NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5711-09T3
A-5890-09T3

IN THE MATTER OF THE PETITION OF
ATLANTIC CITY ELECTRIC COMPANY
FOR APPROVAL OF THE SALE OF CERTAIN
LAND AND PREMISES SITUATE IN THE TOWNSHIP
OF MAURICE RIVER, IN PART, AND THE CITY
OF MILLVILLE, IN PART, COUNTY OF
CUMBERLAND AND STATE OF NEW JERSEY TO
R.W.V. LAND & C.M. LIVESTOCK, L.L.C.
PURSUANT TO N.J.S.A. 48:3-7.

Argued April 15, 2013 – Decided July 17, 2013

Before Judges Graves, Ashrafi, and Guadagno.

On appeal from the New Jersey Board of
Public Utilities, Docket No. EM02050313.

Edward Lloyd (Columbia Environmental Law
Clinic) argued the cause for appellants
Citizen's United, New Jersey Conservation
Foundation, New Jersey Audubon Society, and
Association of New Jersey Environmental
Commissions (A-5711-09) (Mr. Lloyd,
attorney; Mr. Lloyd and Susan J. Kraham
(Columbia Environmental Law Clinic), on the
brief).

Stefanie A. Brand, Director, argued the
cause for appellant State of New Jersey,
Division of Rate Counsel (A-5890-09) (Ms.
Brand, attorney; Brian Weeks, Deputy Rate
Counsel, and James W. Glassen, Assistant
Deputy Rate Counsel, on the brief).

Geoffrey R. Gersten, Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (Jeffrey S. Chiesa, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Gersten, on the brief).

Gerard W. Quinn argued the cause for respondent Atlantic City Electric Company (Cooper Levenson April Niedelman & Wagenheim, P.A., attorneys; Mr. Quinn, on the brief).

Hesser G. McBride, Jr., argued the cause for respondent Millville 1350, L.L.C. and R.W.V. Land & C.M. Livestock, L.L.C. (Wilentz Goldman & Spitzer, attorneys; Mr. McBride and John A. Hoffman, of counsel and on the brief; Anthony Wilkinson, on the brief).

PER CURIAM

The New Jersey Board of Public Utilities (BPU) granted a petition of the Atlantic City Electric Company (ACE) which sought approval of a proposed sale of real property located in Cumberland County to residential home developers. Interveners, who include four environmental groups and the State of New Jersey Division of Rate Counsel (Rate Counsel),[1] appeal the BPU's decision. By order dated October 21, 2010, we consolidated the two appeals for purposes of this opinion. Because the BPU failed to perform a meaningful review of the petition as

[1] Division of Rate Counsel is the statutorily designated representative of the State's utility ratepayers. N.J.S.A. 52:27EE-49.

required by statute and failed to support its conclusions with necessary findings of fact, we reverse and remand.

I.

In the early 1980s, ACE purchased the tract of real property at issue, intending to construct a coal-fired generating station. The property, Block 120, Lot 4, and Block 121, Lots 1, 2, and 3 of Maurice River Township, and Block 582, Lot 10 and part of Lot 1 of the City of Millville, consists of 1346.899 acres. We had occasion to describe the property in a prior opinion:

> The property is in an outlying area, away from the developed portion of the City of Millville. It has frontage on Route 49 and is located near the intersection of Route 49 and Route 55, a major limited access State highway. City water and sewer are available to the property. The property is bordered on one side by the Menantico Creek and on the other by a branch of the Manumuskin River, both of which discharge into the Maurice River.
>
> The property is not a virgin tract. It has been used over the years for mining gravel and sand, leaving behind large craters which have become ponds. A holly orchard has been planted, and, although abandoned, covers a large portion of the property. A conference center [known as the Brian Parent Center], which was unsuccessful in its intended purpose, remains on the property. The property also contains parking lots and other miscellaneous structures, as well as a former railroad bed and power line right-of-way. The property is regularly used, without authorization, by the operators of

> ATVs and other off-road vehicles. The property is not within the Pinelands and is not regulated by the Coastal Area Facility Review Act (CAFRA).
>
> [Citizens United to Protect the Maurice River and its Tributaries, Inc. v. City of Millville Planning Bd., 395 N.J. Super. 434, 439-40 (App. Div. 2007).]

The property is also the natural habitat of two endangered species, the Pine Barrens treefrog and the corn snake, as well as four threatened species including the pine snake, Cooper's hawk, barred owl, and the redheaded woodpecker. Id. at 441.

After concluding the property was no longer of use for utility purposes, ACE decided to offer the property for sale. ACE planned to retain a small portion of land adjacent to the property that contains a power plant operated by an unregulated affiliate.

Prior to listing the property for sale, ACE obtained an appraisal from Conover Appraisal Associates, L.L.C., on November 22, 1998 (Conover I). Conover I found the "as is" appraised value, as of May 15, 1999, was $3,900,000. Between August 1999 and December 2000, ACE received six bids, but only three were considered viable offers.

On November 5, 1999, respondents Millville 1350, L.L.C. and R.W.V. Land & C.M. Livestock, L.L.C. (developers) submitted an

offer of $3,000,000, which was raised to $4,000,000 on December 11, 2000.

On August 23, 1999, the New Jersey Department of Environmental Protection (DEP) submitted an initial offer of $2,553,000, under the Green Acres Program.[2] The DEP offer was an all-cash transaction conditioned on "good and insurable title," and "a satisfactory hazardous waste assessment" done at DEP's cost. ACE rejected the DEP offer because it was considered a low bid.

During 2001 and 2002, ACE advertised the property for sale at a price of $4,200,000. ACE received no bids in response to the advertisement.

On January 22, 2002, ACE and the developers entered into a purchase agreement for the sale of the property based on the $4,000,000 offer. The contract provided for a $300,000 payment upon execution with an additional $100,000 payment following a six-month inspection period, if developers wished to continue with the purchase. The payment of the balance of the purchase

[2] The Green Acres Program, administered by DEP, is a State-wide ballot initiative appropriating funds for State and non-profit purchase of real property for use as public recreation or conservation areas. N.J. Dep't of Envtl. Prot., Green Acres Program, http://www.nj.gov/dep/greenacres (last updated June 7, 2013). The program "is established and governed by the Garden State Preservation Trust Act (GSPTA), N.J.S.A. 13:8C-1 to -42, and by the legislative appropriations made pursuant to the GSPTA."

price was structured using a purchase money note and mortgage. Following the first, second, and third year after closing, developers would make payments to ACE of $100,000. On the fourth year after closing, the balance of the purchase price, or $3,300,000, was due. In the event of developers' default, the purchase agreement called for the immediate surrender of the deed in lieu of foreclosure.

Developers planned to construct an age-restricted residential development of approximately 950 detached homes on 239 acres of land. In addition, developers proposed an eighteen-hole golf course and club house on 170 acres, with the remaining 930 acres to remain undeveloped open space and permanently preserved.

In anticipation of submitting its petition for approval of the sale of the property, ACE obtained a second appraisal from Conover (Conover II). Conover II determined the appraised value of the property, as of April 11, 2002, was $3,000,000, and that developers' purchase agreement provided a net present value (NPV) sale price of $3,000,000, after discounting the $4,000,000 face value because of the seller-held mortgage financing structure.

On May 22, 2002, ACE submitted a petition to the BPU seeking approval of the sale of the property to developers. The

petition declared that the property was not then or prospectively useful for utility purposes and confirmed that ACE believed developers' offer represented the fair market value (FMV) of the property. Upon receipt of the petition, the BPU held a hearing in Millville on December 1, 2003.

In comments filed with the BPU in 2003, appellant, Rate Counsel, did not initially object to the proposed sale by ACE. However, after becoming aware of the benefits of the DEP offer to the ratepayers and citizens, Rate Counsel changed position and opposed the transaction and supported the sale to DEP.

Representatives from ACE and members of local and county government testified at the hearing. ACE projected an increase of approximately $5.8 million in new tax ratables, and the attraction of new residents to Millville who would not "place a burden on [the] school system." Those in favor of development noted the environmentally sensitive nature of the area, but believed developers' general development plan (GDP) appropriately addressed those concerns by incorporating design elements to minimize impact on the area and by ensuring more than 85% of the property would be preserved in its natural state.

Several environmental groups and local residents testified in opposition to the transaction. Those opposed to developers'

purchase stressed the impact the proposed development would have on local wetlands and waterways; questioned the wisdom of placing a golf course in an environmentally sensitive area; expressed concerns regarding contamination of the Cohansey-Kirkwood Formation, an underground natural water aquifer underneath the property that provides drinking water to over a million residents in South Jersey; and expressed reservations regarding the threatened and endangered species that use the property as their natural habitat.

The New Jersey Public Interest Research Group presented the testimony of Steve Gabel who conducted an economic analysis of the proposed sale. Gabel testified as to the "comparative economics" of the developers' offer and the DEP offer and noted "it's not simply $4 million is better than $2.55 million, end of story." Rather, Gabel proposed that the offers be evaluated based on an NPV basis, with consideration given to the relative risk of the two offers, and the drop in lease value the transaction would cause to land ACE was retaining to operate a turbine power plant.

Gabel explained the DEP offer was "payment on the barrelhead," immediately available and having an NPV of $2.55 million. He suggested that the developers' offer must be discounted because installment payments would be stretched over

a four-year period and because "the relative risk of real estate . . . [and] all the contingencies of this deal falling into place" might negate developers' obligation to make the final $3.3 million payment. Gabel explained:

> I used a 15 percent discount rate in calculating that present value. I believe for the overall cost of capital and the risk of the real estate development industry, that's a conservative low discount rate to use.
>
> The 4.0 million turns into a 1.85 million payment when all these factors are taken into account. The offer from [DEP], as I said, is 2.55 million. On a discounted basis, recognizing appropriate analysis of present value, the offer that's on the table in this petition is 27 percent lower than the offer from [DEP].
>
> So I believe that from a ratepayer perspective, this offer fails that basic ratepayer test and shouldn't be approved.

Gabel's report (Gabel I) was introduced into evidence. Gabel I showed the economic analysis of the offers, beginning with the discounting of developers' payments for the passage of time and other risk factors. This discounting, at a rate of 15%, results in an NPV of $2,197,000. Next, Gabel I stated the amount ACE loses from the reduction in lease payments from the unregulated affiliate is $36,000 a year, which at a discounted rate of 8.25% for 20 years, equals an NPV reduction to the sale of $347,000. When the reduction in lease payments is offset

against the NPV of the developers' offer, the total NPV of developers' offer is $1,850,000. Gabel I reached the conclusion that "[o]n a risk-adjusted present value basis, the no-risk, immediate cash offer of $2.553 million from the [DEP] is clearly a better value" than the developers' agreement.

Following the hearing, several parties were granted permission to intervene in the proceedings as interested parties. On March 29, 2004, DEP increased its offer to purchase the property to $3,400,000. The offer continued to be "an all cash transaction" with no financial contingencies, and was not subject to any developmental approvals. This offer did not require legislative approval. Moreover, DEP offered to pay $700,000 less for the property in exchange for voluntary settlement of ACE's liability for unrelated groundwater violations at another site.

The economic analysis in Conover II used a discount rate of between 8% and 9%, which placed the NPV of the developers' offer at $3,000,000. In addition, developers submitted another economic appraisal from Guastella Associates (Guastella I), which challenged the 15% discount rate used in Gabel I, because that rate was not derived from comparable sales or otherwise based on value to the owner. Rather, Guastella I concluded that the discount rate "should be . . . based on available

financing." Therefore, Guastella I concluded the appropriate rates should be in the range of 5% to 10%. Guastella I also found Gabel I's approach to the drop in lease payments inappropriate, because that reduction would occur whether the property was purchased by developers or DEP. Guastella I suggested that Gabel I failed to consider the positive impact a sale to developers would have to ACE and its ratepayers in the form of nearly $800,000 in revenue to ACE. Using discount rates of 5%, 8.25%, and 10%, Guastella I determined the NPV of developers' offer to be $3,256,000, $2,857,000, and $2,666,000, respectively. However, if developers' payment schedule was adjusted to assume payment began at closing, the NPV's for the same discount rates increase to $3,375,000, $3,030,000, and $2,862,000, respectively. Treating the DEP offer as NPV of $2,553,000, the Guastella I report concluded that developers' offer was "far superior" to DEP's offer and "in the best interest of [ACE] and its customers, as well as the City of Millville."

The Millville Planning Board approved developers' GDP and several environmental organizations challenged the approval, claiming the development would have an unreasonably adverse impact upon the environmentally sensitive area. During the

pendency of these proceedings, the BPU took no action on ACE's petition.

Following our decision affirming the Millville Planning Board's approval of the GDP, Citizens United, supra, 395 N.J. Super. at 453, ACE filed a motion with the BPU seeking to expedite the process.

The BPU reiterated it was treating the petition as a contested case and scheduled a pre-hearing conference. The first pre-hearing conference was held on January 23, 2009, and the BPU issued a pre-hearing order on April 14, 2009, confirming "the ultimate question [for the upcoming evidentiary hearing] centers on whether or not the BPU should approve the sale to the developer[s.]" The pre-hearing order also set a schedule for all parties to submit appraisals and economic analyses.

ACE submitted an updated appraisal (Conover III) as of February 10, 2009, establishing an "as is" FMV of $4,150,000. DEP submitted two appraisals of the property, including one from LeGore & Jones, Inc. (LeGore & Jones) setting a FMV of $3,500,000, and one from Edward T. Molinari (Molinari) setting a FMV of $3,636,000.

On March 23, 2009, DEP increased its offer to $3,500,000, and accompanied the offer with a draft agreement. On March 26,

2009, ACE rejected DEP's offer because it claimed the property was already under contract.

The parties also submitted updated economic analyses. The DEP filed a report prepared by Stanton L. Meltzer of Gold Gocial Gerstein, LLC (Meltzer I). Meltzer I compared the 1999 DEP offer and the developers' purchase contract as of January 22, 2002. Meltzer I listed eleven enumerated risks associated with the developers' offer and assessed an 8% risk premium over the risk-free discount rate of 6%, for a total discount rate of 14%. The risks identified in Meltzer I included:

> 1. Initial deposits are fully refundable during the inspection period of six months . . . .
>
> 2. [Developers] can terminate the agreement during the six month[] inspection period and have no further liability to [ACE].
>
> 3. Closing is to take place nine months after the contract date or later if all contingencies have not been satisfied by that time.
>
> 4. [ACE] receives $100,000 at the end of each of the three years following closing and a balloon payment of $3,300,000 at the end of the fourth year - <u>all with no interest</u>
>
> 5. In the event of default by the buyer prior to final payment, [ACE] retains monies previously paid and does not get the balloon payment from [developers] ($3,300,000). The balloon payment represents 82.5% of the purchase price.

> 6. The land is being acquired by [developers] for a specific project and is subject to zoning, site plan and subdivision approvals, required state and local permits and a payment of $1,175,000 in lieu of constructing affordable housing. Many financial, financing, economic and market driven factors could diminish the feasibility of the project during the timeframe of the installment payments or at the time of the final balloon payment.
>
> 7. [Developers], a limited liability company, may or may not have the financial capability to make the required payments at their due dates. The contract does not provide for personal guarantees of the individual principals of [developers]. . . .
>
> 8. Allowance [sic] grace periods reflected in the contract could extend the time of the payments due under the contract with no interest.
>
> 9. Eighty-two and one-half percent of the purchase price is not payable until four years after closing with no interest.
>
> 10. In the event of default by [developers], the costs incurred by [ACE] may be significant.
>
> 11. Any attempt to sell the mortgage held by [ACE] would command a high discount since the mortgage bears no interest and 82.5% of the mortgage is a balloon payment.

Meltzer I identified one risk factor for the DEP offer pertaining to appropriation of funding, but found that the funding was "relatively certain." Meltzer I assigned a discount rate risk premium of 4% to the DEP offer which, when added to the risk-free rate of 6%, required a total discount rate of 10%

for that offer. Applying the discount rates to the offers, Meltzer I calculated the NPV of developers' offer as of January 22, 2002, was $2,260,822, while the NPV of DEP's offer was $2,467,900.

The environmental groups submitted an updated supplemental economic analysis (Gabel II), which supported Gabel I and responded to Guastella I. Gabel II listed the changes in circumstances from those relied on in Gabel I including "the general significant downturn in the national economy," the increased offer from DEP, the risk of getting necessary approvals for development of the property, and the fact that developers' offer remained the same. Reasserting the Gabel I 15% discount rate, Gabel II explained it was only a 6.75% increment above that of a regulated utility company, and was "conservative and appropriate" in light of the delay risk, real estate development risk, and risk of obtaining permits inherent in the developers' offer. In fact, Gabel II believed Guastella I's use of a 5% to 10% discount rate failed to reflect the fact that "[t]he payments from [developers] are contingent on the financial strength and probable success of the real estate venture, which--as indicated by [Conover II,]-- is highly uncertain[.]"

On May 12, 2009, DEP submitted a supplemental economic analysis (Meltzer II). While Meltzer I discounted the offers to January 22, 2002, Meltzer II conducted the comparative economic analysis as of September 1, 2009, assuming the BPU would have rendered a decision by that date, and compared developers' offer to the updated DEP offer. The risk-free rate had dropped from the prior analysis and stood at 4%, but Meltzer II applied the same risk premium utilized in Meltzer I, and applied a total discount rate of 12% to developers' offer. Meltzer II applied a 4% risk premium above the risk-free rate to the updated DEP offer. Applying the discount rates, Meltzer II concluded the NPV of developers' offer was $2,638,377, while the NPV of the updated DEP offer was $3,408,202. Again, Meltzer II concluded the DEP offer was the best offer for the property.

Developers submitted a supplemental economic analysis from Guastella (Guastella II). Guastella II responded to the Molinari, LeGore & Jones, and Conover II reports, and first addressed the FMV of the property. Relying exclusively on developers' agreement, Guastella II explained "[developers] and [ACE] negotiated the purchase price as set forth in their agreement. Both were typically motivated, well informed and acting in their own best interests." Moreover, developers' offer was the "highest offer received by [ACE] from a bidder

demonstrating an ability to finance the transaction" and as "none of the appraisals establishe[d] anything to the contrary," the "opinions of estimated market value [cannot] serve as a substitute for the actual market value as negotiated."

Guastella II retained the discount rate of 5% to 10% and the estimate of the NPV of the developers' agreement as between $2.9 and $3.4 million. Guastella II then explained "there [wa]s no basis to assume that DEP's 'offer' w[ould] result in the immediate payment of $3,500,000 to [ACE]." Rather, "there [were] several potentially time consuming steps associated with negotiating the agreement and closing the deal" including: DEP's inspections and testing; DEP's requirement that ACE provide clear, valid, and record title; the possibility that DEP "may perform engineering, termite, and radon inspections of the Property[;]" and the time it would take to obtain the "appropriation of funds by the State Legislature [with] approval by the Governor." Therefore, Guastella II concluded the DEP offer required discounting to account for these unknown factors, applied a 5% discount rate, and calculated an NPV of the augmented DEP offer at $3.3 million.

Finally, DEP submitted another report from Meltzer (Meltzer III), which criticized Guastella I and II and supported Meltzer II. Meltzer III attacked Guastella I on the basis that the

discount rates selected, 5%, 8.25%, and 10%, had "no foundation" and resulted from lack of "analysis of the risk factors associated with the [developers'] contract." While market driven rates obtained from comparable sales are relevant starting points for obtaining a discount rate, Meltzer III explained that, when valuing a specific contract, the chosen rate must be adjusted by the risks of the specific contract, which Guastella I failed to do, resulting in understated discount rates. Moreover, Guastella I was based on an erroneous assumption that payment from developers began at closing, contrary to the terms of the agreement.

Meltzer III also commented on Guastella II, concluding it used an erroneous methodology in an attempt to establish a lower FMV for the property by discounting the FMV appraisals by the predicted time it would take to obtain an offer at the predicted FMV - the "exposure and marketing time." Guastella II's discounting of the FMV for the exposure and marketing time was "contrary to accepted valuation methodology and [done] for no logical reason[.]" Meltzer III states that discounting for marketing time is irrelevant, as the developers' contract already existed and there was an existing offer from DEP. Meltzer III again concluded that the "DEP offer provides a

higher economic benefit to [ACE] than the [developers'] contract."

Following a second pre-hearing conference, the BPU issued a scheduling order appointing BPU President Jeanne M. Fox as the presiding Commissioner at the upcoming hearing. The scheduling order set a hearing date for September 23, 2009, and set a post-hearing briefing schedule.

On September 23, 2009, Commissioner Fox presided over an evidentiary hearing. The only witnesses called were Guastella, Gabel, and Meltzer. Their reports were introduced as their direct testimony and they were then subject to cross-examination.

Following a public hearing on April 14, 2010, where the BPU announced its ruling, it issued an order on June 21, 2010, approving the sale to developers over the dissent of Commissioner Fox. The majority, consisting of three Commissioners, summarized the parties' positions and explained the significant delay in addressing ACE's petition was not the "standard approach used by the BPU." The BPU explained its conclusion:

> Much has been made of the question of what discount rate should be applied in the course of determining the net present value of the Millville 1350 offer versus the DEP 2009 offer, and what time frame should be used to determine the market value of the

> property. These questions, however, jump beyond the initial and fundamental issue - before the Board at this time is a 2002 Petition seeking approval of a specific sale agreement. ACE . . . believes that the Millville 1350 offer was the best offer available at the time and reflected fair market value. ACE had the opportunity to consider the DEP offer and rejected it as being too low in value; at no time has any party claimed that ACE's rejection was predicated upon bad faith. ACE reviewed the offers before it in 2002 and chose the offer it considered best. Various parties can and have advocated for any number of different discount rates for multiple reasons, but the final consideration is that, except in rare situations, the Board is hesitant to replace a valid and reasonable business judgment of a utility with its own business judgment. Here, ACE made the business judgment that the Millville 1350 offer, even considering the contingencies, was of more value to the company than the DEP offer. In this particular "battle of the experts," with each party providing different and conflicting discount rates, the Board is inclined to accept the judgment of the party that has the most financial stake in the decision and the most desire to maximize financial benefit - and that is ACE. This is especially true in the situation, such as here, where the property is no longer in rate base and thus the proceeds of the sale will not go to the ratepayers, but instead to the shareholders.
>
> [Emphasis supplied].

The majority concluded the developers' offer "satisfies the requirements that the sale price 'is the best price obtainable and represents [FMV] for the property.'"

While the majority acknowledged that environmental issue was a "major . . . question of the public interest," it claimed that it lacked "the ability or authority to place environmental issues above utility issues." The majority explained that it was "authorizing the sale of a piece of property" to developers, without limiting the ability or authority of the DEP to enforce environmental regulations.

The majority also concluded that their review should be limited to "the situation as it existed in 2002, not as it was modified in 2009." Even though the BPU had permitted the parties to submit updated financial analyses as late as 2009, the majority concluded that it would be "unfair and inappropriate" for the BPU to "impose an analysis on the deal based upon changes beyond ACE's control." The majority summed up its view as to the role it should play concluding, "ACE is, based upon its litigation position, willing to accept the 2002 offer despite the delay; it is not the Board's role to second-guess that decision."

Commissioner Fox, in her dissent, stressed that the BPU has an affirmative duty to review the sale of utility-owned land and maintained that the analysis undertaken by the majority was flawed, primarily because the sale did not achieve the best price available representing FMV. The Commissioner also

maintained that the majority failed to examine the effect of the sale on the public good.

Finding that the experts presented by DEP and the environmental groups had "stronger credentials and experience directly related to the specific factors involved in this particular transaction[,]" Commissioner Fox adopted their presentation of risk factors inherent in developers' contract. She rejected the findings in Guastella I and II which "did not consider the numerous risk factors specific to this particular transaction and seems to have utilized a utility discount rate without any supporting foundation." She continued, "[t]he developer[s are] not a utility and should not be utilizing the utility discount rate . . . [when] the risk here is with the purchaser and its speculative investment."

"[R]egardless of the discount rate applied," Commissioner Fox wrote, "it is clear from the briefs submitted that all the parties . . . agree that the offer by the DEP represents the highest monetary value for the property[.]" Therefore, Commissioner Fox found "it clear that the [developers'] contract's [NPV] - or the actual economic benefit - [wa]s substantially lower than its face value and lower than the other offer on the table."

Moreover, Commissioner Fox believed the BPU was required to consider not only the elements for approval of the sale of utility property, but the public good and the public interest as well. Referencing the multiple environmental issues affecting the property, Commissioner Fox concluded that "[p]rotecting a resource of this caliber is important to the state," and found "preservation of this extraordinary habitat is clearly in favor of the public good and in the best interests of the public." In conclusion, Commissioner Fox stated "the Board should have denied the petition of [ACE] to complete the offer to sell the property to [the developers]. ACE would then have been able to accept the better cash offer of the DEP."

On appeal, the environmental appellants, Citizen's United, New Jersey Conservation Foundation, New Jersey Audubon Society, and Association of New Jersey Environmental Commissions, argue that the BPU ignored its statutory obligation to ensure that a proposed sale price is in fact the best price obtainable; failed to make findings of fact to support its conclusion; and erred in limiting its review to the circumstances as they existed in 2002. Environmental appellants also argue that if this court owes any deference, it is to the findings of Commissioner Fox, who sat as the hearing examiner, and is the functional equivalent of an administrative law judge.

Appellant State of New Jersey, Division of Rate Counsel, argues that the BPU failed to perform its statutory duty and violated express legislative policy by ignoring the evidence of the property's FMV and best price obtainable. BPU also failed to exercise independent judgment and oversight over a regulated utility, substituting the regulated utility's judgment for its own.

DEP is not a party to this appeal. None of the parties sought to stay the BPU's order, and ACE consummated the sale of the property to developers on October 8, 2010. We denied developers' motion to dismiss the appeal as moot.

II.

In general, the judicial capacity to review administrative actions is severely limited. In re Musick, 143 N.J. 206, 216 (1996); Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985). Courts can intervene only when the agency action is arbitrary and unreasonable, namely, where the agency action violates legislative policies; where there is no substantial evidence to support the agency's findings; or where the agency reached a conclusion that could not reasonably have been made on a showing of the relevant factors. Musick, supra, 143 N.J. at 216; E. Orange Bd. of Educ. v. N.J. Schs. Constr. Corp., 405 N.J. Super. 132, 143-44 (App. Div.), certif.

denied, 199 N.J. 540 (2009). Moreover, the BPU has special expertise, and its rulings are entitled to "presumptive validity" and will not be disturbed absent a finding of a lack of "'reasonable support in the evidence.'" In re Pub. Serv. Elec & Gas Co., 167 N.J. 377, 385 (quoting In re Jersey Cent. Power & Light Co., 85 N.J. 520, 527 (1981)), cert. denied, 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001).

Our Legislature has endowed the BPU with broad powers to regulate public utilities. See N.J.S.A. 48:2-13. The BPU's authority over sale, lease or other disposition of its property is explicit. N.J.S.A. 48:3-7(a) provides in pertinent part:

> [N]o public utility shall, without the approval of the board, sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof; or merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with that of any other public utility.

Even with the "'presumptive validity'" ascribed to BPU action, the Legislature has authorized us expressly to "review any order of the board and to set aside such order in whole or in part when it clearly appears that there was no evidence before the board to support the same reasonably or that the same was without jurisdiction of the board." N.J.S.A. 48:2-46.

A.

We first consider the developers' argument that the present appeal is moot as the sale by ACE has been completed. "'An issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" N.J. Div. of Youth & Family Servs. v. A.P., 408 N.J. Super. 252, 261 (App. Div.) (quoting Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)), certif. denied, 201 N.J. 153 (2010)). "[C]ourts will not decide cases in which the issue is hypothetical[.]" Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). However, an appeal will not be moot when "a party still suffers from the adverse consequences . . . caused by [the prior] proceeding[.]" A.P., supra, 408 N.J. Super. at 262 (citations and quotation marks omitted).

Developers rely on Brill v. General Industrial Enterprises, Inc, 234 F.2d 465, 468-69 (3rd Cir. 1956), for the proposition that "[a]ppellate courts have often dismissed appeals as moot where, as here, the challenged transaction was consummated pursuant to approval by the lower court." Brill involved the consummation of a corporate merger following a trial court's approval of the transaction where dissenting stockholders failed to seek a stay pending appeal. Ibid. The Third Circuit found

the pursuit of the appellants' appeal did not have the same effect as a stay or injunction and dismissed the case because the consummation of the transaction mooted the challenge of the merger on appeal. Id. at 469-70. However, in Brundage v. New Jersey Zinc Co., 48 N.J. 450, 464 (1967), the New Jersey Supreme Court expressly rejected this approach, holding "consummation of a merger during the pendency of an appeal, as here, does not render the appeal moot and that where the circumstances equitably call for such action the court may order the merger undone."

The circumstances here justify addressing the merits of the dispute because the sale is voidable if BPU failed to perform a meaningful review of the petition as required by statute. See N.J.S.A. 48:3-7(a) ("[e]very sale . . . made in violation of this section shall be void"). In addition, this case involves an important matter of public interest. Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 105 n.4 (2010). The issues presented here are important matters of public interest warranting our review on the merits.

B.

The environmental groups, joined by Rate Counsel, argue the BPU majority violated its statutory mandate when it approved developers' purchase of the property without first considering

whether developers' offer was the best price obtainable. We agree.

The BPU has interpreted its authority under N.J.S.A. 48:3-7(a) as requiring a showing of three factors known as the Erie-Lackawanna test:

> (a) The property must be no longer used or useful, presently or prospectively, for utility purposes.
>
> (b) The sale and conveyance of the property under the terms proposed will not adversely affect the ability of the utility to render safe, adequate, and proper service.
>
> (c) The proposed sale price is the best price obtainable and represents fair market value for the property.
>
> [In re Erie-Lackawanna Ry. Co., 75 P.U.R.3d 246, 247 (N.J. Bd. of Pub. Util. 1968).]

See also In re W. Jersey & Seashore R.R. Co., 46 N.J. Super. 543, 548-49 (App. Div.) (upholding the BPU's "settled administrative construction of the regulation" identical to the Erie-Lackawanna criteria), certif. denied, 25 N.J. 491 (1957); N.J.A.C. 14:1-5.6(a) (outlining the criteria for utility petitions seeking approval of the sale or lease of utility property tracking the Erie-Lackawanna test).

The Erie-Lackawanna test is augmented by "the relationship between such transactions and the public interest, namely, 'the interest of the State and its citizens.'" 46 N.J. Super. at

546. The BPU serves the public interest by monitoring sales of utility property for

> the waste or dissipation of utility assets, such as to undermine its financial structure, [which] would pose a threat to the efficient functioning of such utility for the benefit of the public, and also would bear upon its rate base and the consequent cost to the public of its services.
>
> [Id. at 546-47.]

The Erie-Lackawanna test is the proper standard by which petitions for sale of utility property are judged. See Erie-Lackawanna, supra, 75 P.U.R.3d at 247. Here, the primary issue is whether the proposed sale to developers represents the best price obtainable and represents FMV for the property.

In Erie-Lackawanna, the same element was at issue when a disappointed bidder, Overlook Enterprises, Inc., intervened in opposition to Erie's petition seeking to sell eighty acres of land to Seatrain Lines, Inc. Id. at 247-48. Erie had used the property as a hub between freight liner ships and the railroad, but corporate consolidation in another port in New Jersey negated the property's utility to Erie. Id. at 248. In response to Erie's advertising, which subjected the property to many conditions and servitudes, including the covenant to operate a "containership terminal operation" on the property, Seatrain offered $2,100,000 cash and accepted the conditions.

Id. at 257. Overlook submitted an offer of $2,600,000, payable under a structured payment schedule utilizing a purchase money mortgage payable over five years at 6% interest, and "rejected acceptance of any restrictive covenants as to the use of the land." Ibid. Erie accepted Seatrain's offer and rejected Overlook's, and sought the BPU's approval of the sale to Seatrain. Id. at 248-49.

The BPU approved Erie's petition despite Overlook's objection. Id. at 251. While the BPU noted Overlook's offer was non-responsive because it rejected necessary conditions, the BPU explained it was "not the highest and best price." Id. at 250. The BPU explained:

> Overlook's bid contained therein a purchase money mortgage by a corporation formed eleven days prior to its submission of a bid. Overlook at the time of the hearing, contained no visible assets, nor was there any individual guarantee to that effect. Overlook's ability to perform was thus doubtful and for these reasons the salability of Overlook's purchase money mortgage was highly speculative. Evidence in the record indicates that this motivated the petitioner to reject the Overlook bid.
>
> [Ibid.]

The Seatrain bid, however, represented the FMV for the property in light of "the property appraisal and the tax burden[,]" and was from an established company and would result in "continuing and substantial anticipated freight revenues [to

Erie], and savings generated from the availability of the cash purchase price." Ibid. The BPU found approval was also in the public interest as "[t]he proposed terminal will employ 400 persons and generate an estimated increase in petitioner's freight revenues of over $8 million per year . . . [which] will tend to improve [Erie's] general financial condition." Id. at 251.

Clearly, the BPU in Erie-Lackawanna recognized that when faced with multiple offers, determination of which offer is the best price obtainable required more than the comparison of the face value of the offers. Id. at 250. Rather, the BPU must consider risk factors of both offers with an eye toward which truly is the best price obtainable. Ibid.

Similarly, in West Jersey & Seashore Railroad Company, supra, the BPU was presented with West Jersey's petition seeking to sell abandoned property in Camden to Fred Siris for $50,000. 46 N.J. Super. at 546-47. West Jersey and Siris executed a purchase agreement subject to BPU approval, and Siris began the process of clearing title, expending nearly $25,000 in the process. Id. at 547. West Jersey's board of directors approved the sale, advertised the property for sale, and received a bid from another potential purchaser, Henry Berger, offering $65,500 cash. Id. at 548. West Jersey "determined, nevertheless, to

honor its previous commitment with [Siris]" and rejected Berger's bid. Ibid.

The BPU denied West Jersey's petition seeking approval of the Siris sale, and Siris appealed. Id. at 545. We upheld BPU's denial:

> Our consideration of the whole of the evidence leaves us in agreement with the determination of the Board denying its approval [because] . . . the sale price for which approval was sought was not the best price obtainable for the property . . . . The railroad's adherence to its "moral obligation" to [Siris], in view of his expenditures in clearing the title to the property, in no way militates to the interest of the public, although the situation might differ if the disparity in amount [between the offers] were inconsequential.
>
> [Id. at 548-49.]

Here, the majority of the BPU concluded the only issue before them was whether the developers' offer represented the best price obtainable. However, rather than weigh the conflicting evidence and determine whether DEP's offer was economically superior to developers' offer, the BPU merely stated "ACE made the business judgment that the [developers'] offer, even considering the contingencies, was of more value to the company than the DEP offer." Erie-Lackawanna and West Jersey provide clear direction that N.J.S.A. 48:3-7(a) requires more than a perfunctory review of a utility's application to

sell property. "The requirement of findings is far from a technicality and is a matter of substance." N.J. Bell Tel. Co. v. Commc'ns Workers of Am., 5 N.J. 354, 375 (1950).

The BPU review is not a mere formality prior to consummation of the sale, but a searching inquiry into the options facing the utility. The BPU majority failed to engage in an economic analysis of whether developers' offer was superior to DEP's offer. The majority's deferral to ACE's "business judgment" because ACE had "the most financial stake" in the matter and an interest in "maximiz[ing] [the] financial benefit" from the sale, ignored the Legislature's delegation of authority to the BPU in N.J.S.A. 48:3-7a. The BPU was required to engage in the Erie-Lackawanna analysis and make explicit findings of fact to support their decision.

"[W]hen an administrative body renders a decision and fails to make adequate findings of fact and give an expression of reasoning which, when applied to the found facts, led to the conclusion below, the decision cannot stand." Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 73 (App. Div. 1989). Those findings must be "'sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review an administrative decision and ascertain if the facts upon which the order is based afford a reasonable

basis for such order.'" Ibid. (quoting N.J. Bell Tel., supra, 5 N.J. at 377).

"We cannot accept without question an agency's conclusory statements, even when they represent an exercise in agency expertise." Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202-03 (App. Div. 2003). An "administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985). Without findings of fact supported by the record and supporting the ultimate determination, the agency decision is an arbitrary, capricious, and unreasonable action. In re Issuance of a Permit by Dep't of Envtl. Prot. to Ciba-Geigy Corp., 120 N.J. 164, 173 (1990).

The BPU's failure to address the merits of ACE's petition under the Erie-Lackawanna doctrine violates express legislative policy expressed in N.J.S.A. 48:3-7, and therefore, it is arbitrary, capricious, and unreasonable, and must be reversed for the BPU's full consideration of the Erie-Lackawanna test as applied to the evidence.

C.

Rate Counsel and the environmental groups claim the BPU's review based upon economic conditions as of 2002, not as of 2009, resulted in the BPU's failure "to consider substantial, material evidence in the record" and an erroneous conclusion that developers' offer represented the best price obtainable for the property. We agree.

We have previously held that the BPU may consider facts different from those presented with a petition resulting from "the lapse of time between the filing of the petitions and the hearings[.]" In re Highpoint Dev. Corp., 65 N.J. Super. 530, 537-38 (App. Div.), certif. denied, 34 N.J. 473 (1961). We explained:

> No valid reason exists, or is presented, for requiring the Board to close its eyes to the existing conditions as of the dates of its hearings, and thus to consider the case in a vacuum. There is often some "regulatory lag" before administrative agencies, and . . . [t]he Board properly considered the facts as they existed at the end of the hearings in arriving at its decision."

There is no simply valid reason for BPU to limit its consideration to the facts as of the time the petition was filed in 2002. ACE's property, like the property in West Jersey & Seashore Railroad Company, was not sold with "undue haste." 46 N.J. Super. at 548. The sale was delayed, largely due to

litigation, for more than eight years. However, once the petition was ripe for review, the BPU allowed the parties to file supplementary financial analyses and other documentation reflecting the evolution of the facts during the prolonged litigation. The BPU then held an evidentiary hearing where the parties cross-examined one another's experts, largely on the supplemental reports.

The BPU failed to consider the entire record the parties developed with the BPU's active participation. The BPU's disregard of the vast majority of the financial evidence limited its ability to undertake a meaningful statutorily mandated review.

The significant variation in material facts resulting from the passage of time undermines the BPU's decision to view only facts as of 2002. Because the BPU based its conclusion on less than the whole record, its approval of ACE's petition cannot stand.

D.

By order dated September 14, 2011, we granted BPU's motion to supplement the record with a one-sentence internal DEP email dated October 13, 2010, stating "We can release the hold on the [ACE] funds and make available for other properties."

For the first time on appeal, developers argue that this email demonstrates that the DEP offer for the property is no longer viable as the funds set aside for the purchase have been released.

The email was not part of the record before the BPU and comes to us completely devoid of context. On its face, the email indicates only that certain funds set aside for this purchase may be released. It does not, as BPU suggests, "raise questions as to whether DEP would still be interested in purchasing the property." The email is ambiguous at best regarding whether DEP has the funding available for purchasing the property. We find the email irrelevant to our review on appeal.

At oral argument before us, however, appellants acknowledged that, if DEP no longer intends to purchase the property in accordance with its prior offer, their challenge to BPU's approval of the sale to the developers is moot. Without an alternative offer, approval of the sale would not warrant our intervention. Since we are remanding this matter for further proceedings before the BPU, the parties may present evidence as to whether the DEP offer still stands.

E.

The BPU maintains, also for the first time on appeal, that DEP's 2009 bid was non-conforming because it was submitted "almost seven years after the bidding process had closed, while a contract with another bidder was in place, without re-advertisement by ACE and long after the petition process had been underway." We find BPU's attempt to characterize DEP's 2009 bid as non-conforming to be unpersuasive. The record below is devoid of any claim that any bid ACE received was non-conforming. If the BPU considered DEP's 2009 bid non-conforming, it should have made those explicit findings in the order. Moreover, even if non-conforming, the DEP bid could be considered and evaluated by BPU. See Erie-Lackawanna, supra, 75 P.U.R.3d at 250 (finding Overlook's bid non-conforming because it rejected covenants explained in the advertisement but still applying the Erie-Lackawanna test).

Had the BPU compared the offers under the Erie-Lackawanna doctrine, the fact that DEP had designated funds set aside for the purchase of the property would have weighed heavily in determining the relevant discount rate for the DEP offer's NPV calculation.

F.

Rate Counsel and the environmental groups urge that we cure the fact-finding deficiencies in the BPU's order by relying on the findings in Commissioner Fox's dissent. They claim Commissioner Fox, who was designated to preside over the hearing, was the "functional equivalent of an administrative law judge," which entitles her dissent to "the same weight and deference as the findings of an ALJ." We disagree. Commissioner Fox's dissent lacked the statutorily required majority vote of the BPU commissioners.

N.J.S.A. 48:2-40(a) states, "[a] majority vote of the Board shall be necessary to the issuance of an order." Commissioner Fox was designated as the hearing officer and presided over the proceeding. However, her role was distinct from an ALJ who conducts an evidentiary hearing and issues an initial decision that the agency may then accept or reject. See N.J.S.A. 52:14B-10(c) ("The head of the agency, upon a review of the record submitted by the administrative law judge, shall adopt, reject or modify the recommended report and decision no later than 45 days after receipt of such recommendations."). We decline to adopt Commissioner Fox's dissent.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.