SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3913-14T2

IN RE READOPTION OF
N.J.A.C. 14:2.

Argued January 26, 2017 – Decided August 18, 2017

Before Judges Hoffman and O'Connor.

On appeal from the New Jersey Board of Public Utilities, Docket No. AX14070647.

James H. Laskey argued the cause for appellants Association of Environmental Authorities of New Jersey, New Jersey Section of the American Water Works Association, and National Association of Water Companies, New Jersey Chapter (Norris, McLaughlin & Marcus, PA, attorneys; Mr. Laskey, of counsel and on the brief; Nicholas J. Dimakos, on the brief).

Yao Xiao, Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Xiao, on the brief).

PER CURIAM

Appellants, the Association of Environmental Authorities of New Jersey, the New Jersey Section of the American Water Works

Association, and the National Association of Water Companies, New Jersey Chapter, comprise of water and wastewater companies and authorities. Appellants challenge the validity of N.J.A.C. 14:2-4.2(c)[1] (regulation), readopted by respondent Board of Public Utilities (BPU) on March 16, 2015. Among other things, appellants contend the BPU exceeded its statutory authority when it readopted this regulation. We remand for further proceedings.

I

In 1994, the Legislature enacted the Underground Facility Protection Act (UFPA or Act), N.J.S.A. 48:2-73 to -91. "[T]he Legislature enacted the UFPA to protect both the public from the risk of harm and the utility companies from unnecessary losses." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 582 (2013). The Act establishes a "One-Call Damage Prevention System" (System) to protect underground facilities, commonly referred to as pipes, mains or lines, because these facilities are frequently subject to accidental damage from excavating equipment and explosives. See James Constr. Co. v. Bd. of Pub. Utils., 298 N.J. Super. 355, 360 (App. Div. 1997).

[1] In their brief, appellants do not identify the specific regulation or regulations in N.J.A.C 14:2 they challenge, but it is evident from their arguments their attack is limited to the readoption of N.J.A.C. 14:2-4.2(c).

Under the Act, underground facilities include those carrying water and wastewater.

The Act requires that, before performing an excavation, an excavator must "notify the [One-Call System] . . . of his intent to engage in excavation or demolition not less than three business days and not more than [ten] business days prior to the beginning of the excavation or demolition." N.J.S.A. 48:2-82(a). Once an excavator notifies the System, the One-Call center informs the applicable underground facility operators of the pending excavation. See N.J.A.C. 14:2-4.2. Operators are then required to mark out the facility within three business days. N.J.S.A. 48:2-80(a)(2). The Act defines an operator as a person or entity that owns, operates, or controls the operation of an underground facility, but does not include a "homeowner who owns only residential underground facilities, such as an underground lawn sprinkler system or an underground structure for a residential low-voltage lighting system." N.J.S.A. 48:2-75.

The Act designated the BPU as the appropriate State agency to provide policy oversight to the System and to enforce the provisions of the Act. N.J.S.A. 48:2-74. In accordance with this mandate, the BPU adopted regulations to implement the Act. See N.J.A.C. 14:2-1.1 to -6.10. The regulation at issue in this

appeal, N.J.A.C. 14:2-4.2(c), initially adopted in 2007, 39 N.J.R. 4435 (Oct. 15, 2007), was readopted on March 16, 2015, 47 N.J.R. 659-61 (Mar. 16, 2015). N.J.A.C. 14:2-4.2(c) is set forth below; for context we also include N.J.A.C. 14:2-4.2(b):

> (b) Within three business days after receiving information from the One-Call center regarding a planned excavation or demolition, an underground facility operator shall do either of the following:
>
> > 1. If the underground facility operator owns, operates or controls any underground facilities on the site, the underground facility operator shall mark out the site as required under N.J.A.C. 14:2-5, except if a facility is exempt from mark out requirements under N.J.A.C. 14:2-4.1(b) or (c). If an underground facility operator does not own or operate a facility, but controls it, the operator is responsible for compliance with this paragraph; or
> >
> > 2. If the underground facility operator does not own, operate or control any underground facilities on the site, the underground facility operator shall make a reasonable effort to notify the excavator of that fact.
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> (c) For the purposes of (b) above, an underground facility operator shall be deemed to control all portions of an underground facility carrying metered service, which are not located on the customer's side of the meter, regardless of who owns the property. For example, if a

> residential electric customer owns an underground electric line, which provides electricity from the street to the customer's electric meter in an area served by overhead electric lines, the electric utility shall be deemed to control that underground electric line.
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> [N.J.A.C. 14:2-4.2(b) and (c) (emphasis added).]

In accordance with the rule-making procedures of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, before the readoption of N.J.A.C. 14:2, the BPU invited comments from the public. See N.J.S.A. 52:14B-4(a). Appellants provided comments in opposition to the readoption of the subject regulation. The BPU provided responses to appellants' comments, but declined to make any changes to it or any other regulation in N.J.A.C. 14:2. We address the relevant comments and responses.

It is not disputed that, unlike electric or gas companies, appellants' members typically do not own the lines which extend from their lines under a public right-of-way and the customer's building or meter. The line from the road or curb to the customer's building is generally owned by the customer. Appellants commented the language in N.J.A.C. 14:2-4.2(c) is unreasonable because it compels a service provider, which merely

uses a line to carry its commodity, to mark out the line even if the line is owned, operated, or controlled by another.

The BPU rejected appellants' comment, responding as follows:

> There is a risk to underground facilities, including water facilities, that the Legislature has sought to protect through the Underground Facility Protection Act (UFPA) and this chapter is designed to effectuate. Transferring this responsibility from an operator to a homeowner would not serve this public policy. Additionally, Federal standards for state one-call programs call for the inclusion of all underground facility operators.
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> [47 N.J.R. 659(a) (March 16, 2015).]

Without providing a specific citation, the BPU claimed the Act provided it with the authority to compel a service provider to mark out a line it neither owns, operates or controls, as long as the provider uses the line. The BPU stated:

> Under the One-Call statute, if a utility delivers metered service, it controls the operation of the utility line up to (and often including) the meter, regardless of who owns the line. This is evidenced by the utility's authority to prosecute any person who taps into this line to divert utility service. Since the utility controls the line, it is the underground facility operator who is responsible for marking the facility under the One-Call program. This is a sensible policy because residential utility lines on the utility's side of the

> meter generally have more capacity than customer-controlled utility lines on the customer's side of the meter. Therefore, the risk posed by an excavator hitting the utility controlled line is much greater than the risk for a smaller, customer-controlled line behind the meter. This distinction applies to both residential and non-residential facilities. If a large commercial utility customer has installed underground utility lines on its side of the meter, the customer is responsible for locating those lines, not the utility. As such, the Board of Public Utilities (Board) declines to adopt the recommended change.
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> [Ibid. (Emphasis added).]

Appellants also commented that, even if their members are obliged under the Act to conduct mark-outs, the members do not have immunity should a property owner assert a claim for trespassing as a result of a member entering an owner's property to conduct a mark-out. The BPU responded:

> Pursuant to the Board's rules at N.J.A.C. 14:3-3.6 and 3A.1(a)5i, a utility shall have the right to reasonable access to a customer's premises and may discontinue service in appropriate circumstances if access is refused. Additionally, utility providers routinely access customer premises, including in response to emergencies. As such, the Board declines to adopt the recommended change.
>
> [Ibid.]

II

On appeal, appellants contend the BPU's decision to readopt the regulation without change was arbitrary, capricious, and unreasonable, as evidenced by its responses to their comments. Appellants contend the responses do not provide a justification to readopt the regulation without any changes, and urge we set the regulation aside. Before we address appellants' arguments, we briefly summarize the law that governs our review.

Regulations adopted by administrative agencies are accorded substantial deference, provided they are consistent with the terms and objective of the governing statute. Nelson v. Bd. of Educ., 148 N.J. 358, 364-65 (1997). An administrative agency may not "extend a statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1993). Thus, "when the provisions of the statute are clear and unambiguous, a regulation cannot amend, alter, enlarge or limit the terms of the legislative enactment." Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 294 (App. Div. 2014) (quoting L. Feriozzi Concrete Co. v. Casino Reinvestment Dev. Auth., 342 N.J. Super. 237, 250-51 (App. Div. 2001)). "[A]ny regulation or rule which contravenes a statute is of no force, and the statute will control." L. Feriozzi,

supra, 342 N.J. Super. at 251 (quoting Terry v. Harris, 175 N.J. Super. 482, 496 (Law Div. 1980)).

Courts are required to intervene if an agency's action is inconsistent with the legislative mandate. See Williams v. Dep't of Human Servs., 116 N.J. 102, 108 (1989). "[W]e have invalidated regulations that flout the statutory language and undermine the intent of the Legislature." In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992). Our review is limited to an examination of whether: (1) the action offends the State or Federal Constitution; (2) the agency's action violates express or implied legislative policies; (3) there is an absence of substantial evidence to support the agency's findings; and (4) in applying the legislative policy to the facts, the agency failed to reach a conclusion based on the relevant factors. George Harms Constr. Co., Inc. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994).

Under the APA, an agency "shall consider fully all written and oral submissions respecting the proposed rule," N.J.S.A. 52:14B-4(a)(3), and prepare for the public a report providing the agency's response to the comments submitted. N.J.S.A. 52:14B-4(a)(4). Responses must be meaningful, reasoned and supported. See Animal Prot. League of N.J. v. N.J. Dep't of Envtl. Prot., 423 N.J. Super. 549, 573-74 (App. Div. 2011)

("[d]isagreement with a reasoned, supported agency determination does not give rise to an APA violation"), certif. denied, 210 N.J. 108 (2012). In fact, "[t]he purpose of the APA rulemaking procedures is 'to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated.'" In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 349 (2011) (quoting In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 43 (App. Div.), certif. denied, 182 N.J. 141 (2004)).

Appellants argue the Act does not provide and the BPU cannot justify how a service provider is deemed to control a line merely because it uses the line to transmit its product. Appellants also challenge the BPU's conclusion a service provider controls a water line merely because the provider has the power to prosecute a party who taps into such a line through which the provider's water is flowing and unlawfully divert it. Appellants note it is the water itself that is confiscated when diverted under unlawful circumstances, not the line itself.

Appellants further attack the BPU's claim large commercial customers that have installed underground utility lines on their "side of the meter" are responsible for locating their lines for

mark outs. Appellants point out meters are commonly located adjacent or close to a customer's building. Thus, most of a commercial customer's line is not on the customer's side of the meter. Therefore, service providers have the task of locating most of the line between the meter and the road for their commercial customers, which are generally difficult to locate.

On the question of their members' vulnerability to trespass claims, appellants dispute the BPU's conclusion N.J.A.C. 14:3-3.6 and N.J.A.C. 14:3A.1(a)(5)(i) provide immunity. Appellants note N.J.A.C. 14:3-3.6 provides a utility reasonable access to a customer's premises, as well as to any property on the premises furnished by the facility, but only for the purpose of "inspecting" the premises incident to the rendering of service, including "reading meters; inspecting, testing, or repairing its facilities used in connection with supplying the service; or the removal of its property." Appellants observe this regulation does not provide utilities access to conduct mark outs.

Appellants further note N.J.A.C. 14:3-3A.1(a)(5)(i) merely provides the utility shall have the right to suspend, curtail, or discontinue service if the customer refuses reasonable access to the customer's premises in accordance with N.J.A.C. 14:3-3.6.

The BPU's response to appellants' arguments includes, in part, what the BPU provided in response to appellants' comments

when the readoption of N.J.A.C. 14:2 was pending. The BPU also provides additional reasons in its brief for readopting the subject regulation. Although we have considered these additional reasons, our role is to review the responses the BPU provided to the comments submitted when the subject regulation was pending readoption, not the additional justifications an agency includes in its brief to explain its previous actions.

"The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based[,]" and not upon an after-the-fact explanation of the administrative agency's decision. In re Petition of Elizabethtown Water Co., 107 N.J. 440, 460 (1987) (quoting Sec. and Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 459, 87 L. Ed. 626, 633 (1943)). See also In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 139 (App. Div. 2013) (noting the Department of Environmental Protection's attempt to rehabilitate web postings created after promulgating various rules by asserting additional explanations in its brief was inappropriate, stating "[a]n appellate brief is no place for an agency to try and rehabilitate its actions.").

We question, without deciding, the BPU's claim that: (1) the Act provides authority for the premise the mere use of a line to deliver a product is commensurate with operating or

controlling it; (2) a utility is deemed to control a line if the utility can prosecute a person who taps into and diverts the service provided through that line; and (3) N.J.A.C. 14:3-3.6 and N.J.A.C. 3A.1(a)5(i) immunize a service provider from a claim of trespassing if its agent or employee enters another's property to mark out a line.

We recognize the Legislature has

> determine[d] that it is in the public interest for the State to require all operators of underground facilities to participate in a One-Call Damage Prevention System and to require all excavators to notify the One-Call Damage Prevention System prior to excavation or demolition.
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> [N.J.S.A. 48:2-74.]

However, as previously addressed, with the exception of homeowners who own residential underground facilities, an "operator" is a person or entity that owns, operates, or controls an underground facility. N.J.S.A. 48:2-75. A significant issues is whether appellants members are operators under the Act.

In our view, the responses the BPU provided to appellants' comments when the subject regulation was pending readoption neither fully addressed appellants' comments nor explained why N.J.A.C. 14:2-4.2(c) warranted readoption without any change. Thus, it is not clear from the agency's responses whether it

fully considered appellants' comments, as statutorily required under the APA. N.J.S.A. § 52:14B-4(a)(4). See Animal Prot. League of N.J., supra, 423 N.J. Super. at 572 ("Public comments should be "given a meaningful role" in the process of rule adoption"). The responses provided raises the question whether appellants' comments were given the consideration required by the APA, which is significant because, under the APA, any rule not adopted in substantial compliance with the Act is invalid, see N.J.S.A. 52:14B-4(d).

That said, it would be premature to set aside N.J.A.C. 14:2-4.2(c) when further exposition of the BPU's reasoning may well elucidate why it determined no change to this regulation was warranted. See, e.g., Animal Prot. League of N.J., supra, 423 N.J. Super. at 575 (even if the agency misconstrued or perhaps exaggerated the comments and support for its actions, "we cannot say that such response in isolation (or even assuming a minimal number of other such responses) would support a finding that respondents violated the APA").

Therefore, we remand this matter to the BPU to enable it to amplify its responses to appellants' comments and fully explain its reasons for readopting N.J.A.C. 14:2-4.2(c) without change. The BPU shall have ninety days to provide its amended responses to appellants' comments. If it deems appropriate, the BPU is

not foreclosed from proposing an amendment to N.J.A.C. 14:2-4.2(c). If it decides to do so, BPU shall be afforded the time to which it is entitled under the APA.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.