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BOARD OF PUBLIC UTILITIES

JAN 19 2018

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Stephen B. Genzer
Phone: (973) 286-6712
Fax: (973) 286-6812
Stephen.Genzer@saul.com
www.saul.com

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JAN 19 2018

BOARD OF PUBLIC UTILITIES
SECRETARY'S OFFICE

CMS

January 18, 2018

VIA FEDERAL EXPRESS

Honorable Irene Kim Asbury, Secretary
New Jersey Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350

Re: In the Matter of the Petition of Middlesex Water Company for Approval of an Increase in its Rates for Water Service and Other Tariff Changes and for an Order Authorizing Special Accounting Treatment of Income Tax Refund Proceeds and Future Income Tax Deductions
BPU Docket No. WR1710-1049
OAL Docket No. PUC 16144-2017S

Dear Secretary Asbury:

Please accept this emergent interlocutory appeal (in the form of this letter) pursuant to N.J.A.C. 1:1-14.10 on behalf of Petitioner, Middlesex Water Company ("the Company" or "Middlesex") in the above captioned matter. This matter is a full base rate case filed in October 2017, by Middlesex Water Company with hearings currently set for March, 2018. This emergent appeal is from a ruling of Administrative Law Judge Tricia M. Caliguire on Friday, January 12, 2018, granting New Jersey-American Water Company ("NJAWC") *intervention* status in the above-captioned matter. We believe Judge Caliguire's ruling must be immediately overruled as it will be inevitably disruptive of the proper functioning of rate cases, disruptive of and contrary to the Board's long held standards for granting intervention, will inevitably cause confusion and delay, and because of this decision, the New Jersey Board of Public Utilities ("NJBP" or "Board" or "BPU") must promptly decide to clarify its policies regarding the standards a potential party must meet before being granted intervention or participant status in a base rate case.

As will be further detailed within this appeal, Petitioner believes the NJBP must reverse Judge Caliguire's ruling granting intervention to an entity which does not meet the standards stated in the regulations codified in the New Jersey Administrative Code and NJAWC should

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thus be denied intervention. As will be discussed, *infra*, this matter is of significant substantive institutional importance to the efficient functioning of the regulatory process of rate cases before the BPU and thus Middlesex believes that the Board needs to take this unusual action in overruling the decision of Judge Caliguire granting intervention to an entity not meeting those appropriate regulatory criteria. If allowed to stand, Middlesex believes this ruling will become precedential in rate cases being processed by the NJBPU and will create significant disruption to an efficient regulatory process.

Because the parties are now involved in the second round of discovery, hearings are scheduled in this matter for March 19, 21, and 22, 2018, and the current parties have scheduled various meetings within the next 4 weeks, Middlesex believes it cannot wait for the Board's February meeting to hear this appeal. We thus respectfully request that this emergent appeal be placed on the agenda for the Board's January 31, 2018 agenda meeting and, of course, include in its review any responsive papers received by the Board from any party as part of the record on which this appeal should be decided. We ask the Board to require any responses to this emergent appeal be filed by Wednesday, January 24 (4 business days) with replies filed by Monday, January 29 (2 business days).

For the Board's convenience, we have attached hereto all the papers with respect to this motion filed by both NJAWC and Middlesex before Judge Caliguire, as well as the Judge's decision granting NJAWC intervention status. No other party took a position on NJAWC's motion for intervention.

- Judge Caliguire's Opinion granting NJAWC intervention status (dated Friday, January 12, 2018) is attached as *Exhibit A*;
- NJAWC's original motion to intervene (dated December 13, 2017) is attached as *Exhibit B*;
- Petitioner Middlesex Water Company's response to that motion (dated December 26, 2017) is attached as *Exhibit C*; and
- NJAWC's reply (dated January 2, 2018) is attached as *Exhibit D*.

This motion is filed as an emergent appeal not only because NJAWC fails to meet the proper criteria for eligibility to even file a motion to intervene (which it does not), but is contrary to long standing Board actions with respect to granting parties intervention status¹, and also

¹ Pursuant to N.J.A.C. 1:1-16.1 (a) (Who may apply to intervene; status of intervenor) and 16.3 (a) (Standards for Intervention), when ruling on a motion to intervene, the following criteria must be taken into consideration:

"1:1-16.1 (a) Any person or entity not initially a party who has a statutory right to intervene or who will be **substantially, specifically and directly affected** by the outcome of a contested case, may on motion seek leave to intervene.

because of significant factual errors contained in the Judge's decision which appear to have influenced her decision.²

While most *customers* of a utility have generally been able to meet the Board's regulatory standards for intervention in rate cases, NJAWC is indisputably NOT a customer of Middlesex, nor does it claim to be. It is a 'customer of a customer' of Middlesex. NJAWC's own water supplier, the Township of Marlboro, to whom NJAWC is a customer, has consistently intervened

* * * *

1:1-16.3 (a) ... the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion and other appropriate matters." **Emphasis added.**

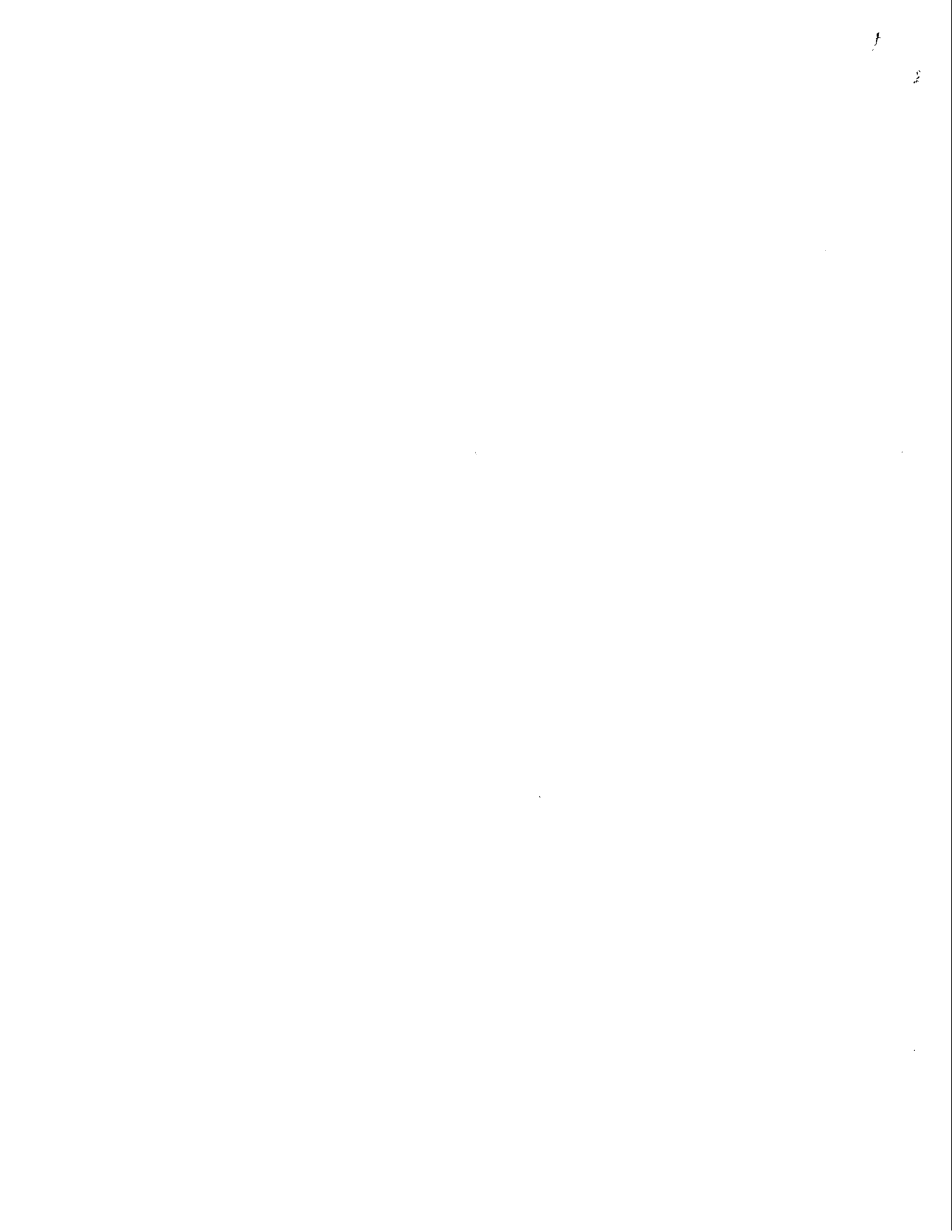
² On page 6 of the Judge's Order on Intervention (attached as Exhibit A), the Judge states (at footnote 2) that Marlboro "will charge this particular customer whatever rate the Board approves in this proceeding". As we noted in our responsive papers, whatever contract Marlboro and NJAWC agreed upon 10 years ago should not be allowed to confer and bootstrap NJAWC standing in this Middlesex proceeding. As stated in the NJAWC responsive papers (Exhibit D at 3) while one section of the contract identifies formulas, other sections might require or allow Marlboro to take other actions, so it is far from certain what Marlboro 'will' charge NJAWC or how NJAWC will flow that Marlboro rate to its customers. Furthermore, in spite of NJAWC's alleged interests, they have made no representations whatsoever that NJAWC has exhausted any claims they may have with respect to Marlboro or any of their other water suppliers statewide which *might* impact rates to their customers. NJAWC has neither alleged nor stated what procedures they have followed to 'protect their customers' interests with respect to Marlboro or any of its other statewide suppliers. It must be remembered that NJAWC has acknowledged at paragraph 1 of its original motion to intervene (at 1-2): "Importantly, no increase in MWC's rates will impact Movant's shareholders." Not only will NJAWC suffer no 'direct impact'; they will suffer none at all.

Secondly, in the last paragraph of Judge Caliguire's 'legal analysis' (Exhibit A at 6), she states that:

"The intervention of NJAWC in this case will create no more confusion and/or delay than the intervention of Middlesex in NJAWC's case has created. NDAs are standard in rate cases and NJAWC has agreed to abide by those already executed. Since, as Middlesex states, it prefers NJAWC - another water company - to sign an NDA more appropriate for a competitor, the parties may wish to use an NDA comparable to the one Middlesex executed in the NJAWC rate case."

Contrary to the Judge's finding, Middlesex *has not executed* an NDA in the NJAWC base rate case not least *because Middlesex has not been offered one*. We do not know why the Judge relies on this fiction, but it is simply wrong. A *customer's* intervention in one case, being *specifically, substantially, and directly* affected is simply not the same as a *non-customer* who, will clearly NOT be *substantially* affected (in fact, at all affected), will NOT be *specifically* affected (again, by its own admission, not affected at all), and thus cannot be either directly or *indirectly* affected. Contrary to the Judge's finding, which ignores that section of the regulation regarding eligibility to even file for an intervention motion, the two situations are simply not the same.

Middlesex is a customer of NJAWC; NJAWC is NOT a customer of Middlesex. Middlesex has NOT been offered an NDA in the NJAWC base rate case by NJAWC, so to state that NJAWC is in the same position in this Middlesex base rate case as Middlesex is in NJAWC's base rate case is simply incorrect.



in Middlesex's base rate cases, without objection. In fact, the Township of Marlboro, a statutory party fully meeting the BPU's intervention standards, has just moved for intervention (after the date of the Judge's decision) to which intervention Middlesex has never, and does not now, object.

While Middlesex has rarely, if ever, objected to any customer's intervention in its base rate cases, a 'customer of a customer' trying to advance *someone else's* interests, as is NJAWC in this case, without more, should be insufficient, to be eligible for *intervention* or even a *participant* status in a base rate case. Even under the broadest view of standing, NJAWC's interests are redundant to Marlboro's, its own water supplier, and might also be redundant to Staff and Rate Counsel, but allowing intervention for parties not meeting the elemental requirements can only disrupt the efficient management of base rate cases.

For the following reasons, in this case, NJAWC's position is clearly insufficient for intervention or even participant status.

First, NJAWC argues that it has no recourse to its own water supplier, Marlboro, and that this is therefore the *only* proceeding in which it can protect the interests of its own customers. Startlingly, the Judge accepted this proposition (Exhibit A at 5-6). This is as insulting to the Township of Marlboro as it is to the state law which determines how municipalities are permitted to set their own rates for water service. Potential intervenors, such as NJAWC here must not be permitted to 'bootstrap' intervention in a rate case based on its own actions (here, the signing of a contract with a third party) having nothing to do with the Petitioner and then, because of that self-created action, claim *its own customers'* interests are affected sufficient to be awarded intervention status. Yet that is precisely what NJAWC has argued in this case and has convinced the Judge to permit such intervention -- *i.e.*, to permit an entity allegedly arguing it intends to protect the interests of customers (*NJAWC customers*) of a customer (*NJAWC*) of a customer (*Marlboro*) of the utility (*Middlesex*). How can this not be too attenuated to qualify for intervention? Middlesex believes it must be.

NJAWC signed a contract with *Marlboro* (not Middlesex) which permits *Marlboro* to adjust rates it charges its customer NJAWC in part based on Middlesex's rates charged to Marlboro. And since the Board in this proceeding will determine Middlesex's rates to Marlboro, as well as all its customers, NJAWC claims it should be permitted to intervene in Middlesex's rate proceeding regardless of what Marlboro, in turn, may or may not do by NJAWC's own contract with *Marlboro*.

Until now, this Middlesex rate case has not been about Marlboro's contract with NJAWC, but this Order by Judge Caliguire is directly about whether, by signing such a contract with Marlboro, NJAWC should be permitted to bootstrap its own standing into a BPU Middlesex rate case. And what, specifically, has NJAWC actually stated is its *substantial* interest? It states quite plainly that "importantly, **no increase in MWC's [Middlesex's] rates will impact Movant's shareholder**" (Exhibit B at 1-2). Rather, NJAWC states that it is requesting intervention 'solely for the purpose of advancing the interests of its customers'. (*Id.*) As we

calculated in our responsive papers (Exhibit C at both the bottom of page 4 and *infra* at page 6) based on NJAWC's own allegations, that '*substantial*' impact amounts to *8 cents per year per customer, or less than 2/3 of one penny per month per customer*. **Substantial?** Middlesex doubts the Board would consider that '*substantial*'. Yet the Judge apparently did.

Middlesex has no reason to assume that the Marlboro/NJAWC contract was entered into at anything other than arms-length and in good faith. But it has nothing to do with bootstrapping NJAWC into Middlesex's rate case. What rational process would allow rate case intervention to be granted because of a contract an entity freely entered into with a third party? And in which the proposed intervenor acknowledges *it will not be affected at all?* Yet that is precisely what the Judge has accepted here.

As noted above, NJAWC has specifically stated that its proposed intervention in this Middlesex base rate case is supposedly to protect 'the interests of its own customers', without even the slightest allegation that it has approached Marlboro to protect those same customers, or that it has approached *any* of its other water suppliers across the state, with any concerns. Only Middlesex, in order to protect each customer from the **substantial** charge of less than 2/3 of one cent per month. So much for NJAWC trying to protect the interests of its *customers*.

The NJBPU must overrule this decision by Judge Caliguire as a means of controlling its own docket, properly directing Administrative Law Judges how the NJBPU wishes its intervention standards and eligibility to be interpreted and in fact reaffirming sensible standing principles in rate cases. Second round discovery is well underway in Middlesex's rate case and the parties have already scheduled numerous discovery meetings to take place both before and immediately after the Board's January 31 meeting. As an intervenor in this matter, with no cognizable interests, NJAWC would have the right to attend and participate in most non-confidential discovery and settlement meetings, and those meetings would be ridiculously more complicated and difficult with NJAWC in attendance.

Middlesex has not yet designated many documents as 'Confidential' in its own case since the other parties (until now) are not competitors of Middlesex, but we have no Non-Disclosure Agreement with a competitor in this case, nor as noted, and contrary to the Judge's finding, Middlesex has not been offered one in the NJAWC base rate case. However, with a competitor in the room, that process would have to be reexamined in some detail for both substantive and procedural issues. Since the Judge has pointed Middlesex to the NJAWC base rate case, we would now be required to go through not only NJAWC's confidential responses in that rate case to determine the aspects of base rate cases NJAWC contends is confidential, but then start its analysis by attempting to apply that learning to the discovery in this case. Only then, based on Judge Caliguire's ruling, would Middlesex be in a position to begin to negotiate an NDA to NJAWC in this case.

There is thus no way upholding the granting of intervenor status to NJAWC would fail to impact and delay the efficient processing of this case. If affirmed, Middlesex will revisit this process, but the Judge's granting NJAWC intervenor status will certainly impact the Middlesex

base rate case. The Judge is simply wrong. Because of the significant impact of this ruling on the very processing of this case on all the active parties to this proceeding, Judge Caliguire's ruling must be overruled.

Middlesex will not repeat all the details of the arguments it made in its response to NJAWC's motion to intervene (Exhibit C attached hereto), however we must reiterate several of the reasons we believe the Judge's granting of intervention to NJAWC must be overturned.

As noted in our responsive papers, in 2009, NJAWC made a similar Motion to Intervene in a Middlesex base rate case, which Motion was subsequently withdrawn by NJAWC (Exhibit C at 1). The rationale on which NJAWC based its argument at that time is essentially the same as in their Motion in this matter. Essentially, through its purchase of a miniscule portion of its overall water supply through the Township of Marlboro ("Marlboro"), which *is* a customer of Middlesex, NJAWC acknowledges that it is not a customer of Middlesex, but rather a '*customer of a customer*' of Middlesex, *i.e.*, the Township of Marlboro. NJAWC's customers' interests, who NJAWC professes its concern to advance, are thus in fact customers of a customer (NJAWC) of a customer (Marlboro) of the utility about which this case is about.

In its reply, NJAWC claims that the BPU has not previously specifically required that to be granted intervention status, a party must be a direct customer (Exhibit D at 1). One either is a customer or is not. As noted in our responsive papers attached (Exhibit C at 6), NJAWC is not a customer of Middlesex nor does it claim to be. Period. Nevertheless, to be clear, it is not Middlesex's position that one must be a customer to have standing to intervene. It is, however, Middlesex's position that generally customers meet the criteria for intervention; and it is obvious to all, non-customers must plead and prove how they might be specifically, substantially and directly affected.

It need not be pointed out to this Board that the BPU has not had to define 'customer' for purposes of intervention because it is usually obvious that a customer would *generally* meet the statutory criteria and that has been so obvious to everyone that it has been unnecessary *until now* for the Board to so state. Middlesex does not believe that one must be a customer to be granted intervention status. But if not a customer, a proposed intervenor must have something more to offer within the criteria as to why it should be granted intervention status. There is simply no 'more' here.

Based on its position in this matter, apparently the impact of actually being a customer is not important enough for either NJAWC or Judge Caliguire, and the Board must now make clear that customers generally meet the standard because they are 'substantially, specifically and directly affected' N.J.A.C. 1:1-16.1 (a), and that generally *non-customers* (such as NJAWC here) must show how they are substantially, specifically and directly affected (Exhibit C at 2-3). As we have pointed out, NJAWC has simply failed to do so. Nevertheless, Judge Caliguire has granted NJAWC intervention, without even a reference to how NJAWC has shown that they were substantially, specifically and directly affected (Exhibit A at 6). That ruling must be

overruled by the BPU in order to maintain a sound process and to uphold the proper intervention criteria.

Through its attenuated relationship of a 'customer of a customer', NJAWC claims since its customers "will" be affected by any BPU action in this case that 'might' increase the rates to one of its own suppliers, in this case Marlboro, that somehow NJAWC should be deemed to have standing and is therefore "entitled" to become a full intervenor. Middlesex disagrees with this strained and tortured conclusion and respectfully urges the BPU to reject this new attenuated standard for establishing standing to intervene or participate in a base rate case by overruling Judge Caliguire.

Middlesex is certainly aware and has, both in this case and historically in prior base rate cases, not generally objected to the intervention of any of its customers in its base rate proceedings. Middlesex's *customers* generally have *direct* interests, since they 'will' be charged rates via tariffs set by the BPU. Municipal customers have statutory rights to intervene. NJAWC, simply by signing a contract with Marlboro, should not be allowed to bootstrap intervention by terms of a contract into which it freely entered.

NJAWC is neither a customer of Middlesex nor has a direct, substantial nor specific relationship with Middlesex and is thus not an eligible intervenor. Indisputably, NJAWC may be impacted by its contract with its supplier, Marlboro, but will NOT be *directly* impacted by any action resulting from this case and it is certainly NOT *substantially* or *specifically* impacted. In fact, it acknowledges it is not being impacted at all. Regardless of NJAWC's wholly overstated allegations with respect to each of those regulatory criteria, and in spite of its unfounded claims to the contrary, NJAWC simply does not meet any of the criteria specified in the regulations governing intervention. Basic statutory construction requires all three criteria to be met by the regulation's use of "and" rather than "or": substantial, specific and direct.

As noted above, NJAWC buys a miniscule portion of its overall water supply from Marlboro, which, in turn, charges its customers (such as NJAWC) for water supply at rates the Township sets using appropriate municipal ordinances and contractual arrangements under state law. That does not bootstrap jurisdiction or standing in this case on NJAWC. Yes, one of *Marlboro's* customers is NJAWC. Marlboro has the legal authority to charge NJAWC whatever rate it deems appropriate pursuant to its municipal ordinances, and within the confines of the Township's contract with NJAWC. NJAWC entered into such contract with Marlboro of its own free will and we assume with full knowledge as to how any future rates charged to NJAWC by Marlboro would be calculated. What the Marlboro/NJAWC contract says or does not say would be otherwise irrelevant to this proceeding, unless NJAWC's intervention makes it relevant in order to determine the actual impact on an intervenor NJAWC. Before now, these were not issues in this case, but if Judge Caliguire's ruling is sustained, they must become issues. Those are the facts.

Judge Caliguire has apparently accepted the logic that NJAWC, as a customer of Marlboro, has as much of a direct interest in this Middlesex base rate proceeding as a resident of

Woodbridge – taking water service under tariff from Middlesex Water Company – has in an NJAWC base rate proceeding. As we noted (*See* Exhibit C at 6-7), the logic appears to be essentially that a Woodbridge resident is a “customer of a customer” of NJAWC because Middlesex is a customer of NJAWC. Under this “customer of a customer” standard for standing, implicitly adopted by Judge Caliguire, extreme and absurd results could abound. Under this logic, a current NJAWC customer from Sussex County would have standing to intervene in a Middlesex base rate case because that customer, as a customer of NJAWC, “might” be affected if the Township of Marlboro acts to increase NJAWC’s rates, which in turn “might” be affected by the results of this Middlesex base rate case.

Though implicit, permitting standing to intervene to a ‘customer of a customer’ with nothing more than NJAWC claims in this case are simply absurd, attenuated, and unworkable criteria. We have found no case in which the BPU adopted anything close to such a standard, nor has NJAWC or the Judge cited any. For good reason. In her legal analysis, Judge Caliguire cites several inapposite cases involving participant status and issues beyond the scope of the proceedings involved. They are not relevant to the attenuated nexus between NJAWC’s interests in this case and the interests identified in those cases.³

Legal Standard

Read together, N.J.A.C. 1:1-16.1 (a) (eligibility) and 16.3 (a) (standards), indicate that when ruling on a motion to intervene, consideration must be given to the following criteria:

16.1 (a) Any person or entity not initially a party, who has a statutory right to intervene or who will be **substantially, specifically and directly affected** by the outcome of a contested case, may on motion, seek leave to intervene.

* * *

16.3 (a) ...the nature and extent of the movant’s interest in the outcome of the case, whether or not the movant’s interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant’s inclusion, and other appropriate matters.

Emphasis added.

³ First the Judge cites the attempt by Middlesex to intervene with respect to Shorelands acquisition. (Exhibit A at 4) which was rejected in favor of the NJAWC base rate case because there, as here, Middlesex’s (*i.e.*, the customer’s) rates were being set. With respect to the Public Service Energy Strong Petition (Exhibit A at 5), intervenors were dealing with issues outside the scope of that proceeding...much like the contract calculation issues with respect to the NJAWC-Marlboro contract here. The cases are inapposite.

As Middlesex has demonstrated, NJAWC has failed to satisfy any of these criteria for intervention, the ALJ should be overruled, and the NJAWC Motion should be denied.

As we stated in our responsive papers, but which was not disputed by NJAWC or even referenced in Judge Caliguire's opinion, paragraph number 5 of the original NJAWC motion (Exhibit B at 3) calculates that *if* Middlesex's proposed increase were to be granted *in full*, and if fully passed through to Middlesex's customer, Marlboro, *without adjustment*, and *if* Marlboro then fully passes it on *without adjustment of any kind*, to NJAWC, the motion calculates the impact **in total** to be about \$55,000 (\$449,906-\$394,055) for NJAWC. But NJAWC says the increase will have **no impact on NJAWC** because of the NJAWC PWAC (Exhibit B at 1-2). However, those amounts applied over the 631,000 customers identified in numbered paragraph 2 of the NJAWC Motion (Exhibit B at 2), the alleged '**substantial**' impact on the interests of each of the customers NJAWC claims it wants to advance would be little more than **8 cents per year per customer, or less than 2/3 of one penny per month per customer**. And that is *only if* the increase were granted in full, *only if* that increase was fully passed to Marlboro and *only if* Marlboro then in turn fully passed it on to NJAWC and its customers with no other offsets, calculations, or tariff design changes. *Substantial?* We think not. This calculation based on NJAWC's own data in its motion simply clarifies and illustrates the frivolous nature of this Motion. It is clear that Judge Caliguire's Order should be overruled and that NJAWC, in this case, has no valid legal or regulatory standing to intervene.

1. NJAWC's interest in this matter is far too attenuated to warrant intervenor status.

It is Middlesex's understanding from NJAWC (Exhibit B at 4) that in 2008 NJAWC and Marlboro executed a water supply agreement that contained pricing terms impacted, in part, on certain BPU determined Middlesex tariff rates. Middlesex was not a party to that agreement and played no role in its negotiation or execution. Solely by virtue of those financial terms between itself and Marlboro, however, NJAWC effectively convinced Judge Caliguire that it has met the eligibility standard of 'specific, substantial **and** direct' impact. It has not. But the Judge nevertheless granted NJAWC intervention. NJAWC's interests are too attenuated to be either an intervenor or a participant in this case.

NJAWC has gone to great lengths in its reply papers (Exhibit D at 3) to specifically tread through its contract with Marlboro to buttress its argument that *Marlboro will* calculate its rate in a certain way and must pass it through to NJAWC. Must this Middlesex rate case now be turned into an examination of what Marlboro might or might not charge NJAWC under the contract? Must we now examine what Marlboro might or might not do under all other provisions of its contract with NJAWC to determine the actual impact to NJAWC's customers, the very customers whose interest NJAWC states it is intervening to advance? Discovery in this case already in the second round will become much more complicated and attenuated. Will Marlboro, which has now requested intervenor status (without objection by Middlesex) even consent to such review of what it may or may not do, since it is not under the jurisdiction of the BPU, yet the impact of any increase on parties is always an issue in base rate cases? This case should not



be about the Marlboro/NJAWC contract, but it will inevitably become that in order to determine the impact on not only Middlesex's customer, Marlboro, but on Marlboro's customer, NJAWC, and then on the impact on NJAWC's customers all over the state (Exhibit B at 3).

Unless there is something else in that contract between Marlboro and NJAWC (which we will then have to examine on the record of this case to determine the impact on NJAWC's customers of any change in rates to Middlesex's customer Marlboro), the pricing terms linked to Middlesex's rates remain merely one portion of the overall rate paid by NJAWC, so the Marlboro contract is not merely a pass through arrangement, as NJAWC has had Judge Caliguire believe. As we noted in our responsive papers (Exhibit C at 2), it is Middlesex's understanding that Marlboro also produces its own water and it is Middlesex's understanding that Marlboro can change the rate it charges NJAWC, using appropriate municipal procedures, under its contract, based on a myriad of factors, each of which *might* affect NJAWC's final rate, and thus alter the rate Marlboro charges Middlesex, which NJAWC may then charge to its *statewide* customers. Unless something has changed (unmentioned by NJAWC in either its initial motion or in its response (Exhibits B and D attached hereto), Middlesex's rate is therefore but one pricing input to NJAWC's rates to its customers under its supply from Marlboro. Middlesex's rate to Marlboro is NOT the entire rate NJAWC is assessed by Marlboro, yet that in turn is alleged to provide the basis of NJAWC's intervention.

It is undisputed that customers' interests are not generally difficult to ascertain. That is not the case here for the non-customer, NJAWC. Judge Caliguire seems to have accepted the idea that NJAWC's interests here are attenuated partly because they are not a customer of Middlesex and the eventual rate to those customers or to any of NJAWC's statewide customers will have to be calculated. Middlesex again observes, as it did in 2009, that it seems a dangerous and foolhardy precedent for the BPU, and frankly, for NJAWC itself, to adopt this 'customer of a customer' reality, without more, for determining eligibility for intervention.

Upholding Judge Caliguire's decision permitting the interests of NJAWC could have far reaching detrimental consequences to the BPU in regulating all utilities under the its jurisdiction throughout the State of New Jersey. As the largest private water company in the state, and specifically the largest wholesale supplier of water service to endless others in New Jersey, NJAWC has a large number of water supply contracts with other water purveyors. NJAWC is the supplier; the other water purveyors are NJAWC's customers. Will we have to examine, in this case, all of NJAWC's contracts with any customer to determine the impacts on NJAWC customers? Will that analysis result in less of an impact than 2/3 of one penny per month? If one follows the logic of Judge Caliguire's decision granting intervention to NJAWC, each and every one of those suppliers' residential, commercial, or industrial customers, individually, would be entitled to intervene in NJAWC's current base rate proceeding. Their individual interests would be no more attenuated than NJAWC's interests here.

Middlesex purchases over 3 million gallons per day of water from NJAWC pursuant to NJAWC's tariffed rates, at a current cost of approximately \$2.62 million annually, an amount currently petitioned to increase by NJAWC by over 27%, which is why Middlesex has

intervened in NJAWC's base rate proceeding. But under the logic implicitly adopted by Judge Caliguire, standing should now be conferred on any and all Middlesex customers to intervene in the current NJAWC base rate case since they would have interests no less specific, substantial **and** direct as any other 'customer of a customer' of NJAWC. To take but one more example, should an individual residential customer of Middlesex's Bayview system in Downe Township on Delaware Bay now be permitted to intervene in *NJAWC's* current base rate case on the theory that any rate increase granted to NJAWC *would* eventually appear on that Bayview customer's Middlesex bill since the BPU has the authority to allocate any increase to any set of customers it deems appropriate? How does this granting of intervention make any sense at all?

Clearly, the rationale of the Judge in granting NJAWC intervention status is an unworkable and overly expansive view of who has standing to be an intervenor, and one which to the best of our knowledge has never before been adopted (for good reason) by the Board or the Office of Administrative Law. Notions of judicial economy and efficiency all undercut Judge Caliguire's decision to permit NJAWC intervention.

NJAWC has failed to allege that it has ever even intervened or discussed that with any of its suppliers (except Middlesex) nor did Judge Caliguire indicate that her order was conditioned upon that requirement. We must therefore take with a grain of salt NJAWC's actual intention in its intervention motion. NJAWC may in fact be costing its customers far more in legal fees in its attempt to intervene in this proceeding of one of its supplier's suppliers than NJAWC might indeed save its customers from this effort. So layered on top of this intervention motion are: (1) the fact that NJAWC has made no representation with respect to its efforts directly with any of its actual suppliers – including Marlboro – to control costs; and (2) NJAWC is attempting to impose a 27.4% increase on Marlboro's supplier – Middlesex – in NJAWC's own base rate case. To ignore the reality that NJAWC is failing to make a consistent effort to advocate on behalf of its customers for cost containment is an understatement. There must be other reasons why NJAWC has selected this one water supplier of all *its* suppliers in which to intervene. Yet Judge Caliguire has granted intervenor status to NJAWC, irrespective of the impact on this and future BPU proceedings. The BPU must take a broader view.

Fundamentally, the interest that NJAWC claims to raise is a contract matter between it and Marlboro. Marlboro is a municipality over which the BPU has no jurisdiction. The BPU does not control how Marlboro might input the result of this Middlesex base rate case on NJAWC or how Marlboro will factor in its own costs in setting NJAWC's rates, but as noted, if NJAWC is granted intervenor status in this case we will have to examine this in the instant case to determine the impact on NJAWC's customers. Customer impacts are always considered in rate cases; now we will have to consider 'customer of customer' impacts as well. This is neither a sound result nor one designed to rationalize or administratively economize base rate cases.

2. NJAWC's interest is not sufficiently different from any other party, certainly now that Marlboro has moved to intervene (without objection by petitioner), and will not measurably and constructively add to the scope or analysis of this case.

The BPU, in assessing Judge Caliguire's decision, must consider the extent to which NJAWC's interest here differs from that stated of other parties. While NJAWC does not belabor its differences with other parties' interests, it merely states that their interests are different in one sentence. However, this is a requirement to justify intervention. And while NJAWC alleges in that one sentence that its interest is significantly different from other parties, a simple review of the facts questions that assertion, and with Middlesex's customer and NJAWC's supplier, Marlboro, now petitioning to intervene, the redundant interests are even more glaring.

An explanation should be asked as to why its interests are not fully and completely represented by other current or statutorily eligible parties to this proceeding, including its supplier Marlboro, who has been an intervenor in each and every Middlesex base rate case for more than a decade.

3. NJAWC's inclusion in this case will inevitably cause confusion and could cause undue delay.

Neither the Judge nor NJAWC has explained why NJAWC's intervention in this case would not cause confusion, only that NJAWC will adhere to the schedule already set for this case. The Judge apparently believes a competitor NDA would fully mitigate any confusion or delay. It will not. The Judge also seems to believe that a competitor NDA has been drafted and accepted between Middlesex and NJAWC in the NJAWC base rate case. It has not. Middlesex has not been offered an NDA in that case.

As stated, discovery and settlement meetings have been set and there is no question that documents during the second round of discovery between the current parties and Marlboro will require far more delay and detail with NJAWC in the case as an intervenor than without them. As described above, NJAWC has not offered Middlesex an NDA in its case, so the Judge's claimed basis for indicating that no confusion or delay is simply wrong (Exhibit A at 6). Middlesex will certainly require different terms for the NDA agreements if another water company were able to rummage through its financial and other records. And unlike the Judge's baseless statement, there is no template in NJAWC's current base rate case from which to work since NJAWC has not offered Middlesex such an NDA. In itself, that would create significant confusion and time to work such agreements out, if indeed they could be worked out. We would have to confront that issue if faced with a legitimate entity with standing to intervene, but that is simply not the case here.

4. Conclusion.

For the reasons stated herein, Middlesex continues to oppose NJAWC's motion to intervene in this proceeding and respectfully requests that the Board of Public Utilities overrule

Honorable Irene Kim Asbury, Secretary
January 18, 2018
Page 13

Judge Caliguire's Order granting NJAWC intervention status, reject NJAWC's intervention as too attenuated and specifically reject the implied standard of intervention being granted to an inefficient and unworkable 'customer of a customer' standard, not previously implied nor adopted by the BPU or any previous New Jersey Administrative Law Judge. For these same reasons, Middlesex opposes the granting of participant status to NJAWC (which, admittedly, has not been requested by NJAWC nor awarded by Judge Caliguire).

With this letter and signature below, I certify that Judge Caliguire (from whose decision this letter appeal has been filed), as well as the entire service list, have been served electronically today and by mailing hard copies via regular mail.

Respectfully submitted,



Stephen B. Genzer

SBG/jg

Enclosures

cc: Honorable Tricia M. Caliguire, ALJ (via facsimile and regular)
Ira G. Megdal, Esq. (via electronic and regular mail)
Attached Service List (via electronic and regular mail)
Alex Moreau, DAG (via email only and overnight delivery)
Carmen Diaz, BPU (via email and overnight delivery)
Aida Camacho, BPU (via email and overnight delivery)
Heather Weisband, BPU (via email and overnight delivery)
Erick Forde, BPU (via email and overnight delivery)
Maria Zazzera (via email and overnight delivery)
Rhaman Johnson, BPU (via email and overnight delivery)
Kathleen O'Brien, BPU (via email and overnight delivery)

SERVICE LIST

In the Matter of the Petition of Middlesex Water Company for Approval of an Increase in its Rates for Water Service and Other Tariff Changes and for an Order Authorizing Special Accounting Treatment of Income Tax Refund Proceeds and Future Income Tax Deductions
BPU Docket No. WR17101049
OAL Docket No. PUC 16144-17

BOARD OF PUBLIC UTILITIES

Irene Kim Asbury, Secretary
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
irene.asbury@bpu.nj.gov

Maria L. Moran, Director
Division of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
maria.moran@bpu.nj.gov

Dr. Son-Lin Lai
Division of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
son-lin.lai@bpu.nj.gov

Michael Kammer, Chief
Bureau of Rates, Div. of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
mike.kammer@bpu.nj.gov

Mona Mosser, Bureau Chief
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
mona.mosser@bpu.nj.gov

Kofi Ocansey
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
kofi.ocansey@bpu.nj.gov

Kyle Felton
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
kyle.felton@bpu.nj.gov

James Kane
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
jim.kane@bpu.nj.gov

Rupal Patel
Division of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
rupal.patel@bpu.nj.gov

RATE COUNSEL

Stefanie A. Brand, Director
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625
sbrand@rpa.nj.gov

Debra F. Robinson, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
drobison@rpa.nj.gov
(electronic only)

Susan McClure, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
smcclure@rpa.nj.gov
(electronic only)

Brian O. Lipman, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
blipman@rpa.nj.gov

Kathryn A. Hart
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
khart@rpa.nj.gov

DIVISION OF LAW

Veronica Beke, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
veronica.beke@law.njoag.gov

Renee Greenberg, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
renee.greenberg@law.njoag.gov

Jenique Jones, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
jenique.jones@law.njoag.gov

MIDDLESEX WATER CO.

Dennis W. Doll
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
ddoll@middlesexwater.com
(electronic only)

A. Bruce O'Connor
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
aboconnor@middlesexwater.com
(electronic only)

Richard M. Risoldi
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
rrisoldi@middlesexwater.com
(electronic only)

Jay L. Kooper, Esq.
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
jkooper@middlesexwater.com
(electronic only)

Raquel Koukourdelis
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
rkoukourdelis@middlesexwater.com
(electronic only)

Robert J. Capko
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
rcapko@middlesexwater.com
(electronic only)

G. Christian Andreasen
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
candreasen@middlesexwater.com

Ada Soto
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
asoto@middlesexwater.com
(electronic only)

Michele Tilley
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
mtilley@middlesexwater.com
(electronic only)

Stephen B. Genzer, Esq.
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza, Suite 1520
1037 Raymond Blvd.
Newark, NJ 07102
stephen.genzer@saul.com

Colleen Foley, Esq.
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza, Suite 1520
1037 Raymond Blvd.
Newark, NJ 07102
colleen.foley@saul.com

Courtney Schultz, Esq.
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Fl.
Philadelphia, PA 19102-2186
courtney.schultz@saul.com

Jane H. Gisbey
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza, Suite 1520
1037 Raymond Blvd.
Newark, NJ 07102
jane.gisbey@saul.com

Dylan W. D'Ascendis, Director
ScottMadden Management Consultants
1900 West Park Drive, Suite 250
Westborough, MA 01581
ddascendis@scottmadden.com

John Guastella
Guastella Associates, LLC
6 Beacon Street, Suite 200
Boston, MA 02108
jfg@guastella.com

CONSULTANTS

Brian Kalcic
Excel Consulting
225 S. Meramec Avenue, Suite 750T
St. Louis, Missouri 63105
excel.consulting@sbcglobal.net

Dante Mugrace, Senior Consultant
PCMG & Associates
90 Moonlight Court
Toms River, NJ 08753
dmugrace@pcmgregcon.com

Marlon Griffing, Ph.D., Senior Consultant
PCMG & Associates
938 Juno Avenue
St. Paul, MN 55102
mgriffing@pcmgregcon.com

Howard J. Woods, Jr., Consultant
Howard J. Woods, Jr. & Assoc.
49 Overhill Road
East Brunswick, NJ 08816-4211
howard@howardwoods.com
(via email only)

INTERVENOR/CONTRACT CUSTOMERS

L. Mason Neely, Chief Financial Officer
Township of East Brunswick
1 Jean Walling Civic Center
P.O. Box 1081
East Brunswick, NJ 08816-1081
lou.neely@eastbrunswick.org

Michael S. Nagurka, Esq.
Gilmore & Monahan, P.A.
10 Allen Street, 4th Floor
P.O. Box 1540
Toms River, NJ 08754-1540
msn@gm-law.net



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON INTERVENTION

OAL DKT. NO. PUC 16144-17

AGENCY DKT. NO. WR17101049

**IN THE MATTER OF THE PETITION
FOR APPROVAL OF AN INCREASE
IN ITS RATES FOR WATER SERVICE
AND OTHER TARIFF CHANGES
FOR MIDDLESEX WATER COMPANY.**

Stephen B. Genzer, Esq., for petitioner, Middlesex Water Company (Saul Ewing
Arnstein & Lehr, attorneys)

Jay Kooper, Vice President, General Counsel and Secretary (Middlesex Water
Company/Pinelands Water Company)

Veronica Beke and Renee Greenberg, Deputy Attorneys General, for Staff of the
Board of Public Utilities (Christopher S. Porrino, Attorney General of New
Jersey, attorneys)

Debra Robinson and Susan McClure, Assistant Deputies Rate Counsel, for
Division of Rate Counsel (Stefanie A. Brand, Director)

Michael S. Nagurka, Esq., for intervenor, Township of East Brunswick (Gilmore &
Monahan, attorneys)

Ira G. Megdal, Esq., for intervenor, New Jersey-American Water Company, Inc.
(Cozen O'Connor, attorneys)

BEFORE TRICIA M. CALIGUIRE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 10, 2017, Middlesex Water Company (Middlesex) filed a petition for an increase in its rates for water service and other relief with the Board of Public Utilities. The matter was transmitted to the Office of Administrative Law (OAL) on October 30, 2017, and assigned to the undersigned. An initial case management conference was held on December 11, 2017.

On December 13, 2017, New Jersey-American Water Company, Inc. (NJAWC) filed a motion seeking leave to intervene as a party in the above-captioned utility rate case pursuant to N.J.A.C. 1:1-16.1 *et seq.* On December 26, 2017, Middlesex filed a letter stating its opposition to the motion of NJAWC and on January 2, 2018, NJAWC filed a reply letter to petitioner's letter in opposition to NJAWC's motion.

POSITIONS OF THE PARTIES

Middlesex and NJAWC are the only parties to take a position with respect to NJAWC's motion. An earlier motion to intervene filed by the Township of East Windsor, a customer of Middlesex, was granted without opposition.

NJAWC stated that its interest in this matter results from its Agreement for the Supply of Water (Agreement) with the Marlboro Municipal Utilities Authority (Marlboro) by which, among other things, NJAWC pays Marlboro for water purchased by Marlboro from Middlesex at the same rates as Marlboro is charged by Middlesex, meaning that any increase in Middlesex rates approved by the Board in this matter will be passed on to NJAWC and, eventually, on to NJAWC's customers.

Middlesex opposes the motion of NJAWC on the grounds that NJAWC's indirect relationship to Middlesex, as a "customer of a customer," is not sufficient to give NJAWC standing to intervene (or participate) in this matter. Middlesex stated that the interests of the customers of NJAWC are already represented by both the Division of Rate Counsel and the

Staff of the Board, eliminating the need for multiple representation. In 2017, NJWAC also initiated a base rate case in which Middlesex was granted intervenor status without opposition. Middlesex distinguished its interest, and intervenor status, in the NJAWC rate case from that of NJAWC in this case. Middlesex is a direct customer of NJAWC and intervened in the NJAWC rate case to “insure that its own customers . . . are treated fairly” in that case. Middlesex notes that standing to those so directly affected is “regularly granted.”

Middlesex stated that the actual financial impact of any potential rate increase on the customers which NJAWC represents is not substantial and, therefore, cannot support standing to intervene by NJAWC. Further, NJAWC's interest in this matter is not sufficiently different from that of any other party's so as to add measurably and constructively to the scope of this case, and including NJAWC would result in confusion and undue delay.

NJAWC responded that there is no basis for an indirect customer of Middlesex to be denied intervenor status. NJAWC seeks to intervene in this proceeding for the same reason that Middlesex intervened in the NJAWC rate case, that being to protect the interests of its customers. To avoid any confusion or undue delay, NJAWC agreed to abide by the procedural schedule already adopted by the undersigned and to abide by the terms of the non-disclosure agreements (NDAs) already executed by Middlesex and the other parties.

Neither party cited to any caselaw. Middlesex noted that NJAWC is attempting to change the standard for intervention into “an efficient and unworkable ‘customer of a customer’ one not previously adopted by the [Board] or any [ALJ].” NJAWC counters that Middlesex offers no support for the direct customer standard, other than to assert that the standard exists.

LEGAL ANALYSIS

In ruling on a motion to intervene, N.J.A.C. 1:1-16.3(a), requires that the decision-maker consider the following factors:

- (1) the nature and extent of the moving party's interest in the outcome of the case;

- (2) whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
- (3) the prospect for confusion and delay arising from inclusion of the party; and
- (4) other appropriate matters.

If the standard for intervention is not met, N.J.A.C.1:1-16.5 and N.J.A.C. 1:1-16.6(c), provide for a more limited form of involvement in the proceeding as a "participant," if, in the discretion of the trier of fact, the addition of the moving party is likely to add constructively to the case without causing undue delay or confusion. Under N.J.A.C. 1:1-16.6(c), such participation is limited to the right to argue orally, or file a statement or brief, or file exceptions, or all of these as determined by the trier of fact. In applying the standards for intervention to a matter subject to Board review, it is appropriate to look to the agency for guidance. See, Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980).

Just a year ago, the Board was asked to determine whether Middlesex could intervene—over NJAWC's objection—in an action brought by NJAWC for Board approval of the acquisition of a third water company. Order, In the Matter of the Joint Petition of American Water Works Company, et al., Docket No. WM16101036, 2017 N.J. PUC LEXIS 17 (Jan. 25, 2017).¹

Middlesex, as a direct customer of NJAWC through two water purchase contracts, stated that costs associated with the proposed acquisition would be recovered and, therefore, could affect the rates NJAWC would then charge Middlesex. Id. at 2. Middlesex also stated that its interests would not be advanced by any of the parties to the case, which included Rate Counsel. Id.

In its Order, the Board explained that the application of the above-cited regulatory standards involves an implicit balancing test:

The need and desire for development of a full and complete record, which involves consideration of a diversity of interests,

¹ As stated above, neither party cited to this decision.

must be weighed against the requirements of the New Jersey Administrative Code, which recognizes the need for prompt and expeditious administrative proceedings by requiring that an intervenor's interest be specific, direct and different from that of the other parties so as to add measurably and constructively to the scope of the case.

[Id. at 4-5 (citation omitted).]

In the above case, the Board declined to give Middlesex intervenor status (but did accord the company participant status) because the proceeding would not result in changes in rates or rate classification and "Middlesex's ratemaking concerns . . . will be addressed in NJAWC's next base rate case, and it [was] anticipated that Middlesex will request and receive intervenor status then." Id. at 5. In other words, the Board looked to whether the issue as to which movant was interested would be considered in the case.

Two environmental advocacy groups were denied intervenor status, but granted participant status, in an action brought by an electric distribution company for approval of an infrastructure resiliency upgrade program. Order, In the Matter of the Petition of Public Service Electric and Gas Company for Approval of the Energy Strong Program, Docket Nos. EO13020155 and GO13020156, 2013 N.J. PUC LEXIS 279 (Sept. 18, 2013). On interlocutory appeal, the proposed intervenors described their interest as seeking to ensure that the proposed infrastructure upgrades included energy efficiency and other demand-side efforts. The Board, though, agreed with the company in finding that its review in this proceeding was limited to ensuring that the proposed resiliency program satisfied the requirements already delineated by the Board in an earlier Order and would not factor in the use of "distributed generation, energy efficiency and demand-side programs." Id. at 20-21. The interests identified by the proposed intervenors "lie beyond the scope of this proceeding," making the grant of participant status "the appropriate avenue." Id. at 21.

Here, NJAWC looks to intervene in the base rate case because, if the Board approves the rate increase sought by Middlesex, NJAWC will pay more for the water sold by Middlesex and NJAWC's customers will in turn pay more. Yes, as Middlesex insists, the relationship between Middlesex and NJAWC is indirect. Middlesex's direct customer, the Township of Marlboro, resells water purchased from Middlesex to NJAWC. Yet, NJAWC has, by the terms of its agreement with Marlboro, no ability to negotiate rates; it must simply pay

whatever new rate the Board approves.² As movant's counsel states (though with less emphasis), the current proceeding is the only one in which NJAWC can participate to protect its customers from the increase in rates for water sold by Middlesex.³

The intervention of NJAWC in this case will create no more confusion and/or delay than the intervention of Middlesex in NJAWC's case has created. NDAs are standard in rate cases and NJAWC has agreed to abide by those already executed. Since, as Middlesex states, it prefers NJAWC—another water company—to sign an NDA more appropriate for a competitor, the parties may wish to use an NDA comparable to the one Middlesex executed in the NJAWC rate case.

ORDER

IT IS ORDERED that the motion of the New Jersey-American Water Company, Inc. for leave to intervene is **GRANTED**.

IT IS FURTHER ORDERED that this Amended Order shall not serve or be used as a reason to delay the proceedings, nor shall duplicative testimony be permitted of NJAWC without leave of the undersigned at the plenary hearing.

This amended order may be reviewed by the **BOARD OF PUBLIC UTILITIES**, either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

January 12, 2018 _____

DATE

TMC/nd



TRICIA M. CALIGUIRE, ALJ

² Middlesex's argument that "[w]hat Marlboro charges its own customers for water service is not the business of this [proceeding]" is not persuasive. Notwithstanding Marlboro's potential arrangements with other customers, Marlboro will charge this particular customer whatever rate the Board approves in this proceeding.

³ To further support its claimed interest in this proceeding, NJAWC cites the regulation describing factors the Board must consider when evaluating petitions for approval of purchase water adjustment clauses, which includes review of the applicant's "efforts to investigate the basis for any cost increase proposed by its purveyor." N.J.A.C. 14:9-7.6(b)8.

December 13, 2017

VIA FACSIMILE 609-689-4100 AND FEDERAL EXPRESS

Ira G. Megdal

Direct Phone 856-910-5007
Direct Fax 877-259-7984
imegdal@cozen.com

Honorable Tricia M. Caliguire
Administrative Law Judge
Office of Administrative Law
PO Box 49
Trenton, NJ 08625-0049

Re: In the Matter of Middlesex Water Company for Approval of an Increase in its Rates for Water Service and Other Tariff Changes, and for an Order Authorizing Special Accounting Treatment of Income Tax Refund Proceeds and Future Income Tax Deductions
BPU Docket No. WR17101049
OAL Docket No. PUC 16144-2017 S

Dear Judge Caliguire:

This firm represents New Jersey-American Water Company, Inc. ("NJAWC" or "Movant"). On behalf of Movant we are enclosing its Motion for Leave to Intervene (the "Motion").

For the reasons set forth in the Motion, NJAWC meets the requirements to be accorded full intervention status pursuant to N.J.A.C. 1:1-16.3.

Also enclosed with this letter please find a proposed form of Order and a Certification of Service. Also enclosed is an additional copy of this submission. Please stamp the same as "filed" and return it to the undersigned in the enclosed envelope.

Thank you for your attention to this matter.

Respectfully,

COZEN O'CONNOR, PC

By: 
Ira G. Megdal

IGM/kn

Enclosure

cc: Attached Service List (via email and first class mail)

IN THE MATTER OF MIDDLESEX WATER COMPANY FOR APPROVAL OF AN
INCREASE IN ITS RATES FOR WATER SERVICE AND OTHER TARIFF CHANGES,
AND FOR AN ORDER AUTHORIZING SPECIAL ACCOUNTING TREATMENT OF
INCOME TAX REFUND PROCEEDS AND FUTURE INCOME TAX DEDUCTIONS

BPU Docket No. WR17101049
OAL Docket No. PUC 16144-2017 S

Service List

Donna Lee-Thomas
Bureau of Case Management
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Stephen B. Genzer, Esq.
Saul Ewing Arnstein & Lehr, LLP
One Riverfront Plaza - Ste. #1520
Newark, NJ 07102-5426

Jay L. Kooper
Vice President, General Counsel & Secretary
Pinelands Water Company
PO Box 400
Iselin, NJ 08830

Susan E. McClure, Esq.
Assistant Deputy Rate Counsel
Division of Rate Counsel
140 East Front Street, P.O. Box 003
Trenton, NJ 08625

Debra F. Robinson, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
PO Box 0003
Trenton, NJ 08625

Veronica Beke, DAG
and Renee Greenberg, DAG
Division of Law
124 Halsey St., PO Box 45029
Newark, NJ 07101

Renee Greenberg, DAG
Division of Law
124 Halsey St.
PO Box 45029
Newark, NJ 07101

Ira G. Megdal, Esq.
Cozen O'Connor
A Pennsylvania Professional Corporation
LibertyView, Suite 300
457 Haddonfield Road
Cherry Hill, NJ 08002
856-910-5007
Imegdal@cozen.com
Attorneys for Intervenor,
New Jersey-American Water Company, Inc.

IN THE MATTER OF MIDDLESEX
WATER COMPANY FOR APPROVAL OF
AN INCREASE IN ITS RATES FOR
WATER SERVICE AND OTHER TARIFF
CHANGES, AND FOR AN ORDER
AUTHORIZING SPECIAL ACCOUNTING
TREATMENT OF INCOME TAX REFUND
PROCEEDS AND FUTURE INCOME TAX
DEDUCTIONS

:
:
OFFICE OF ADMINISTRATIVE LAW
:
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OAL Docket No. PUC 16144-2017 S
BPU Docket No. WR17101049
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:

ORDER GRANTING INTERVENTION

This matter having been presented to the Office of Administrative Law by Cozen O'Connor, attorneys for Intervenor, New Jersey-American Water Company, Inc. ("NJAWC"), Ira G. Megdal, Esq., appearing, on notice to the parties and persons set forth on the attached Service List, and the Administrative Law Judge assigned to preside over this proceeding, having read and considered the moving papers and other documents on file in this matter, including the papers submitted in support of the Motion for Leave to Intervene, and other good cause appearing,

IT IS on this day of , 2017,

ORDERED that:

1. NJAWC is hereby granted leave to intervene and fully participate in the above-entitled matter and that counsel for NJAWC be placed on the Service List for receipt of all case documents, papers, pleadings, discovery materials and exhibits and to receive notification of all hearings, conferences, stipulation discussions and all other proceedings in this matter; and

2. A true, but uncertified, copy of this Order shall be served upon the attached Service List by regular mail within ___ days of the date of this Order.

_____, A.L.J.
Tricia M. Caliguire

Ira G. Megdal, Esq.
Cozen O'Connor
A Pennsylvania Professional Corporation
LibertyView, Suite 300
457 Haddonfield Road
Cherry Hill, NJ 08002
856-910-5007
Imegdal@cozen.com
Attorneys for Intervenor,
New Jersey-American Water Company, Inc.

IN THE MATTER OF MIDDLESEX	:	
WATER COMPANY FOR APPROVAL OF	:	OFFICE OF ADMINISTRATIVE LAW
AN INCREASE IN ITS RATES FOR	:	
WATER SERVICE AND OTHER TARIFF	:	OAL Docket No. PUC 16144-2017 S
CHANGES, AND FOR AN ORDER	:	BPU Docket No. WR17101049
AUTHORIZING SPECIAL ACCOUNTING	:	
TREATMENT OF INCOME TAX REFUND	:	
PROCEEDS AND FUTURE INCOME TAX	:	
DEDUCTIONS	:	

**MOTION FOR LEAVE TO INTERVENE
ON BEHALF OF NEW JERSEY-AMERICAN WATER COMPANY, INC.**

New Jersey-American Water Company, Inc. (“NJAWC”) (the “Movant”), by and through its undersigned counsel, hereby moves for leave in this Middlesex Water Company (“MWC”) rate proceeding pursuant to N.J.A.C. 1:1-16.1 et seq. NJAWC respectfully submits that all factors for full intervenor status, as set forth in N.J.A.C. 1:1-16.3, support granting the Movant’s motion in the above-captioned proceeding. In support of its motion for intervenor status in this proceeding. NJAWC states as follows:

Preliminary Statement

1. NJAWC seeks leave to intervene in this proceeding solely for the purpose of advancing the interests of its customers. Any increase in rates to NJAWC is passed on to NJAWC’s customers dollar-for-dollar, pursuant to the Board’s Purchased Water Adjustment Clause (“PWAC”) rules. Importantly, no increase in MWC’s rates will impact Movant’s

shareholder. No such increase will impact Movant's bottom line. However, any such increase will impact the bottom lines of most of Movant's 631,000 water customers, nearly all of whom pay the PWAC and therefore will be affected by any increase in rates emanating from this proceeding.

Background

2. NJAWC is a regulated public utility corporation, engaged in the production, treatment and distribution of water and collection of sewage within its defined service territory within the State of New Jersey. Said service territory includes portions of the following counties: Atlantic, Bergen, Burlington, Camden, Cape May, Essex, Gloucester, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Union, and Warren. NJAWC currently serves approximately 631,000 water and fire service customers and 41,000 sewer service customers.

3. In this proceeding MWC (the "Petitioner") seeks authority to increase rates for water service by very significant amounts, with some classes of service subject to higher increases than are others. For example, according to schedules filed by MWC in this matter, rates for the service which NJAWC must pay will be increased by 23.1% while the overall rate increase sought by MWC is 19.8%. (Exhibit P-8, Schedule 20, page 4 of 4).

4. NJAWC does not have a direct interconnect with MWC from which it purchases water. As a result, NJAWC entered into an agreement with the Marlboro Township Municipal Utilities Authority ("Marlboro MUA"). The Marlboro MUA has an interconnection with MWC. Under the Agreement for the Supply of Water (the "Agreement") by and between the Marlboro MUA and NJAWC, NJAWC pays the Marlboro MUA, as a direct pass through, charges for water

service that the Marlboro MUA pays to MWC. NJAWC also pays the Marlboro MUA an additional charge for Marlboro MUA to wheel MWC water to NJAWC.

5. NJAWC is contracted to purchase 91.25 million gallons (“mg”) from the Marlboro MUA each year. But for MWC’s rate increase, NJAWC’s customers would pay \$394,055 for this water. As a result of MWC’s proposed rate increase, NJAWC’s customers would pay \$449,906 for this water.

6. NJAWC resells to its customers the water that it purchases from Petitioner. Pursuant to the Board’s PWAC regulations codified at N.J.A.C. 14:9-7.1, et seq., any increases in rates from MWC are passed directly on to Movant’s customers.

7. As a result, any decision of the New Jersey Board of Public Utilities (the “Board”) in this matter will have a direct economic impact on NJAWC customers. The impact of any rate increase granted to MWC in the instant case will be included in NJAWC’s rates. Therefore it is vital that NJAWC participate in the instant proceeding in order to protect the interests of its customers, as well as to monitor the progress of the case to properly reflect the results of these proceedings in NJAWC’s rates.

8. The Agreement with Marlboro provides that the MWC rate charged to Movant for purchased water “shall be increased each and every time the New Jersey Board of Public Utilities (the “BPU”) approves an increase in either the Service Rate or Transmission Rate, or both, and the amount of the increase in the [MWC] Component shall be equal to the amount of each BPU-approved increase.” In other words, any increase in MWC’s rate is passed on to NJAWC, and through the PWAC to NJAWC’s customers. **THIS IS THE ONLY PROCEEDING IN WHICH NJAWC CAN ASSURE THE PROPRIETY OF THESE MWC RATE INCREASES TO MOVANT’S CUSTOMERS.**

Argument

9. As a public utility of the State of New Jersey, NJAWC is required to provide safe, adequate and proper service at just and reasonable rates. See N.J.S.A. 48:2-23 and 48:2-21. MWC's proposed rate increase has the potential to have a significant impact on the Movant's ability to discharge its obligation to its customers. As such, Movant has a direct interest in this proceeding and fully meets the criteria for intervention. Specifically, N.J.A.C. 1:1-16.1 sets forth the criteria for intervention:

[A]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.

As set forth herein, Movant satisfies these criteria and should be permitted to intervene as a full party. Most importantly, NJAWC is entitled to intervene because the interests of its customers will be substantially, specifically and directly affected by this proceeding.

10. The Board has recognized the importance of NJAWC's need to protect the interests of its customers. In fact, pursuant to N.J.A.C. 14:9-7.6(b) 8 in each PWAC Petition, NJAWC must provide the following:

- i. The utility's efforts to investigate the basis for any cost increase proposed by its purveyor;
- ii. The utility's findings and results of the investigation conducted under i above;

Movant's proposed intervention in this proceeding is necessary in order to meet the obligations imposed by the above regulations.

11. N.J.A.C. 1:1-16.3(a) sets forth further guidance to be used to evaluate a motion to intervene:

In ruling upon a motion to intervene, the judge shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably

and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.

12. The Movant's direct economic interest in this proceeding is clear. Any decisions by the Board will have a direct and material impact on the rates paid by NJAWC's customers. Therefore, NJAWC's customers will be substantially affected by the results of this docket, and no other party with different contractual arrangements, points of interconnection, and possible varying interests, can adequately represent its interests or the interests of its customers. No other party is impacted in the same way that NJAWC is impacted.

13. The Movant's intervention will not add confusion to, or otherwise delay, these proceedings in any way. Movant does not know whether a procedural schedule has yet been established, but if it has, movant will abide by the same.

14. All communications with respect to this Motion and in these proceedings should be served on the following persons:

Ira G. Megdal, Esquire
Christine Soares, Esquire
Cozen O'Connor
LibertyView, Suite 300
457 Haddonfield Road
Cherry Hill, NJ 08002
imegdal@cozen.com
csoares@cozen.com

Suzana Duby, Corporate Counsel
New Jersey American Water Company
Short Hills Operations Center
Admin Building
167 J.F.Kennedy Parkway
Short Hills, NJ 07078
Suzana.duby@amwater.com

Conclusion

For the reasons set forth above, NJAWC respectfully requests that it be granted leave to intervene in this matter pursuant to N.J.A.C. 1:1-16.1 et seq.

Respectfully submitted.

By: Ira G. Megdal
Ira G. Megdal

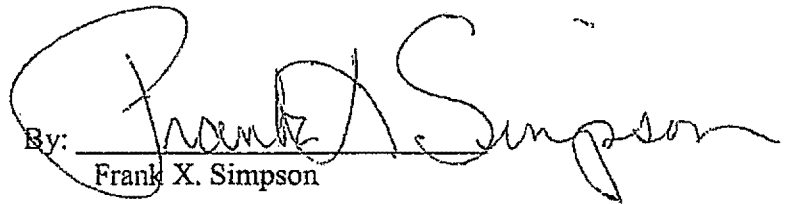
Dated: December 13, 2017

CERTIFICATION

STATE OF NEW JERSEY)
 :
COUNTY OF CAMDEN)

Frank X. Simpson, of full age, being duly sworn, upon his oath deposes and says:

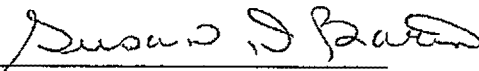
1. I am the Senior Director of Rates and Regulations and I am authorized to make this Certification on behalf of New Jersey-American Water Company, Inc. in this matter.
2. I have reviewed the within Motion and the same is true and correct to the best of my knowledge, information and belief.
3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

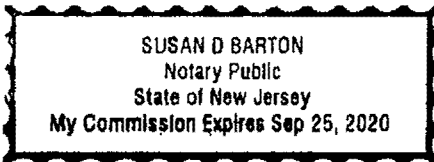
By: 
Frank X. Simpson

Sworn to and subscribed

before me this 13th day of

December, 2017


Notary



CERTIFICATION OF SERVICE

Ira G. Megdal, certifies that I am a member of the firm of Cozen O'Connor and on this date I caused copies of the attached Motion for Leave to Intervene of New Jersey American Water Company, Inc. to be served via first class mail upon each of the parties named on the service list attached to this filing. The above statements made by me are true. I am aware that if any statement made by me is willfully false, I am subject to punishment.


Ira G. Megdal

Dated: December 13, 2017

SAUL EWING
ARNSTEIN
& LEHR ^{LLP}

Stephen B. Genzer
Phone: (973) 286-6712
Fax: (973) 286-6812
Stephen.Genzer@saul.com
www.saul.com

December 26, 2017

Honorable Tricia M. Caliguire, ALJ
Office of Administrative Law
P.O. Box 49
Trenton, NJ 08625-0049

Re: In the Matter of the Petition of Middlesex Water Company for Approval of an Increase in its Rates for Water Service and Other Tariff Changes and for an Order Authorizing Special Accounting Treatment of Income Tax Refund Proceeds and Future Income Tax Deductions
BPU Docket No. WR17101049
OAL Docket No. PUC 16144-2017S

Dear Judge Caliguire:

In lieu of a more formal filing, please accept this letter on behalf of Petitioner, Middlesex Water Company ("the Company" or "Middlesex") in Opposition to the Motion to Intervene served electronically on Middlesex by New Jersey-American Water Company ("NJAWC" or "American") on Wednesday, December 13, 2017.

1. Introduction

In 2009, NJAWC made a similar Motion to intervene in a Middlesex base rate case, which Motion was subsequently withdrawn. The rationale on which NJAWC based its argument at that time is essentially the same as to their Motion in this matter. Essentially, through its purchase of a miniscule portion of its overall water supply through the Township of Marlboro ("Marlboro"), which is a customer of Middlesex, NJAWC argues – without expressly acknowledging so – that it is not a customer, but rather a *'customer of a customer'* of Middlesex.

Through that attenuated relationship, NJAWC then claims since it "will" be affected by any New Jersey Board of Public Utilities ("Board" or "BPU") action that might increase the rates to one of its own suppliers, in this case Marlboro, that somehow NJAWC has standing and is therefore "entitled" to become a full intervening party to this proceeding because NJAWC "will" be affected by any decision in this matter. Middlesex disagrees with this strained and tortured

conclusion and respectfully urges both Your Honor and the BPU to reject this new attenuated standard for establishing standing to intervene or participate in a base rate case.

Middlesex is certainly aware and has, both in this case and historically in prior base rate cases, not objected to the intervention of any of its customers, including those who are municipalities, in its base rate proceedings. Middlesex's *customers* have *direct* interests, since they '*will*' be charged rates set by the BPU as just and reasonable and who will then be obliged to pay rates pursuant to BPU tariffs. Municipal customers have statutory rights to intervene.

That is simply not the case with respect to '*customers of customers*', such as NJAWC here, or '*customers of customers of customers*', taking NJAWC's newly designed standard for establishing standing to its logical potential result as NJAWC argues that such intervention is needed in turn to protect its own customers (including, ironically, Middlesex, since Middlesex is indeed a *direct customer* of NJAWC). Only customers or other statutory intervenors who actually meet the criteria specified in the regulations should be permitted intervention. Not others. NJAWC is not either a customer or a municipal customer of Middlesex and therefore is not an eligible intervenor---statutory or otherwise. NJAWC is not being *directly* impacted by any action resulting from this case and is certainly not *substantially* impacted or *specifically* impacted. Regardless of its wholly overstated allegations with respect to each of the regulatory criteria, and in spite of its unfounded claims to the contrary, NJAWC simply does not meet any of the criteria specified in the regulations governing intervention.

And no amount of NJAWC's repeating that something "will" happen when it merely "might" or "might not" happen, can actually transform uncertainties into certainties. When NJAWC's allegations are actually sorted through, the facts for Your Honor to determine are both simple and straightforward: NJAWC buys a miniscule portion of its overall water supply from the Township of Marlboro, which, in turn, charges its customers for water supply at rates the Township sets using appropriate municipal ordinances and contractual arrangements with NJAWC. One of *Marlboro's* customers is NJAWC. Marlboro has the legal authority to charge NJAWC whatever rate it deems appropriate pursuant to its municipal ordinances, and within the confines of the Township's contract with NJAWC. NJAWC entered into such contract with Marlboro of its own free will and we assume with full knowledge as to how any future rates charged to NJAWC by Marlboro would be calculated. Such rate charged by Marlboro to NJAWC can in theory bear no resemblance whatsoever to the rate Middlesex charges to Marlboro under the water supply contract between Middlesex and Marlboro. Those are the facts.

NJAWC is *not* a customer of Middlesex. NJAWC does not *directly* purchase water from Middlesex, under tariff, under contract, or in any other manner. Middlesex does not dispute here the NJAWC allegation that the Township of Marlboro has a contract with NJAWC nor (in this response to the NJAWC motion) does it make any effort to analyze or dispute NJAWC's or Marlboro's rights or obligations under that contract. It is simply not a relevant examination for this proceeding. Marlboro is a contract customer of Middlesex and buys water subject to BPU approved tariffs and the terms of Marlboro's contract with Middlesex. Middlesex's rates to

Marlboro and to every other Middlesex customer in this case will be set based on BPU-approved ratemaking principles.

What Marlboro charges its own customers for water service is not the business of this Middlesex rate proceeding, which is the proceeding in which NJAWC, a non-customer of Middlesex, now seeks to intervene. What NJAWC is charged by Marlboro and how that process plays itself out is governed by municipal law, contract law, and between those parties – NJAWC and Marlboro – to work out. It is not governed by the BPU or at issue in this Middlesex case.

Moreover, the Board's Purchased Water Adjustment Clause (PWAC) regulations, cited by NJAWC in its Motion herein, simply have no bearing on this matter. Middlesex has every reason to believe that NJAWC will comply with the Board's PWAC regulations in formulating its own PWAC, taking into account relevant NJAWC costs which increase or decrease or both. Middlesex is equally confident that whatever method Marlboro uses with respect to determine its charges for water to its customers – including NJAWC – will be implemented pursuant to law and that NJAWC has sufficient interest, as Marlboro's customer, to insure that. This is no different from Middlesex, in formulating its own base rates and PWAC, takes into account rates charged by its supplier, NJAWC. There is one critical difference here – Middlesex is a direct customer of NJAWC, NJAWC is not a customer of Middlesex.

NJAWC is asking Your Honor to adopt the logic that NJAWC, as a customer of Marlboro, has as much of a direct interest in this Middlesex base rate proceeding as a resident of Woodbridge – taking water service under tariff from Middlesex Water Company – has in a NJAWC base rate proceeding. The logic appears to be essentially that a Woodbridge resident is a "customer of a customer" of NJAWC because Middlesex is a customer of NJAWC. Under this seeming new proposed "customer of a customer" standard for standing, extreme and absurd results could abound. Under this logic, a current NJAWC customer from Sussex County would have standing to intervene in a Middlesex base rate case because that customer, as a customer of NJAWC, "might" be affected if the Township of Marlboro acts to increase NJAWC's rates, which in turn "might" be affected by the results of this Middlesex base rate case.

It is an absurd, attenuated, and unworkable standard. We have found no case in which the BPU adopted anything close to such a standard, nor has NJAWC cited any. For good reason.

2. Legal Standard

Pursuant to N.J.A.C. 1:1-16.3 (a) and 16.3 (c), when ruling on a motion to intervene, the Court must take into consideration the following criteria:

- a) Any person or entity not initially a party, who has a statutory right to intervene or who will be **substantially, specifically and directly** affected by the outcome of a contested case, may on motion, seek leave to intervene.

* * *

c) The nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.
Emphasis added.

As Middlesex will demonstrate, NJAWC has failed to satisfy any of these criteria for intervention, its intervention is unnecessary, and so its Motion should be denied.

NJAWC implies that its customers, on whose behalf the Motion states it is protecting, is insufficiently represented by the Division of Rate Counsel as well as the Staff of the Board of Public Utilities. In fact, Middlesex has intervened in NJAWC's base rate case as a direct customer of NJAWC precisely to insure that its own customers – one of which is the Township of Marlboro – are treated fairly from the results of the NJAWC base rate case. Customers, like Middlesex in the NJAWC base rate case, who are *directly* affected are regularly granted standing. Customers who “may” be affected indirectly by the results of this proceeding, such as NJAWC (as described *infra*), have no need for multiple representations in the same case.

An examination of the actual impact of any rate increase ultimately awarded to Middlesex and applying that to the criteria for standing reveals that NJAWC's customers may not be affected at all, let alone *substantially* affected by any increase awarded to Middlesex by the BPU. Gross numbers are misleading at best, but since that is what the NJAWC Motion relies on, rather than the impact on any specific customer, let us first examine that allegation. NJAWC carefully makes no allegation whatsoever about how each of its customers may be *substantially* impacted, although it is those customers NJAWC claims need representation.

Paragraph numbered 5 of the NJAWC motion calculates that *if* Middlesex's proposed increase were to be granted *in full*, and if fully passed through in full to Middlesex's customer, Marlboro, *without adjustment*, and *if* Marlboro then fully passed it on *without adjustment*, to NJAWC, the motion calculates the impact to be about \$55,000 (\$449,906-\$394,055). Applied over the 631,000 customers identified in paragraph 2 of the NJAWC Motion, the alleged '*substantial*' impact would be little more than 8 cents per year per customer, or less than 2/3 of *one* penny per month per customer. And that is *only if* the increase were granted in full, *only if* the increase was fully passed to Marlboro and *only if* Marlboro then in turn fully passed it on to NJAWC and its customers with no other offsets, calculations, or tariff design changes. *Substantial?* We think not. This hypothetical extrapolated financial impact to NJAWC is added here simply to further illustrate the frivolous nature of this Motion and in no way undermines the central issue at hand which is that NJAWC, as a 'customer of a customer', has no valid legal or regulatory standing to intervene.

NJAWC is simply not a customer of Middlesex. It has alleged in numbered paragraph 8, in bolded caps, that this Middlesex base rate case is the 'only proceeding in which NJAWC can assure the propriety of the MWC base rate increases'. But is that statement really true even if it could be concluded that a 'customer of a customer' trying to represent interests of 'customers of customers of a customer' has any right whatsoever to try to somehow assure the 'propriety' of the result of any Middlesex base rate increase?

Is NJAWC now or has NJAWC ever alleged that it has intervened in every rate proceeding before every public or private body which determines any input to its customer's rates, or even to its PWAC inputs? Here, it has not even *alleged* it has appeared or argued before Marlboro, to whom it *is* a customer, to defend its customers' rights. NJAWC has not alleged that Marlboro has failed in any way to adhere to state law in setting its own rates to NJAWC, nor would fail to follow state law in setting its own rates. Yet NJAWC now wants Your Honor and the BPU to allow it to intervene in this case so NJAWC can examine the rates of an entity to which it is not even a customer? *Specific? Direct?* Again, it has not.

3. NJAWC's interest in this matter is far too attenuated to warrant intervenor status.

It is Middlesex's understanding that in 2008 NJAWC and Marlboro executed a water supply agreement that contained pricing terms impacted, in part, on certain BPU determined Middlesex tariff rates. Middlesex was not a party to that agreement and played no role in its negotiation or execution. By virtue solely of those financial terms between itself and Marlboro, however, American would now have this Court believe NJAWC has somehow been transformed into a Middlesex "customer". And because of this fiction, it is now somehow 'entitled' to intervene in this matter. American is simply wrong.

As support for this fanciful proposition, American's Motion relies on the certification of Mr. Simpson who generally certifies that the statements made in the Motion are accurate. But unless something has changed with respect to this contract, which NJAWC has not yet alleged (and so we can not respond), there are clearly things left out which Mr. Simpson could not certify, and he has not done so.

Unless something has changed since this same argument was presented by NJAWC in 2009, the pricing terms of the contract between Marlboro and NJAWC are not as simple as what is argued in the NJAWC motion. NJAWC neglects to note that the rate paid by American to Marlboro under their contract has a second component intended to cover Marlboro's own costs in providing water service to American. The pricing terms linked to Middlesex's rates are merely one portion of the overall rate paid by American, so the Marlboro contract is not merely a pass through arrangement, as NJAWC would have Your Honor believe. Marlboro produces its own water and it is Middlesex's understanding that Marlboro can change the rate it charges American, using appropriate municipal procedures, under its contract, based on a myriad of factors, each of which *might* affect American's final rate, and thus alter the rate, after an NJBPU proceeding, which American may then charge to its *statewide* customers. Unless something has

changed (unmentioned by NJAWC), Middlesex's rate is therefore but one pricing input to American's rate under its supply from Marlboro. However NJAWC impliedly represents to Your Honor that Middlesex's rate to Marlboro is the entire rate it is assessed by Marlboro and that in turn provides the alleged argument for NJAWC's intervention in this matter.

As an initial matter, it is ordinarily a fairly straightforward exercise to determine who is or is not a utility customer for purposes of determining an intervention request. If one is a customer, the party seeking intervention simply says so and it is easily verified. NJAWC has not done that in its current motion and the reason is obvious. They are not a customer of Middlesex.

As we also noted in 2009, typically customers are located in a utility's service territory and so are entitled to service from the utility. Alternatively, potential customers execute contracts for service with the utility, making them actual customers. Customers expect to receive bills for utility services rendered and expect the utility to respond to questions regarding those bills. Customers expect to pay the utility for the services provided. Utility customers expect their utility to respond to service issues and complaints, and they even have the right to file a complaint at the BPU should a problem arise with their utility services. In short, these are all common indicia of a customer-utility relationship.

Yet none of these activities are performed between Middlesex and NJAWC with respect to American's service *from Marlboro*. Middlesex has no obligation to serve American; *Marlboro* has undertaken this obligation by virtue of its 2008 water supply contract with American. Indeed, it is our understanding that the American/*Marlboro* agreement required *American* to construct new water interconnections *with Marlboro* to facilitate *Marlboro*'s delivery of water supply to American. Middlesex does not provide water service to American, *Marlboro* does. Middlesex does not bill American for water service, *Marlboro* does. American does not pay Middlesex for water service; it pays *Marlboro*. When American has a complaint about service under its contract, it contacts *Marlboro*. If American wishes to increase or decrease its water purchases, it must negotiate with *Marlboro*. There is no relationship whatsoever between Middlesex and American arising out of the *Marlboro/American* contract.

Middlesex again observes, as it did in 2009, that it seems a dangerous and foolhardy precedent for the BPU, and frankly, for American itself, to try to establish this 'customer of a customer' standard for determining eligibility for intervention, *i.e.*, standing. A finding by Your Honor in favor of NJAWC's Motion could have far reaching detrimental consequences to the BPU in regulating electric, gas, telecommunications, and water utilities under the its jurisdiction throughout the State of New Jersey. As the largest private water company in the state, and specifically the largest wholesale supplier of water service to others in New Jersey, American has a large number of water supply contracts with other water purveyors. American is the supplier; the other water purveyors are American's customers.

If one follows the logic of American's argument here, then each and every one of those suppliers' residential, commercial, or industrial customers, individually, would be entitled to intervene in American's current base rate proceeding. After all, for example, Middlesex

purchases over 3 million gallons per day of water from American pursuant to American's tariff rates, at a current cost of approximately \$2.62 million annually, an amount currently petitioned to increase by over 27%, which is why Middlesex has intervened in that proceeding. But under American's logic stated herein, standing could now be conferred on any and all Middlesex customers in the current NJAWC base rate case as a 'customer of a customer'. For example, an individual residential customer of Middlesex's Bayview system in Downe Township on the Delaware Bay should now be permitted to intervene in NJAWC's current base rate case on the theory that any rate increase granted to American *would* eventually appear on that Bayview customer's Middlesex bill (we assume) since the BPU has the authority to allocate any increase to any set of customers it deems appropriate.

Clearly, this is an unworkable and overly expansive view of standing, and one which to the best of our knowledge has never been adopted for good reason by the Board or the Office of Administrative Law.. Notions of judicial economy and efficiency all undercut American's new and frivolous effort at interpreting the needed criteria for standing for an entity or individual to intervene or participate.

As noted above, beyond the nature of the interest American asserts, Your Honor should consider the quantum of the financial interest identified by American. By American's estimate, calculated based on NJAWC's own suggested data cited above, the annual impact of a fully granted rate increase by Middlesex in this matter would be less than 8 cents per year per customer. While Middlesex takes no position on whether American might consider this *substantial* or not, even American must concede that this miniscule amount would not even rise to the level of a rounding error for a company who recovers nearly a billion dollars of revenue each year, and whose average residential customer might pay approximately \$800 per year, depending on usage.

Although American might otherwise be applauded for its apparent selective focus on cost containment, and its apparently selective efforts in trying to protect its customers from increases by its own *municipal* or other water suppliers, NJAWC may in fact be costing its customers more in legal fees to attempt to intervene in this proceeding of one of its supplier's suppliers than NJAWC might indeed save its customers from this effort. Layered on top of this are: (1) the fact that NJAWC has made no representation with respect to its efforts directly with any of its actual suppliers – including Marlboro – to control costs; and (2) NJAWC is attempting to impose a 27.4% increase on Marlboro's supplier – Middlesex – in NJAWC's own base rate case. To ignore the reality that NJAWC is failing to make a consistent effort to advocate on behalf of its customers for cost containment is an understatement. There must be other reasons why NJAWC has selected this one tiny water supplier of *its* supplier in which to intervene.

Fundamentally, the interest that NJAWC claims to raise is a contract matter between it and Marlboro. Marlboro is a municipality over which the BPU has no jurisdiction. The BPU does not control how Marlboro might input the result of this Middlesex base rate case on NJAWC or how Marlboro will factor in its own costs in setting NJAWC's rates. NJAWC should not be permitted to bootstrap its unrelated contract concerns with Marlboro into this proceeding

through an ill-considered motion to attempt to provide standing for itself and try to intervene in the Middlesex base rate case. Based on this filing, NJAWC could not even remotely justify participant status, let alone intervention status.

4. NJAWC's interest has not been alleged to be sufficiently different from any other party's so as to add measurably and constructively to the scope of this case.

Your Honor must consider the extent to which NJAWC's interest here differs from that stated by other parties. While NJAWC does not belabor its differences with other parties' interests, it merely states one sentence. However, this is a requirement to justify intervention. And while NJAWC alleges in that one sentence that its interest is significantly different from other parties or potential parties, a simple review of the facts questions that assertion.

Middlesex infers by this motion that NJAWC must mean that its concern rests with the Middlesex rate schedules covering *Service under Contract* and *Transmission Service South River Basin* since those are the schedules under which NJAWC's supplier, and Middlesex's customer, Marlboro, takes water from Middlesex. NJAWC has made no allegation of why Rate Counsel and/or Board Staff, in combination with Middlesex itself in this proceeding, are incapable or unwilling to protect the fairness, justification, and appropriateness of the rates imposed on those tariff classifications. In fact, it is our understanding that Rate Counsel believes itself specifically directed to represent all classes of customers.

NJAWC must at least allege, and provide the BPU and other parties the ability to check on the allegations, that no other party is capable or willing to protect its identified interest. It has failed to do so.

5. NJAWC's inclusion in this case will cause confusion and could cause undue delay.

NJAWC has stated, but has again neglected to provide any basis whatsoever for its raw statement that its intervention in this case will not cause confusion, only that it will adhere to the schedule already set for this case. Ordinarily, Middlesex would not consider this omission particularly important. However in this case, Middlesex and the state parties have already negotiated and executed non-disclosure agreements in this case which have governed a so far efficient and effective discovery process. Middlesex would have certainly required different terms for those agreements if another water company were able to rummage through its financial and other records. In itself, that would create significant confusion and time to work such agreements out, if indeed they could be worked out. We would have to confront that issue if faced with a legitimate entity with standing to intervene, but that is simply not the case here.

6. Conclusion

For the reasons stated herein, Middlesex opposes NJAWC's motion to intervene in this proceeding and respectfully requests that Your Honor reject NJAWC's naked attempt to rewrite

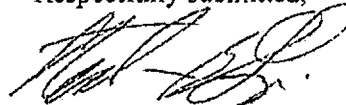
Honorable Tricia Caliguire, ALJ
December 22, 2017
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(as far as we can tell) the standard of intervention into an inefficient and unworkable 'customer of a customer' one not previously adopted by the BPU or any New Jersey Administrative Law Judge. For these same reasons, Middlesex opposes the granting of participant status to NJAWC, (which, admittedly, has not been requested).

Middlesex therefore respectfully requests that Your Honor deny in its entirety the Motion To Intervene filed by New Jersey American Water Company.

With this letter and signature below, I certify that the entire service list have been served electronically today and by mailing hard copies.

Respectfully submitted,



Stephen B. Genzer

Cc: service list as noted

SERVICE LIST

In the Matter of the Petition of Middlesex Water Company for Approval of an Increase in Its Rates for Water Service and Other Tariff Changes and for an Order Authorizing Special Accounting Treatment of Income Tax Refund Proceeds and Future Income Tax Deductions
BPU Docket No. WR17101049

Irene Kim Asbury, Secretary
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
irene.asbury@bpu.nj.gov

Maria L. Moran, Director
Division of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
maria.moran@bpu.nj.gov

Mark Beyer, Chief Economist
Office of the Economist
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
mark.beyer@bpu.nj.gov

Dr. Son-Lin Lai
Division of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
son-lin.lai@bpu.nj.gov

Michael Kammer, Chief
Bureau of Rates, Div. of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
mike.kammer@bpu.nj.gov

Mona Mosser, Bureau Chief
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
mona.mosser@bpu.nj.gov

Kofi Ocansey
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
kofi.ocansey@bpu.nj.gov

Kyle Felton
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
kyle.felton@bpu.nj.gov

James Kane
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
jim.kane@bpu.nj.gov

Rupal Patel
Division of Water
Board of Public Utilities
44 South Clinton Ave., Suite 314
P.O. Box 350
Trenton, NJ 08625-0350
rupal.patel@bpu.nj.gov

Stefanie A. Brand, Director
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625
sbrand@rpa.state.nj.us

Debra F. Robinson, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
[drobinson@rpa.state.nj.us](mailto:drobison@rpa.state.nj.us)
(electronic only)

Susan McClure, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
smcclure@rpa.state.nj.us
(electronic only)

Katherine A. Hart
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
khart@rpa.state.nj.us

Veronica Beke, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
veronica.beke@dol.lps.state.nj.us

Renee Greenberg, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
renee.greenberg@dol.lps.state.nj.us

Jenique Jones, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
jenique.jones@dol.lps.state.nj.us

Dennis W. Doll
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
ddoll@middlesexwater.com
(electronic only)

A. Bruce O'Connor
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
aboconnor@middlesexwater.com
(electronic only)

Richard M. Risoldi
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
rrisoldi@middlesexwater.com
(electronic only)

Jay L. Kooper, Esq.
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
jkooper@middlesexwater.com
(electronic only)

Raquel Koukourdelis
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
rkoukourdelis@middlesexwater.com
(electronic only)

Robert J. Capko
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
rcapko@middlesexwater.com
(electronic only)

Ada Soto
Middlesex Water Company
1500 Ronson Road

Iselin, NJ 08830
asoto@middlesexwater.com
(electronic only)

Michele Tilley
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
mtilley@middlesexwater.com
(electronic only)

Stephen B. Genzer, Esq.
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza, Suite 1520
1037 Raymond Blvd.
Newark, NJ 07102
stephen.genzer@saul.com

Colleen Foley, Esq.
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza, Suite 1520
1037 Raymond Blvd.
Newark, NJ 07102
colleen.foley@saul.com

Courtney Schultz, Esq.
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Fl.
Philadelphia, PA 19102-2186
courtney.schultz@saul.com

Jane H. Gisbey
Saul Ewing Arnstein & Lehr LLP
One Riverfront Plaza, Suite 1520
1037 Raymond Blvd.
Newark, NJ 07102
jane.gisbey@saul.com

Dylan W. D'Ascendis, Director
ScottMadden Management Consultants
1900 West Park Drive, Suite 250
Westborough, MA 01581
ddascendis@scottmadden.com

John Guastella
Guastella Associates, LLC
6 Beacon Street, Suite 200
Boston, MA 02108
jfg@guastella.com

Dante Mugrace, Senior Consultant
PCMG & Associates
90 Moonlight Court
Toms River, NJ 08753
dmugrace@pcmgregcon.com

Marlon Griffing, Ph.D., Senior Consultant
PCMG & Associates
938 Juno Avenue
St. Paul, MN 55102
mgriffing@pcmgregcon.com

Howard J. Woods, Jr., Consultant
Howard J. Woods, Jr. & Assoc.
49 Overhill Road
East Brunswick, NJ 08816-4211
howard@howardwoods.com
(via email only)

Brian Kalcic
Excel Consulting
225 S. Meramec Avenue, Suite 750T
St. Louis, Missouri 63105
excel.consulting@sbcglobal.net

January 2, 2018

VIA FACSIMILE 609-689-4100 AND FEDERAL EXPRESS

Ira G. Megdal

Direct Phone 856-910-5007
Direct Fax 877-259-7984
imegdal@cozen.com

Honorable Tricia M. Caliguire
Administrative Law Judge
Office of Administrative Law
PO Box 49
Trenton, NJ 08625-0049

Re: In the Matter of Middlesex Water Company for Approval of an Increase in its Rates for Water Service and Other Tariff Changes, and for an Order Authorizing Special Accounting Treatment of Income Tax Refund Proceeds and Future Income Tax Deductions
BPU Docket No. WR17101049
OAL Docket No. PUC 16144-2017 S

Dear Judge Caliguire:

Please accept this letter submitted on behalf of New Jersey-American Water Company, Inc. ("NJAWC" or "Movant") in response to the truculent opposition ("Opposition") to Movant's Motion for Leave to Intervene in this matter. The said truculent Opposition was filed by Middlesex Water Company ("MWC" or "Petitioner") on December 26, 2017.

In the Opposition MWC invites Your Honor to adopt the novel proposition that a party that will be absolutely and certainly impacted by a rate increase in this case should be denied intervention because that party is not a direct customer of MWC. Without stating it as such, MWC invites Your Honor to determine for the first time, *as a matter of law* that an intervenor must be a direct customer of a public utility seeking a rate increase. Your Honor should decline this invitation.

I. The nature of the Opposition.

As NJAWC stated in its Motion, Movant has an agreement to purchase water from the Marlboro MUA, which NJAWC, in turn, resells to Movant's customers. That Agreement, with a political subdivision of the State of New Jersey provides that Marlboro MUA's rates to NJAWC "shall be increased each and every time the New Jersey Board of Public Utilities (the 'BPU') approves an increase" in the rates paid by the Marlboro MUA to Petitioner. The increase in the Marlboro MUA rate "shall be equal to the amount of each BPU-approved increase" to MWC. Any increase in MWC's rate is passed on to NJAWC dollar-for-dollar, automatically. The Marlboro MUA will not exercise any discretion.

In the Opposition, for inexplicable reasons, MWC states as follows: "And no amount of NJAWC's repeating that something 'will' happen when it merely 'might' or 'might not' happen can actually transform uncertainties into certainties." Given the contractual language referenced in the prior paragraph, MWC's assertion that the passing on of any rate increase granted to

MWC only "might" happen is incomprehensible. MWC is looking at clear, unambiguous facts, disregarding them, and asking Your Honor to disregard them. It is sad to see a regulated utility of this State engaging in such a tactic.

NJAWC seeks leave to intervene in this proceeding to safeguard the interests of its customers. This is wholly appropriate. In an attempt to do the same, MWC has intervened without opposition from NJAWC in NJAWC's currently pending rate case, presumably in order to do the same for its customers.

As Movant noted in its initial papers, it seeks intervention in this case to assert the interests of its customers. In the Opposition MWC acknowledges that it has done the same. Petitioner states: "In fact, Middlesex has intervened in NJAWC's base rate case as a direct customer of NJAWC precisely to ensure that its own customers – one of which is the Township of Marlboro – are treated fairly from the results of the NJAWC base rate case." In this case, NJAWC also seeks to ensure that its customers are treated fairly.

NJAWC has a substantial and direct interest, meriting intervention.

II. MWC impermissibly reads into N.J.A.C. 1:1-16.1 a requirement that an intervenor must be a customer.

N.J.A.C. 1:1-16.1 specifies who may intervene. Specifically, an intervenor may be "any person or entity" who will be substantially, specifically and directly affected by the outcome of a contested case. That is, an intervenor must have a sufficient stake in the proceeding. Neither the rule, nor any case law cited by MWC or found by NJAWC requires that an intervenor be a direct customer. Nevertheless, MWC repeats a nearly uncountable number of times in the nine pages of the Opposition that NJAWC should be denied intervention, because it is not a direct customer of MWC.

In support of its contention that one must be a direct customer in order to be an intervenor, MWC offers nothing but *ipse dixit*. MWC offers no support for its claim that one must be a customer to be an intervenor, and in lieu of authority for this proposition, MWC simply offers assertions that if Movant is granted intervention, other interested stakeholders may be permitted to intervene in other public utility proceedings. However, MWC offers no reason why such intervention should not be permitted to NJAWC nor to other interested stakeholders. If those other stakeholders will receive a government contract-mandated dollar-for-dollar rate increase equal to that of the public utility in whose proceeding they seek to intervene, they should be granted such intervention status.

Lacking any support for its position that an intervenor must be a direct customer, on several occasions Petitioner invokes a proceeding nearly nine years old, in which NJAWC initially sought intervention, and voluntarily withdrew its request. It is unclear how this voluntary withdrawal in any way supports MWC's claims. Nevertheless Petitioner invokes this withdrawal several times.

Moreover, MWC's assertion is belied by N.J.S.A. 48:2-32.2 which allows for municipalities, whether utility customers or not, to intervene to assert the interests of municipal residents. NJAWC seeks to do the same for its customers.

III. Movant has a direct and specific interest in this case.

Movant pays the Marlboro MUA a two part rate. The first part consists solely of a pass-through of MWC's rate to the Marlboro MUA. The second portion consists of a wheeling charge, which NJAWC pays to the Marlboro MUA to transport water wheeled from MWC to NJAWC. Surprisingly, in its opposition MWC states "NJAWC neglects to note that the rate paid by American to Marlboro under their contract has a second component intended to cover Marlboro's own costs in providing service to American." In fact, the two component rate was specifically discussed in Paragraph 4 of Movant's initial papers. The second part, or wheeling rate, is not at issue in this case. What is simply at issue is that any increase in MWC's rate will be passed on, dollar-for-dollar, to NJAWC. MWC asserts that such a pass through "might" or "might not" happen. MWC also states that NJAWC "may" be affected by the results of this proceeding. This assertion is blatantly false. Pursuant to its contract with a subdivision of the State of New Jersey, NJAWC *will* be affected by the results of this proceeding.

Shockingly, MWC accuses Movant of misrepresentation. MWC states: "However NJAWC impliedly represents to Your Honor that Middlesex's rate to Marlboro is the entire rate it is assessed by Marlboro and that in turn provides the alleged argument for NJAWC's intervention in this matter." What is shocking about this assertion is that in Paragraph 4 of the Motion, Movant stated that it pays a two part rate, only one part of which is the pass through of charges from MWC. As a result, Petitioner's assertion is unfathomable.

IV. The interest which NJAWC seeks to protect is not miniscule.

MWC attempts to make light of the impact that an increase emanating from its rate case will have on NJAWC's customers. It does so by attempting to convert the substantial dollar impact which could emanate from this case, to a per customer impact on each individual NJAWC customer. Of course, this argument is specious.

While it is certainly true that NJAWC is the largest water utility in New Jersey, and serves customers throughout the state, that does not minimize the potential impact of a rate increase in this proceeding on NJAWC customers. The argument might have some merit if MWC were Movant's only supplier. However, Movant has many suppliers, and incurs many costs.

NJAWC jealously regards cost increases from any vendors, whether they be negotiated increases with vendors of water, of supplies, or other similar increases. It would be inappropriate for Movant to simply state to a vendor: "We don't care about your increase, because the increase on specific, individual customers is not all that great." Cumulatively, each increase has a substantial impact upon NJAWC's customers. In this regard, NJAWC is proud of its efforts to control costs, and benefit customers.

V. NJAWC's interest in this proceeding is different from those of the other parties.

MWC states: "NJAWC implies that its customers, on (sic) whose behalf the Motion states it is protecting, is insufficiently represented by the Division of Rate Counsel as well as the Staff of the Board of Public Utilities." This is a specious assertion. It is no more true than to assume that MWC and Aqua American Water Company ("Aqua") asserted that they were insufficiently represented by Rate Counsel and Staff in NJAWC's currently pending rate case. NJAWC did not oppose either MWC's or Aqua's intervention motions.

It also ignores N.J.A.C. 1:1-16.3(b) which states that in a case where one of the parties is a State agency authorized by law to represent the public interest, no movant shall be denied intervention solely because the Movant's interest may be represented in part by said State agency.

The simple fact of the matter is there is no other intervenor in this case receiving service in the same manner, under the same rate schedules that will impact NJAWC in this case.

VI. Movant's intervention in this case will cause no confusion nor undue delay.

NJAWC is in receipt of Your Honor's pre-hearing Order in this matter, setting forth the procedural schedule. NJAWC will abide by this schedule.

MWC attempts to make much of the fact that it has already negotiated and executed non-disclosure agreements ("NDAs") in this case. In all due respect to MWC, that really is "no big deal". However, Movant is perfectly willing to abide by the executed NDAs.

MWC conjures up an incredible image that NJAWC wishes to "rummage" through MWC's financial records. This is simply not true, of course. Any discovery in which NJAWC engages must be completely in accordance with OAL rules.

There is no more reason to put credence in this assertion, than there is to assume that MWC intervened in Movant's current rate proceeding, because it wished to "rummage" through Movant's financial records.

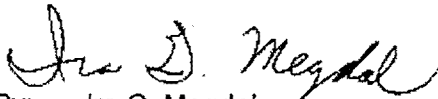
VII. Conclusion.

MWC's opposition rests almost entirely on the house of cards it has constructed for its argument. Each of these cards contains the oft-repeated assertion that Movant is not a direct customer of MWC. However, MWC offers no support whatsoever for the *ipse dixit* that an intervenor must be a customer. In the face of a direct, specific and substantial interest in this case on behalf of Movant, Your Honor should decline to adopt the novel principle of law advocated by MWC, that a Movant must be a direct customer of a petitioner in order to be permitted leave to intervene.

In order for NJAWC to fulfill its responsibility pursuant to N.J.A.C. 14:9-7.1, *et seq.*, it should be granted intervention status in this case.

Respectfully,

COZEN O'CONNOR, PC



By: Ira G. Megdal

IGM/kn

Enclosure

cc: Attached Service List (via email)

IN THE MATTER OF MIDDLESEX WATER COMPANY FOR APPROVAL OF AN
INCREASE IN ITS RATES FOR WATER SERVICE AND OTHER TARIFF CHANGES,
AND FOR AN ORDER AUTHORIZING SPECIAL ACCOUNTING TREATMENT OF
INCOME TAX REFUND PROCEEDS AND FUTURE INCOME TAX DEDUCTIONS

BPU Docket No. WR17101049
OAL Docket No. PUC 16144-2017 S

Service List

Donna Lee-Thomas
Bureau of Case Management
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Jay L. Kooper
Vice President, General Counsel & Secretary
Pinelands Water Company
PO Box 400
Iselin, NJ 08830

Debra F. Robinson, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
PO Box 0003
Trenton, NJ 08625

Renee Greenberg, DAG
Division of Law
124 Halsey St.
PO Box 45029
Newark, NJ 07101

Stephen B. Genzer, Esq.
Saul Ewing Arnstein & Lehr, LLP
One Riverfront Plaza - Ste. #1520
Newark, NJ 07102-5426

Susan E. McClure, Esq.
Assistant Deputy Rate Counsel
Division of Rate Counsel
140 East Front Street, P.O. Box 003
Trenton, NJ 08625

Veronica Bekke, DAG
Division of Law
124 Halsey St., PO Box 45029
Newark, NJ 07101

Michael S. Nagurka, Esq.
Gilmore & Monahan
Allen Street Professional Center
10 Allen St., PO Box 1540
Toms River, NJ 08754

