



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE PETITION OF ATLANTIC CITY) ORDER
ELECTRIC COMPANY FOR APPROVAL OF THE SALE OF)
CERTAIN LAND AND PREMISES SITUATED IN THE)
TOWNSHIP OF MAURICE RIVER, IN PART, AND THE)
CITY OF MILLVILLE, IN PART, COUNTY OF)
CUMBERLAND, STATE OF NEW JERSEY TO R.W.V.)
LAND & C.M. LIVESTOCK, L.L.C. PURSUANT TO N.J.S.A.)
48:3-7) DOCKET NO. EM02050313

Parties of Record:

Gerard W. Quinn, Esq., Cooper Levenson, on behalf of Atlantic City Electric
Stefanie A. Brand, Esq., Director, Division of Rate Counsel
Barbara Koonz, Esq., Wilentz, Goldman & Spitzer, on behalf of Millville 1350
Edward Lloyd, Esq., Environmental Law Clinic, on behalf of Environmental Interveners

BY THE BOARD:

This matter comes before the New Jersey Board of Public Utilities ("Board" or "BPU") on a request by Atlantic City Electric Company ("ACE") for permission for the sale of utility property claimed no longer used or useful for utility purposes pursuant to N.J.S.A. 48:3-7. ACE's petition was initially filed on May 22, 2002. On December 1, 2003, a public hearing was held where more than 50 members of the public spoke as well as a number of public officials. Thereafter, the purchaser selected by ACE, R.W.V. Land & C.M. Livestock, L.L.C., intervened through its affiliate, Millville 1350, LLC (collectively, "Millville 1350"), in this proceeding. Additionally, a coalition of environmental groups (the New Jersey Audubon Society, New Jersey Conservation Foundation and Association of New Jersey Environmental Commissions), represented by the Columbia University School of Law Environmental Law Clinic ("Environmental Interveners"), as well as the New Jersey Department of Environmental Protection ("DEP"), sought and received permission to intervene. The Division of the Rate Counsel ("Rate Counsel") is also a party to this proceeding.¹

At its April 4, 2010 Board agenda meeting and subsequently through its June 21, 2010 order, the Board granted ACE's petition to sell the property to Millville 1350. Interveners, who include four environmental groups and Rate Counsel, appealed the Board's decision. In a decision

¹ Formerly the Department of Public Advocate, Division of Rate Counsel.

issued July 17, 2013, the Appellate Division reversed (In re Atl. City Elec. Co., 2013 N.J. Super. Unpub. LEXIS 1775 (App. Div. Unpub. 2013) ("In Re ACE") ("In Re ACE") and remanded the matter to the Board for consideration of the petition consistent with In re Erie-Lackawanna Ry. Co., 75 P.U.R.3d 246 (N.J. Bd. Of Pub. Util. Comm'rs 1968), and for the Board to make explicit findings of fact to support its decision. In Re ACE at *36.

The Board now reviews ACE's petition in consideration of the full record before the Board.

FACTUAL AND PROCEDURAL HISTORY

In its petition, ACE sought approval to sell approximately 1,350 acres of property located in Millville, New Jersey. The property consists of vacant land, a corporate meeting facility, and a holly farm. ACE had originally purchased the property for a coal-fired electric generation plant, but that plan did not come to fruition and instead ACE subdivided the property and determined it was no longer used or useful for utility purposes.

To determine the fair market value of the property as required by N.J.A.C. 14:1-5.6, ACE obtained an appraisal of the land by Conover Appraisal Associates, Inc. Conover conducted its appraisal in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). Conover issued a report on November 22, 1998 ("Conover I"). Conover I appraised the hypothetical "as-is" market value of the Millville Property as of May 15, 1999 to be \$3.9 million.

Between 1999 and 2002, ACE advertised the property and solicited bids. After considering the various bids associated with the process, ACE selected Millville 1350 as the winning bid with a \$4 million offer that involved a four-year pay-out and a balloon payment. ACE was to hold a First Purchase Money Note and Mortgage from Millville 1350 payable as follows: a \$400,000 down payment, \$100,000 per year for the first three years following closing and the remaining \$3,300,000 million dollars due the fourth year after closing. In addition to payment, the parties agreed to other terms of sale, including a six-month inspection period, execution of a deed in lieu of foreclosure, and ACE's conveyance of marketable and insurable title. ACE would also be responsible for obtaining government approval to reduce the size of the leased Generation Property from 500 acres to 140 acres and obtain any other permits required by the federal, state or local government.

ACE explicitly rejected a number of other bids and effectively rejected a \$2.553 million bid by DEP by entering into the agreement with Millville 1350. ACE believed that the Millville 1350 offer reflected the best possible offer under the circumstances, and that the offer represented the fair market value. Following this decision on the part of ACE, a number of entities sought to intervene in the matter based upon the environmental nature of the property and the impact the proposed development might have.

In or about April 2002, ACE commissioned Conover to conduct a second fair market value appraisal of the property ("Conover II") before filing its Petition with the Board. The Conover II report also calculated the net present value ("NPV") of the Millville 1350 \$4.0 million offer. The Conover II report indicated that the property's market value had decreased to \$3.0 million and further found that Millville 1350's \$4.0 million offer had a cash equivalent value between \$2.9 million and \$3.4 million with a discount rate between 5% - 10%, which supported its final value conclusion on the property for sale and exceeded the DEP \$2.553 million offer.

On May 22, 2002, ACE filed a petition with the Board to sell the property to Millville 1350. On December 1, 2003, the Board held a public hearing in Millville, New Jersey. Several interested parties attended and voiced both support and opposition to the sale and proposed development project. Steven Gabel ("Gabel") appeared from Gabel Associates and presented an economic analysis of the proposed sale of the property to Millville 1350 and opined that the \$4.0 million Millville 1350 purchase price had a NPV of \$1.85 million.

By orders dated March 3, 2004, March 18, 2004 and May 19, 2004, the Board granted intervention status to Millville 1350; the DEP; and each of the Appellant Environmental Interveners. In or about January 2004, Millville 1350 commissioned valuation and rate consultants Guastella Associates, Inc. ("Guastella") to conduct an analysis of the proposed sale of the property to Millville 1350 and determined that the Millville 1350 offer far exceeded the value of the \$2.553 million DEP offer.

In or about July 2003, during the pendency of the proceedings before the Board, Millville 1350 applied to the City of Millville for approval of its General Development Plan ("GDP") to construct 950 age-restricted homes and an eighteen-hole golf course on the Property. The Planning Board's October 4, 2004 approval of the GDP Application was subsequently appealed, which delayed the adjudication of this matter before the Board through 2007. See Citizens United To Protect The Maurice River And Its Tributaries, Inc. v. City of Millville Planning Bd., 395 N.J. Super. 434 (App. Div. 2007) (Upholding the Planning Board's approval of Millville 1350's GDP).

On or about January 23, 2009, the Board held a pre-hearing conference, where the parties discussed the issues to be resolved and established discovery deadlines. Several appraisals and expert reports were submitted to help properly assess the value of the Millville 1350 offer and the value of property at stake. DEP hired two appraisers, Ed T. Molinari, SRA ("Molinari") and LeGore and Jones Appraisal Services ("LeGore"), who found that the property's value as of February 2009 was \$3.635 million and \$3.5 million, respectively. Stan Meltzer ("Meltzer") submitted a rebuttal analysis and Conover submitted yet another evaluation on behalf of ACE, indicating that the as-is market value of the property as of February 2009 was \$4.150 million. Notwithstanding ACE's contract for sale with Millville 1350, DEP sent a March 23, 2009 letter to ACE expressing an interest in purchasing the Millville property for \$3.5 million ("DEP 2009 offer"). ACE rejected the offer, citing the pending contract for sale with Millville 1350 and the pending petition with the Board.

The question of what discount rate should be applied in the course of determining the NPV 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 was a major issue in this matter. Gabel concluded that the \$4 million Millville 1350 purchase price had a NPV of only \$1.85 million when a 15% discount rate and lease payment reductions were applied. Meltzer testified and applied a 14% discount rate to the Millville 1350 purchase price and determined that the NPV of that \$4.0 million price was \$2.26 million. Conversely, Meltzer discounted the earlier \$2.5 million DEP offer by only \$33,000, deriving an NPV of \$2,467,000. The Conover II report indicated that a 5-10% discount rate was appropriate, making the NPV of the Millville 1350 offer, between \$2.9 million and \$3.4 million.

ACE reviewed the offers before it and decided that the Millville 1350 offer, even considering the contingencies, was of more value to the company than the \$3.5 million 2009 DEP offer. Therefore, ACE continued to pursue its petition before the Board to sell the property to Millville 1350.

Then Commissioner Jeanne M. Fox presided over an evidentiary hearing held on September 23, 2009. The parties agreed that the only issues in dispute were whether Millville 1350's purchase price represented fair market value, and represented the best price obtainable. Accordingly, the hearing was limited to cross-examination of Guastella, Gabel and Meltzer concerning their various reports which addressed the valuation of the property as well as Millville 1350's contract and DEP's offer to purchase the property. Expert reports from Conover, Guastella, Gabel and Meltzer were considered with regard to valuations of the Millville 1350 and \$2.5 million DEP offers. Although each expert agreed that some discounting of Millville 1350's offer was appropriate, their assessments and valuations varied to a great degree. The experts' comparison of the Millville 1350 offer and \$3.5 million 2009 DEP offers also varied.

At its April 14, 2010 agenda meeting and subsequently through its June 21, 2010 order, the Board granted ACE's petition approving the sale to Millville 1350. The full Board considered all of the evidence presented by the parties in light of N.J.S.A. 48:3-7, N.J.A.C. 14:1-5.6 and the requirements under Erie-Lackawanna, supra, 75 P.U.R.3d at 246. This BPU decision was appealed to the Appellate Division but a stay was not sought. As such, ACE and Millville 1350 consummated the sale on October 12, 2010, in accordance with the Board's ruling. The Appellate Court agreed with the Environmental Interveners and Rate Counsel, who argued the BPU violated its statutory mandate when it approved developers' purchase of the property without first considering whether developers' offer was the best price obtainable. In Re ACE, supra.

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; and
- (c) The proposed sale price is the best price obtainable and represents fair market value for the property.

[Erie-Lackawanna, supra, 75 P.U.R.3d at 247]

In a July 17, 2013 decision, the Appellate Division reversed and remanded the matter to the Board. In Re ACE, supra. The Appellate Court stated 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 the fair market value for the property. 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. In Re ACE, supra, at *9.

The Appellate Court stated:

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 based on the 2009 data. 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. 48:3-7(a). The BPU was required to engage in the Erie-Lackawanna analysis and make explicit findings of fact to support their decision.

[In Re ACE, supra, at *10. (quotations in original)]

The court found that the Board had not considered the complete record and it specifically found that the Board should have considered the 2009 economic analysis developed in the record pursuant to the Board's direction. Id. at *38. The court held that the Board's "disregard of the vast majority of the financial evidence limited its ability to undertake a meaningful statutorily mandated review. Id. at 39. With regard to DEP's 2009 offer, the court concluded that it could be considered and evaluated by the Board. Id. at *41.

The court went on to discuss the significance of a possible withdrawal of DEP's 2009 offer. The court further concluded that on remand, the Board can consider whether DEP's offer still stands, stating "without an alternative offer, approval of the sale would not warrant our intervention." Ibid. The court noted that whether DEP's offer remained was relevant to review on remand. Ibid. The Appellate Division reversed and remanded the matter back to the Board directing that evidence may be presented regarding whether DEP's offer remains.

POST-APPEAL HISTORY

On September 13, 2013, the Board asked for the parties' position on the matter moving forward, in light of the July 17, 2013 decision by the Appellate Division. In an attempt to seek the parties' positions on their continued interest in participating in any proceedings in this matter, the Board sought clarification on the status of any outstanding offers and interest in purchasing the subject property, including DEP's 1999 and 2009 offers. Although submissions were initially due October 11, 2013, DEP sought extensions to determine whether it would withdraw its 2009 offer. On December 16, 2013, the parties met at the Board's offices in Trenton to discuss the status of the matter. At this meeting, the parties discussed how the matter would proceed as well as concerns over the current status of Millville 1350's title to the property. At that time, the Board advised the parties that it must determine whether the contract contemplated in the pending petition is the best price obtainable and represents fair market value for the property. The parties further requested an opportunity to submit comments regarding procedural steps to be taken by the Board. As such, the Board sought comments from the parties regarding the procedure to ensure that the contract in the pending petition represents the best price obtainable and fair market value for the property, consistent with Erie-Lackawanna, including comments regarding whether ACE should re-advertise the property and the impact of DEP's pending determination of its interest in purchasing the property. The parties could submit comments by January 10, 2014 and reply comments by January 17, 2014.

The Board informed the parties that DEP was still a party to the action until it informed the BPU otherwise and as such could submit comments in accordance with the above schedule. The Board hoped that this comment period would provide DEP with the additional time it requested to assess whether it has a continued interest in purchasing the subject property. On or about March 13, 2014, DEP advised the Board that it was no longer interested in purchasing the

subject property based on its 2009 offer, and that DEP would not continue to participate in the matter before the Board.

On April 28, 2014, a conference was held and a briefing schedule was agreed to between the remaining parties. A June 2, 2014 Status Conference was held, in which the Board acknowledged receiving the parties' briefs and it would subsequently render a decision.

POSITIONS OF THE PARTIES²

Environmental Interveners

In 2009, the Environmental Interveners asserted that the Board should deny the Petition because the Millville 1350 contract is not the best price obtainable. Environmental Interveners agreed that the analysis requires a review of the proposed sale price to other, competing offers, and that the risks associated with each transaction must be considered. Environmental Interveners noted that the risk factors between the Millville 1350 offer and the 2009 \$3.5 million DEP offer are significant and that the structure of the payments must be considered in any analysis. They believed, the risks associated with the completion of the project, could best be reflected in a discount rate that should be applied to the offers to create a fair basis for comparison. Based upon this fundamental understanding, and based upon a significant discussion, Environmental Interveners asserted that a risk premium discount rate of no less than 8% should be applied to the Millville 1350 offer to properly reflect the risks associated with payment and completion of the project. The DEP offer, on the other hand, should receive a discount rate of no more than 4%, if any, because of the lack of market or regulatory risk. When compared with these numbers in place, the NPV of DEP's 2009 offer was higher than the NPV of the Millville 1350 offer. The DEP 2009 offer is the appropriate offer to consider, claimed Environmental Interveners, because it best reflects the reality of the current situation.

Environmental Interveners also claimed that the Board should deny the petition because the price did not represent the fair market value of the property. Three separate appraisals were conducted, and they valued the Property in 2009 at between \$3.5 million and \$4.15 million, yet the NPV of the Millville 1350 offer was no higher than \$3.375 million, using the highest valuation of the offer made by Millville 1350's own review.

In its January 14, 2014 letter to the Board, the Environmental Interveners asserted that although parties should be able to supplement their brief arguments, the Board should apply the Erie-Lackawanna analysis based on the record established in 2009. This position was reiterated in their January 21, 2014 reply, stating that all parties agree an Eric-Lackawanna analysis is required and that there is "substantial agreement" that the decision should be based on the 2009 record. Therefore, the Environmental Interveners opposed opening the property for re-bidding.

The Environmental Interveners stated in its May 16, 2014 letter, that remand requires the Board to determine whether the contract of sale in the petition is the best price obtainable and represents the fair market value for the property. The Environmental Interveners acknowledge that that the DEP withdrawal relieves the Board of the obligation to review DEP's offer, but argue it does not relieve the Board of its obligation to make the determination under the Erie Lackawanna standard.

² Although summarized here, an additional recitation of the procedural history, parties pre-appeal arguments and facts was set forth in the Board's July 17, 2010 Order.

The Environmental Interveners continue to assert that ACE's petition fails to meet the fair market value requirement because:

The purchase agreement does not satisfy the fair market requirement of the appraiser;

There is no evidence in the record demonstrating an ability to finance the transaction; and

The purchase agreement fails to reflect a common financial arrangement as it is a lengthy deferral of the payment of the purchase price; and therefore does not reflect fair market value.

[See Environmental Interveners May 28, 2014 letter.]

The Environmental Interveners believe there are risk factors that must be addressed with both original offers and that a denial of the petition will enhance the opportunity to protect the environmental attributes of the property. The Environmental Interveners also contend that the existing agreement has been made void or voidable because the purchaser has stopped paying the additional funds required by the purchase agreement.

Finally, as to the preservation of a portion of the track, the Environmental Interveners argue that Millville 1350 previously committed to the Millville Planning Board and the Appellate Division in 2006 that it would preserve 930 acres of the 1350 acre track. They assert that a DEP plan to purchase the same 930 acres would not add any additional protection.³

Rate Counsel

Rate Counsel asserted in 2009 that a sale to DEP represented the highest value to ACE, and on that basis alone the Board should deny the Petition. Rate Counsel believed that DEP's \$3.5 million offer was superior to that of Millville 1350's \$4.0 million offer when factoring discounts. Rate Counsel was of the opinion that all three experts believed the DEP 2009 offer held a greater monetary value than the Millville 1350 offer. Rate Counsel further noted that DEP should be awarded the property based on public importance.

In its October 8, 2013 brief in response to the Board's letter seeking the post-appeal positions of the parties interested in the referenced matter, Rate Counsel stated that the sale price was negotiated on appraisals done nearly 15 years ago and a structured sales price negotiated 11 years ago. At issue for Rate Counsel was the third element of the test set forth in Erie-Lackawanna, whether the best price obtainable and fair market value for the property is obtained by relying on a 15 year old appraisal. Rate Counsel further states that DEP's continued interest is not determinative of the matter and the sale as structured. Rate Counsel believes that by accepting Millville 1350's bid based on what they thought are outdated appraisals, the Board cannot obtain the best price and fair market value for the property pursuant to N.J.S.A. 48:3-7.

³ The Board notes that although several parties reference a purported DEP plan to purchase a portion of the track, such a purchase agreement between Millville 1350 and DEP is not subject to Board review and is not before the Board.

Rate Counsel maintains that its position has not changed, stating the Erie-Lackawanna test must be applied to the present sale and relying on 15 year old appraisals and 11 year old negotiations will not meet such standard.

Rate Counsel's May 15, 2014 brief questions whether the Board has sufficient information in the record to determine if the purchase price in the purchase agreement is the best price obtainable and fair market value. They again note that the appraisal is 15 years old and suggest opening the record for additional information that may support the current value of the property. Rate Counsel further states that the purchase agreement was conditioned on the purchasers meeting certain obligations under the agreement as part of the purchase of the property. Additionally, Rate Counsel suggested re-opening the record to see if the purchasers are abiding by the agreement and to allow the parties to introduce new evidence that the January 22, 2002 purchase agreement is the best price obtainable and the fair market value of the property.

Millville 1350

In 2009, Millville 1350 pointed out that the DEP offer remained subject to significant conditions, not the least of which is the funding, which consists of \$4 million allocated to 52 different pieces of property, and thus the assertions that the money existed and was ready to go was speculative at best. Likewise, none of the parties recognized the time, effort, and money that Millville 1350 had placed into this process, and the idea that Millville 1350 would simply "walk away" was without foundation. Furthermore, Millville 1350 asserted that despite the changed circumstances in the property valuations, its offer remained the best offer under the situation and thus should have been approved.

In its May 16, 2014 brief, Millville 1350 notes the Appellate Court's instruction that "if DEP no longer intends to purchase the property in accordance with its prior offer, [the Appellants'] challenge to BPU's approval of the sale to [Millville] is moot. Without an alternative offer, approval of the sale would not warrant [the Court's] intervention." Notwithstanding the Appellate Court's opinion, Millville 1350 believes the Board should evaluate the substantial evidence in the record and issue an order approving the petition. It believes the evidence – including the 2009 appraisals – demonstrates the Purchase Agreement is the best price obtainable and represents the fair market value of the property.

ACE

In 2009, ACE adopted the arguments made by Millville 1350, and asserted that the offer made by DEP was incomplete, and was insufficient to form the foundation of a commercial transaction for the sale of property.

In its May 15, 2014 brief, ACE states that it accepted the high bid of six offers made - the original bid of \$3 million, later raised to \$4 million by Millville 1350. The purchase agreement between Millville 1350 and ACE was entered into January 22, 2002 for approximately 1,347 acres of land for \$4 million. In July 2001 and January 2002, the property was again advertised for \$4.2 million, however, there were no bidders. The purchase price offered by Millville 1350 is within the range of values of the five appraisals done between November 1998 and March 2009 for the fair market value of the premises. The summarized bids were as follows:

Appraisal Prepared by	Appraisal Prepared for	Amount	Date of Appraisal	Date of Valuation
Conover	ACE	\$3,900,000	11/22/98	05/15/99
Conover	ACE	\$3,000,000	4/22/02	04/11/02
Molinari	DEP	\$3,636,000	03/03/09	02/20/09
LeGore	DEP	\$3,500,000	03/04/09	02/20/09
Conover	ACE	\$4,150,000	03/06/09	02/10/09

ACE reminds the parties that the Appellate Court emphasized the existence of competing offers as being significant, opining, "Without an alternative, offer approval of the sale would not warrant our intervention." By letter dated March 31, 2014, the DEP informed the BPU that it was no longer interested in purchasing the property, thus making the Millville 1350 offer the only remaining offer.

On May 27, 2014, ACE sent a letter in lieu of a brief, specifically addressing the possibility of Millville 1350's default on the contract terms. The company said that contrary to the Environmental Interveners contention, until the Appellate Division issued its decision effectively clouding title, Millville 1350 had carried out all of its contractual obligations. Nothing indicates that Millville 1350 will not go forward with its obligations should the petition be granted. ACE further expressed that if the petition is granted and Millville 1350 does default, ACE is protected from loss by the terms of the contract which allow ACE the option of terminating the agreement and retaining all deposit monies paid to date, allowing the company to keep the money paid and to place the property out for re-bid. Moreover, ACE maintains that a denial of the petition would allow Millville 1350 to demand a return of its deposit and possibly real estate taxes paid by Millville 1350 on the property. Additionally ACE would be required to put the property back on the market. ACE further asserts that there are negative public policy consequences as it would prevent DEP from acquiring 800 acres of land from Millville 1350 to preserve as open space.

As to the contract price not representing fair market value, ACE points out that value is dependent upon what a buyer is willing to pay. Furthermore, the two appraisals performed at the behest of the DEP in March 2009 show a value of \$3.5 million and \$3.636 million, respectfully. The purchase price offered by Millville 1350 of \$4 million is in excess of those two amounts. Additionally, Millville 1350 had made all payments in furtherance of the contract until the appellate decision created a cloud on Millville 1350's title.

DEP

As set forth above, DEP is no longer a party to this matter and has withdrawn its \$3.5 million offer to purchase the property. However, in 2009, it argued that its offer exceeded Millville 1350's offer and should be considered the best price obtainable. Additionally, DEP asserted in its January 13, 2014 correspondence that subject to DEP making a determination whether it will proceed with its offer, the Board should consider the record "the parties had developed and provided in 2009 and apply the Erie-Lackawanna analysis to that evidence." See January 13, 2014 e-mail submitted by DAG John Renella on behalf of DEP.

DISCUSSION AND FINDINGS

As the Appellate Court in this matter noted, when a utility is disposing of property and multiple offers have been made, the Board's determination of which offer is the best price obtainable, requires more than the comparison of the face value of the offers. See Erie-Lackawanna, supra, 75 P.U.R.3d at 247. Rather, the Board must consider risk factors of both offers with an eye toward which truly is the best price obtainable. In re ACE, supra, at *9. In this matter, there are no longer multiple bids since the DEP has withdrawn its offer and the bid of Millville 1350 is the only remaining offer. In its opinion, the Appellate Court made clear that "if DEP no longer intends to purchase the property in accordance with its prior offer, "approval of the sale would not warrant our intervention." Nonetheless, in reviewing the sale of utility property under the authority given to it by N.J.S.A. 48:3-7(a), a showing of three factors known as the Erie-Lackawanna standard must be demonstrated before the sale is approved. Specifically:

- (a) The property must be no longer used or useful, presently or prospectively, for utility purposes;
- (b) The sale and conveyance of the property under the terms proposed will not adversely affect the ability of the utility to render safe, adequate, and proper service; and
- (c) The proposed sale price is the best price obtainable and represents fair market value for the property.

All of the parties previously agreed that the first two prongs of the test have been satisfied. What remains unsettled, as dictated by the Appellate Division and the Board agrees, is the third factor - whether the proposed sale price is the best price obtainable and represents fair market value for the property.

At the January 23, 2009 pre-hearing conference, all parties concurred that the disagreement revolved around the economic evaluation of the offer to purchase the property. The parties were directed to submit updated economic data though supplemental economic reports and/or appraisals and an evidentiary hearing was scheduled for September 23, 2009. The majority of the evidentiary hearing testimony focused on the economic value of the property as evaluated through risk factors specific to this transaction and their effect on determining the discount rate and the monetary compensation.

In reviewing this case, consistent with the Appellate Division order, the Board has analyzed the complete record, including the 2009 supplemental reports that were submitted by the parties as well as the additional arguments submitted by the parties and the withdrawal by DEP of its offer. As directed by the Appellate Division, the Board has supplemented the record to consider DEP's withdrawal of its offer. The Board further gave the parties an additional opportunity to file legal briefs addressing the significance of this supplemental fact.

Pursuant to the Board's direction, in 2009, the parties submitted three valuation analyses which varied considerably despite adhering to the same Uniform Standards of Professional Appraisal Practice, similar comparable sales, and agreeing as to the common industry definition of market value. The accepted definition of market value is:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

[See Molinari 2009 appraisal at 6 (citing The Appraisal of Real Estate, 12th Edition, pg 224)]

Nonetheless, LeGore's 2009 appraisal valued the property at \$3.5 million; Molinari appraised the property at \$3.635 million; and Conover valued the property at \$4.15 million (\$1.15 million more than his previous appraisal). The parties also submitted analysis of the appropriate discount rates applied to Millville 1350's offer from Gable, Meltzer and Guastella. The appraisals and analysis considered the property, not in a vacuum, but in comparison to the then existent DEP offer. Although the parties disagreed as to their significance, there were some inspection and other contingencies to the then existent DEP offer.

The analysis also discussed contingencies to the Millville 1350 offer as set forth in the petition. By 2009, Millville 1350 and ACE had satisfied numerous contingencies in their contract. Additionally, Millville 1350 had expended funds litigating site approval, conducting inspections and otherwise continuing to pursue the purchase agreement. Any argument as to a pending default on the purchase agreement is made without merit, as Millville 1350 had begun payment on the contract, including property taxes (which have since halted due to clouded title stemming from the appellate decision) upon closing, and have chosen to actively litigate for this property since this matter's inception.

Additionally, if the Board denies ACE's petition, ACE is required to comply with N.J.S.A. 48:3-7 and re-advertise the property as one option, or entertain a viable offer from a state agency not subject to Board approval pursuant to N.J.S.A. 48:3-7.

Unlike Gable and Meltzer, Guastella did consider possible contingencies to the DEP offer in his Supplemental Analysis, concluding that a 5% discount rate should be applied to DEP's 2009 offer, resulting in a NPV of \$3.3 million dollars. In applying a similar 5% discount rate to Millville 1350's purchase price, valuing the purchase price at \$3.4 million dollars, Guastella concluded that the Millville 1350 price is superior to the then existent DEP offer. As he went on to correctly opine in his report, the offer and subsequent purchase agreement by Millville 1350 met the fair market value as defined above:

Both [ACE and Millville 1350] were typically motivated, well informed and acting in their own best interest. As explained in [ACE]'s petition commencing this case, [ACE] began marketing the property in early 1999, received numerous inquiries from prospective purchasers as a result of an ad campaign that targeted areas brokers and developers, and also advertised the property for sale in an area newspaper in July 2001 and again in January 2002. Thus, a reasonable time was allowed for exposure of the property in the open market. The offer of Millville 1350 was the highest offer received by [ACE] from a bidder demonstrating an ability to finance the transaction. The payment terms provided for under the Millville 1350/[ACE] agreement reflect a common

financial arrangement compatible to cash in United States dollars, unaffected by special or creative financing or sales concessions.

[Guastella May 1, 2009 Supplemental Economic Analysis at 3.]

In 2009, an offer existed worth \$3.5 million. That DEP offer is no longer on the table. However, realizing that at some point between 2009 and present day another hypothetical offer could have been made, the Board has made certain, after looking to the 2009 supplemental data, to review whether the only remaining offer, Millville 1350's offer of \$4.0 million, represents fair market value and the best price obtainable.

The Appellate Division noted that the Board does not need to ignore the realities of the passage of time in considering whether or not the sale represents fair market value and the best price obtainable. Additionally, in presenting evidence at the hearing, the parties focused on comparing the then existent DEP offer to Millville 1350's offer. As noted by the Appellate Division, the lack of a current DEP offer is significant, in that the court would have deemed this matter moot had the evidence before it made clear that DEP's offer had been withdrawn.

The court ordered the Board to review this matter consistent with Erie-Lackawanna and consider the full record, including the 2009 record developed by the Board. On remand, the Board has provided the parties with numerous opportunities to address how this matter should proceed. Having considered the parties positions, the Board agrees with the majority of the parties and therefore, **HEREBY FINDS** that terminating ACE's current contract without reviewing it on its merits consistent with the Erie-Lackawanna standard and requiring ACE to re-advertise this property anew is inappropriate under the circumstances of this case. The Board further agrees with Rate Counsel's May 28, 2014 reply brief that to "reargue the issues raised by the parties prior to the Appellate Division decision ... is a waste of Board resources."

In their supplemental briefs, the Environmental Intervenors and Rate Counsel argue that the Board should deny this petition as it fails to represent the best price obtainable or represent fair market value. They further argue that the Board should re-open the record. Millville 1350 and ACE argue that the Board has sufficient information to approve the sale consistent with the Erie-Lackawanna standard.

The Board has reviewed the record and determines that based on the mandates of the Appellate Division Order and the Board's obligation to review the sale under the Erie-Lackawanna standard, the Board has sufficient information in the record to determine whether this sale agreement represents the best price obtainable and fair market value of the property.

In considering the testimony before the Board, the appraisals overly discounted Millville 1350's offer. In addition, Millville 1350 has continued to participate in this process and has taken all steps anyone would expect of a purchaser in conformance with the contract. Based on the whole of the record, the Board does not believe that were this property to be re-advertised that ACE would obtain a higher value than the Millville 1350's offer. Additionally, as noted above, the majority of the parties, including DEP prior to its withdrawal, argued that no such attempt to re-advertise the property was appropriate. In considering the entirety of the record, the Board believes that Millville 1350's offer represents fair market value and the best price obtainable for the property.

The Board has considered the economic analysis, the appraisals and the risk factors presented in the testimony and concludes that the lower discount rate applied by Guestalla was more appropriate to this contract. The Board also notes that the appraisals varied.

In reviewing the record and the parties' briefs, the economic analysis and the supplemental information before the Board, it is evident that Millville 1350's \$4.0 million offer satisfies the third prong of the Erie-Lackawanna test, in that the proposed sale price is the best price obtainable and represents fair market value for the property.

Accordingly, based upon the above, the Board having abided by the Appellate Court ruling, on remand, **HEREBY FINDS** that the proposed property to be sold to Millville 1350 is no longer used or useful for utility purposes, that the sale will not adversely affect the ability of ACE to provide safe, adequate, and proper service, and that the sale price reflects the best price obtainable and the fair market value at the time of the agreement. The Board **FURTHER FINDS** that the proposed sale is in accordance with regulation and law, and accordingly **HEREBY APPROVES** the sale, subject to the following conditions:

Petitioner shall inform the Board of the date upon which the transaction is completed, within ten (10) days of completion;

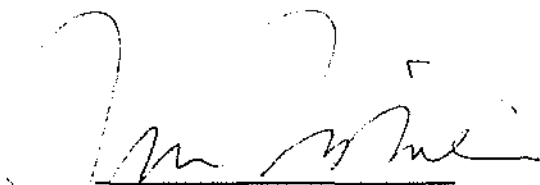
This Order shall be of no effect, null and void, if the sale hereby approved is not completed within six (6) months of the date of this Order unless otherwise ordered by the Board; and


Nothing in this Order shall set or in any way limit the exercise of the authority of this Board, or of the State, in any future petition or in any proceeding with respect to rates, financing, accounting, capitalization, depreciation or in any other matter affecting Petitioner.

This Order shall be effective on October 10, 2014.


DATED: 9/30/14

BOARD OF PUBLIC UTILITIES
BY:

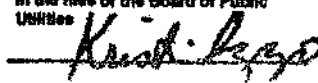

JOSEPH L. FIORDALISO
COMMISSIONER


DIANNE SOLOMON
PRESIDENT


MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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



IN THE MATTER OF THE PETITION OF ATLANTIC CITY ELECTRIC COMPANY FOR
APPROVAL OF THE SALE OF CERTAIN LAND AND PREMISES SITUATED IN THE
TOWNSHIP OF MAURICE RIVER, IN PART, AND THE CITY OF MILLVILLE, IN PART,
COUNTY OF CUMBERLAND, STATE OF NEW JERSEY TO R.W.V. LAND & C.M.
LIVESTOCK, L.L.C. PURSUANT TO N.J.S.A. 48:3-7
BPU DOCKET NO. EM02050313

SERVICE LIST

Stefanie A. Brand, Esq., Director
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Ami Morita, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

James Glassen, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Geoffrey Gersten, DAG
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

John R. Renella, DAG
Department of Law & Public Safety
Division of Law
Hughes Justice Complex
Post Office Box 093
Trenton, NJ 08625

Susan Kraham, Esq.
The Environmental Law Clinic
Columbia University School of Law
435 West 116th Street
New York, NY 10027-7297

Edward Lloyd, Esq.
The Environmental Law Clinic
Columbia University School of Law
435 West 116th Street
New York, NY 10027-7297

Barbara Koonz, Esq.
Wilentz, Goldman & Spitzer, PA
90 Woodbridge Center Drive
Suite 900, Box 10
Woodbridge, NJ 07095

Gerard W. Quinn, Esq.
Cooper Levinson April
Niedelman & Wagenheim, PA
1125 Atlantic Avenue
Atlantic City, NJ 08401

Philip J. Passanante
Assistant General Counsel
Atlantic City Electric Co.
800 King Street, 5th Floor
Post Office Box 231
Wilmington, DE 19899-0231