 417, 421-22 (App. Div. 1974). The Board has authority over utility tariffs pursuant to its authority under N.J.S.A. 48:2-13. The Board's rules, and, by extension, utility tariffs subject to modification under the Board's rules, effectuate Board policy to provide for a safe and reliable utility system.[8] The interpretation of a tariff is uniquely within the Board's expertise as the agency charged with regulating utility tariffs. See Muise v. GPU, Inc., 332 N.J. Super. 140, 159 (App. Div. 2000). Each utility must operate in accordance with its tariff at all times, "unless specifically authorized in writing by the Board to do otherwise."[9]

The Board agrees with ALJ Cookson that the issue before the Board is whether VWNJ charged the Petitioners the correct water rates. Initial Decision at 7. As to this issue, with reference to evidence in the record, ALJ Cookson found there was no dispute that River Vale approved, and VWNJ installed, one-and-one-half-inch meters as directed on the plans for the Cottages and as requested by Woodmont and/or Toll Brothers. Initial Decision at 6 . There is also no dispute that the appropriate charge for one-and-one-half inch meters was $2.8932 per diem according to VWNJ's Board-approved. Ibid. No allegation has been made that there was a deviation from the $2.8932 per diem charge. Accordingly, as to the lone issue properly before the Board, the record is clear that VWNJ acted in accordance with its tariff and charged Petitioners appropriately for a service actually provided. By contrast, there is no authority under VWNJ's tariff or Board regulations pursuant to which the courts or the Board may force VWNJ to create a solution exclusively for the Cottages in the absence of a mutual agreement presented to the Board for approval. Id. at 8. Therefore, the Board concurs with ALJ Cookson's conclusion that VWNJ's Motion for Summary Decision should be granted and that the Petitioners' Cross-Motion for Summary Decision should be denied.

[8] See e.g., N.J.A.C. 14:1-5.11 and 5.12

[9] N.J.A.C. 14:3-1.3.

The Board also agrees that Toll Brothers and Woodmont's motions to dismiss should be granted. The Board is required to evaluate a petition before it in accordance with the standards set forth in N.J.A.C. 14:1-5.4:

> (a) If in the opinion of the Board the petition complies substantially with these rules and appears on its face to state a matter within this Board's jurisdiction, and necessary copies have been received and fees paid, the Secretary of the Board shall file same.
>
> (b) If after review the Board determines that a petition is deficient, the Board may refuse to consider and may issue an order dismissing said petition.

According to N.J. Court Rule 4:6-2, "a pleading which sets forth a claim for relief . . . shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement." By analogy, a petition before the Board would need to follow similar principles. New Jersey case law cautions that a motion to dismiss under Rule 4:6-2(e) should be "treated with great caution and should only be granted in the rarest of instances." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). This is why New Jersey courts are urged to view allegations in a complaint "with great liberality and without concern for a plaintiff's ability to prove the facts alleged in the complaint." Id. at 106. A court is required to treat all of the allegations in the pleading as true, and to consider only "whether those allegations are legally sufficient to establish the necessary elements of the claimed cause of action." Maxim Sewerage v. Monmouth Ridings, 273 N.J. Super. 84, 90 (Law Div. 1993).

Here, the Board's staff accepted the Petition and transmitted it to the OAL because Petitioners', customers of VWNJ, claimed they had been improperly charged by VWNJ, which is a matter within the Board's jurisdiction. See N.J.A.C. 14:3-1.3(d). The First Amended Petition and Second Amended Petition reflect the addition of a variety of claims unrelated to VWNJ's conduct toward the Petitioners, including contract-based claims against Toll Brothers and Woodmont, which are outside of the Board's authority to decide. As to these claims, even accepting Petitioners' allegations as true, their subject matter is outside of the Board's jurisdiction and as to which no relief can be granted. The Initial Decision correctly resolved question of whether, pursuant to N.J.A.C. 14:3-1.3(d), VWNJ operated in accordance with its tariff in the context of the Petitioners' allegations. Initial Decision at 8. The Initial Decision correctly did not adjudicate the claims against Toll Brothers and Woodmont, but appropriately dismissed them. See 4:6-2(a) and (e).

With respect to the Petitioners' exceptions, the Board rejects them in their entirety. By the Petitioners' first exception, the Petitioners argued that the ALJ Cookson's reference to the Franklin Place Matter during a case management conference in explaining the outcome of factually similar cases points to bias and prejudice, rather than the standardization of legal principles, and was therefore erroneous. Petitioners' Exceptions at 2-4. This argument has no merit. The Franklin Place Matter is not mentioned anywhere in the Initial Decision and there is no evidence that ALJ Cookson relied upon that case as precedent to decide this matter. To the contrary, the Initial Decision suggests that, to the extent this matter brought to mind the Franklin Place Case during a case management conference and prior to the establishment of a motion record, ALJ Cookson appropriately decided this matter after careful review of the actual record in this case. The invocation of case law, also identified in the Franklin Place Case, for the proposition that courts are not intended to rewrite contracts, does not suggest otherwise.

The Petitioners' second exception is also without merit. The Petitioners argued that ALJ Cookson erred in first finding that the Petitioners were a party to a contract with VWNJ and later contradicted herself in finding that the "water utility service is premised upon a tariff, not a negotiated contract." Petitioners' Exceptions at 4; Initial Decision at 8. ALJ Cookson clearly identified that if any purported contract in this matter existed it was between the developer and installer of the larger water meters in the Cottages, not between the Petitioners and VWNJ. Id. at 7. ALJ Cookson also correctly stated that the Petitioners' water rates are not subject to a contract negotiated between Petitioners and VWNJ, but to VWNJ's tariff, which is determined by the Board. Initial Decision at 7-8. These statements are accurate and not contradictory.

The Petitioners' third exception is similarly without merit. The Petitioners argued that ALJ Cookson erroneously applied a "'Reasonableness Test'" that is not defined or based upon legal theory and that the Petitioners' initial argument was that the larger meters were unnecessary and unnecessarily required, not that they were unreasonable. Petitioners' Exceptions at 6-7. The Board agrees that ALJ Cookson found that, even if a one (1)-inch service was feasible, that feasibility did not establish that use of one-and-one-half inch service was unreasonable. Initial Decision at 6. However, the Initial Decision does not rest on that finding, the Board's Final Decision here does not rely on that finding, and that finding is not material to the issue before the Board. The issue before the Board is proper application of VWNJ's tariff, and specifically, whether the rate charged by VWNJ to the Petitioners is appropriate. ALJ Cookson correctly identified this issue. Initial Decision at 7. Looking at the facts in a light most favorable to the Petitioners, the claim that the larger service lines and meters were unnecessary at their inception does not create a genuine issue of material fact as to whether the rate charged for the lines and meters currently installed is consistent with VWNJ's tariff. There is no evidence that the tariff rates charged by VWNJ for water service in the Cottages were not accordance with the law.

Therefore, after careful consideration of the record in this matter, the Board **HEREBY FINDS** that there is no genuine issue of material fact and the Company is entitled to judgment as a matter of law, and **HEREBY GRANTS** the Company's Motion for Summary Decision. The Board **HEREBY DISMISSES WITH PREJUDICE** the Second Amended Petition and **DENIES** the Petitioners' Cross-Motion for Summary Decision. Further, the Board **HEREBY GRANTS** each of the Motions to Dismiss filed by Toll Brothers and Woodmont.

Consistent with the foregoing, the Board **HEREBY ADOPTS** the Initial Decision in its entirety and without modification.

The effective date of this Order is August 21, 2024.

DATED: August 14, 2024

BOARD OF PUBLIC UTILITIES
BY:

CHRISTINE GUHL-SADOVY
PRESIDENT

DR. ZENON CHRISTODOULOU
COMMISSIONER

MARIAN ABDOU
COMMISSIONER

MICHAEL BANGE
COMMISSIONER

ATTEST:

DAWN A. GRAY
EXECUTIVE ASSISTANT

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

BRENDA CASTRODAD, ROBERT HARRIS, ROBIN JANELL, LINDA PACK, LOIS SILVERMAN, AND ALL SIMILARLY SITUATED, PETITIONERS V. VEOLIA WATER NEW JERSEY, WOODMONT PROPERTIES, TOLL NJ I, LLC, AND TOLL BROTHERS, INC., RESPONDENTS

BPU DOCKET NO. WC22120730
OAL DKT NO. PUC 00701-23

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
SUMMARY DECISION
OAL DKT. NO. PUC 00701-23
AGENCY REF. NO. WC22120730

BRENDA CASTRODAD, ROBERT HARRIS, ROBIN JANELL, LINDA PACK, LOIS SILVERMAN, AND ALL SIMILARLY SITUATED,
Petitioners,
v.
VEOLIA WATER NEW JERSEY WOODMONT PROPERTIES, TOLL NJ I, LLC, AND TOLL BROTHERS, INC.,
Respondents.

Carlos M. Valentin, Esq., for petitioners (Law Offices of Carlos M. Valentin, attorneys)

Chad Klasna, Esq., for respondent Veolia Water New Jersey (Florio Perrucci, attorneys)

Jennifer L. Alexander, Esq., for respondent Woodmont Properties (Griffin Alexander, attorneys)

Antimo A. Del Vecchio, Esq., for respondents Toll NJ I, LLC, and Toll Brothers, Inc. (Beattie Padovano, attorneys)

Record Closed: January 24, 2024 Decided: March 5, 2024

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about December 12, 2022, petitioners Brenda Castrodad, Robert Harris, Robin Janell, Linda Pack, Lois Silverman, and all similarly situated residents of the cottage unit Cottages (Cottages) constructed in River Vale, Bergen County, as part of a development known as the Fairways at Edgewater Country Club, sought relief from the New Jersey Board of Public Utilities (BPU) from what they allege are improper water facility charges and improper water meter rental rates invoiced to these residents by Veolia Water New Jersey (Veolia or respondent). Respondent filed its Answer to the Petition under cover of December 28, 2022.

Petitioners' application was determined to be a contested case and the matter was transmitted to the Office of Administrative Law (OAL) on or about January 20, 2023, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I held a case management conference with the parties on March 23, 2023, at which time we discussed whether there might be an engineering solution that would address the service line and meter sizing. Another conference was scheduled for April 24 but ultimately adjourned twice because the petitioners sought to amend their petition on May 5, 2023. Further management conferences were held, with leave granted for subsequent dispositive motion practice. All parties sought summary decision in their favor and filed argument and supporting materials. The cross-motions for summary disposition are now ripe for determination.

MOTIONS UNDER CONSIDERATION

Petitioners assert that the undisputed material facts demonstrate that the 1.5" fire protection system installed in the Cottages by its contractor allegedly at the demand of

Veolia was unnecessary and unnecessarily required. They also argue that the arrangements between Woodmont Properties and Veolia were an adhesion contract to which they have third-party rights to contest, and/or that the charges violate the BPU regulations.

Respondent Veolia has filed its motion for summary decision on the basis that the developer not only agreed to the installed services but requested them and knew of the water service fees associated with it before proceeding with its water service application. Veolia has simply applied its tariff rates to the Cottage project as designed by the site contractor or other third-party contractor of the property developer. Respondent further argues that petitioners have no third-party rights to challenge the contract between it and Woodmont and that an assertion that the contract was one of "adhesion" is a tool to engage in a discovery "fishing expedition" unsupported by factual assertions. Veolia asserts that there can be no genuine dispute about the development project and that judgment should be entered on its behalf.

Respondents Woodmont and Toll Brothers also assert a legal right to judgment in their respective favor insofar as they are not proper parties to this administrative public utility action. They also argue that petitioners' claims that the BPU must relieve them of the tariff charges must fail.

Petitioner Cottages opposes the motions of the other parties and filed their omnibus cross-motion in response. They assert that the main issue to be decided is whether the larger water and fire suppression service and meters were unnecessary and unnecessarily required. Petitioners argue: "Ultimately, it was Toll Brothers who directed Woodmont Properties to change the 1" lines to 1-1/2" as they were going to have individual fire sprinkler systems for each unit rather than the fire sprinkler systems for each building. Accordingly, Toll Brothers is jointly and severally liable to petitioners for the damages caused to them." [Brief at 9.]

STATEMENT OF UNDISPUTED FACTS

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

1. Petitioners are residents of the Cottage condominiums in the Fairways at Edgewater Country Club development (Fairways) in River Vale, New Jersey. [Certification of Chad L. Klasna (Klasna Cert.) Exhibit A, ¶ 1.]

2. The Fairways consists of 225 residential units, of which 193 are multi-level units known as Carriage units and 32 are single-level condominium units known as the Cottages. [Klasna Cert., Exhibit A, ¶ 6.]

3. The Fairways were developed by Toll NJ I, LLC and Toll Brothers, Inc. (Toll Brothers), which purchased the property from Woodmont Properties (Woodmont) in or about August 2020. Woodmont was then contracted by Toll Brothers to undertake the site work. [Klasna Cert., Exhibit A, ¶¶ 3-4.]

4. Veolia is a public utility company which provides water services at the Fairways. [Klasna Cert., Exhibit A, ¶ 2.]

5. The Cottages were constructed with fire sprinkler systems in each unit and one and a half inch (1 ½") water meters, as compared to the Carriages which were constructed without individual fire sprinkler systems and with one inch (1") water meters. [Klasna Cert., Exhibit A, ¶¶ 9-10.]

6. On or about April 23, 2021, Woodmont Properties submitted a "Preliminary Application for Water Service" to Suez Water New Jersey, which was subsequently acquired by respondent Veolia Water New Jersey.[1] [Morgenstern Cert., Exhibit C.]

[1] At the time of application, water services were provided by Suez Water New Jersey, which was later acquired and merged with Veolia Water New Jersey in a transaction approved by the Board of Public Utilities on December 15, 2021, Docket No. WM21060909.

7. Toll Brothers did not select the 1.5" water meters that were installed for the Cottage units. [A.J. Morgenstern Certification (Morgenstern Cert.), Exhibit C, Exhibit B at pg. 2, and Exhibit A at ¶ 18.] Toll Brothers does not assess or collect water service fees, and Toll Brothers was not a party to any contract with Suez or Veolia in connection with water services for the Fairways. [Morgenstern Cert., Exhibit A at ¶¶ 18-20.]

8. Woodmont Properties was apparently directed by Toll Brothers to change the 1" lines to 1.5" service as they were going to have individual fire sprinkler systems for each unit rather than the fire sprinkler systems for each building. Woodmont Properties did not prepare or have any involvement with the creation of the building fire sprinkler system engineered design. It did file the Preliminary Application for Water Service with Suez on April 23, 2021. [Klasna Cert., Exhibit B.]

9. The Plumbing Sub-Code Official for River Vale has stated that the Cottages were able to support two meters, and that in theory, the fire suppression system could have been designed differently; however, any changes now would require new permits and new plans. [Affidavit of Brian Drewes (Drewes Aff.) ¶ 8.] While the official's responsibilities include "recommend[ing] modifications and adjustments as necessary," no such recommendations were made in this case. [Drewes Aff. ¶ 3.]

10. The Fire Sub-Code Official for River Vale filed the same affidavit. [Affidavit of Alan Silverman.]

11. David Romao is a designer with Quick Response Fire Protection, the entity responsible for the design and installation of the fire suppression system at the Cottages. [Affidavit of David Romao (Romao Aff.) ¶ 2.] Romao asserted that the design specifications were provided to Quick Response by Suez Water but there is no factual underpinning for this statement. [Romao Aff. ¶ 12.]

12. After the Cottages were completed, occupied, and this administrative action filed, Romao was asked by petitioners if the system could have been designed with 1" meters. In theory, that would have hydraulically functioned. [Romao Aff. ¶¶ 8-10.]

13. The Standard Terms and Conditions for the Water Service Agreement between Veolia (then Suez) and Woodmont Properties were set forth in the tariff approved by the Board of Public Utilities. [Klasna Cert., Exhibit C.]

14. Both at the time of installation and at the time of the filing of the Petition, the water service fee for a one and a half inch (1 ½") meter was $2.8932 per diem, or $88.00 per month, in accordance with the established tariff approved by the Board of Public Utilities. [Klasna Cert. at Exhibit C at 49.]

Accordingly, I further **FIND** that all parties acknowledge that River Vale approved and Suez (and/or its successor Veolia) installed 1.5" meters as directed on the plans designed by Quick Response and requested by Woodmont and/or Toll Brothers. Even if a 1" service would have also been hydraulically feasible, that does not make the designed use of 1.5" service unreasonable, and I so **FIND**.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

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." All parties have filed 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). Here, I **CONCLUDE** that the issues in dispute are governed by the application of utility regulations and laws.

It is important to note that petitioners have always characterized this dispute as one seeking to answer the question as to whether the 1.5" services were necessary. To the contrary, I must **CONCLUDE** that the primary issue here is whether Veolia is charging current water service rates correctly based on the construction specifications that included fire suppression sprinklers in each individual unit. As set forth above, Veolia or its predecessor Suez merely assessed tariff charges consistent with the Application for Water Services submitted by the builder and as designed by Quick Response. Damages against Toll Brothers or Woodmont are not cognizable in this administrative forum, and any determination of a private right of action[2] against them must abide a different forum and jurisdiction, namely the Superior Courts of New Jersey.

Even giving petitioners, the benefit of any doubts, there is no proffered testimony that raises anything other than after-the-fact regret for the implications of the developer's design and installation of these individual condominium unit fire suppression systems on the ultimate purchasers of these Cottages.

In sum, there are no genuine issues of material fact and therefore summary decision should be granted to the respondents. Petitioners received the water service installation that the developer requested and contracted for, and that the municipality approved. In fact, petitioners admit that it was not the public utility that selected the service size. "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,

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[2] Petitioners argue in their cross-motion, citing "The Planned Real Estate Development Full Disclosure Act," N.J.S.A. 45:22A-21 et seq.:

> By its very definition, if a Developer makes a disclosure about the property being offered the disclosure have to be in full. Therefore, if Toll Brothers make a disclosure about the owners at the Fairways paying the cost of any utilities that are individually metered, it has the obligation to disclose that the tariff may be somehow different as the units have a fire sprinkler systems that requires the installation of a one and a half inches (1-1/2") water meter. Otherwise, it would not be a full disclosure.
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> [Brief at 10.]

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).

Meanwhile, the law and regulations governing water service are clear that the lawful utility charge is based upon either a tariff or an agreement subject to BPU approval N.J.A.C. 14:3-1.3(d)-(e). The Board cannot create the terms and conditions of a different rate for the parties without an application supported by an executed agreement.[3] 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.

I **CONCLUDE** that there is no authority under the tariff or the Board regulations for me to force Veolia to create a solution just for the Cottages unless and until the parties enter into a mutual agreement and present such for Board approval.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the motion for summary decision filed by respondent Veolia Water New Jersey is **GRANTED**. It is further **ORDERED** that the cross-motion for summary decision filed by petitioner residents of the Cottages at the Fairways, Edgewater Country Club, River Vale, for relief from certain tariff charges of Veolia Water New Jersey, is hereby **DENIED**. It is further **ORDERED** that Toll Brothers and Woodmont are dismissed from this action.

[3] Based upon the lack of any contract between Suez/Veolia and the developers, I will not address petitioner's adhesion contract arguments. This water utility service is premised upon a tariff, not a negotiated contract.

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

March 5, 2024
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 3/5/24

Date Mailed to Parties: 3/5/24
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