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BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

January 26, 2018  
(via Federal Express)

Honorable Irene Kim Asbury  
Secretary of the Board  
New Jersey Board of Public Utilities  
44 South Clinton Avenue, 3<sup>rd</sup> Floor, Suite 314  
PO Box 350  
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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 Secretary Asbury:

Middlesex Water Company (the "Company" or "Middlesex") files this letter in reply to New Jersey-American Water Company's ("NJAWC") response dated January 26, 2018 to the Company's January 18, 2018 Emergent Interlocutory Appeal in the above-referenced matter. For purposes of brevity, Middlesex will not rehash the procedural history of the subject matter of this Appeal but rather offers the following observations in reply to NJAWC's response.

**Discussion**

Both Middlesex and NJAWC seem to be in agreement as to the legal criteria governing decisions on intervention status – they are codified in *two* provisions of the New Jersey Administrative Code at N.J.A.C. 1:1-16.1(a) (Eligibility for Intervention) and N.J.A.C. 1:1-16.3(a) (Standards for Intervention).

Pursuant to N.J.A.C. 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. (Emphasis added).

J. Kane, Legal

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Legal  
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Water

Pursuant to N.J.A.C. 1:1-16.3(a), the criteria includes:

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 movant's inclusion**, and other appropriate matters. (Emphasis added).

Any aspiring intervenor must meet *two criteria* for intervention under the Board's regulations. First, the aspiring intervenor must be **eligible for intervention** under N.J.A.C. 1:1-16.1(a). Second, after meeting the eligibility for intervention criteria, the aspiring intervenor must meet the standard for intervention set forth in N.J.A.C. 1:1-16.3(a). Middlesex has consistently argued before both Judge Caliguire and in its Appeal that **both criteria must be met**.

Judge Caliguire, in her Order dated January 12, 2018 granting NJAWC leave to intervene, **did not address the N.J.A.C. 1:1-16.1(a) eligibility criteria at all**. Judge Caliguire's Order focused solely on the N.J.A.C. 1:1-16.3(a) standards criteria. The necessary "step one" – the eligibility criteria – was skipped, representing a departure from the Board's regulatory policy governing intervention. This is something even NJAWC does not dispute in its January 26, 2018 response to Middlesex's Emergent Interlocutory Appeal.

Turning to the N.J.A.C. 1:1-16.1(a) eligibility criteria (**substantially, specifically and directly affected**):

- NJAWC states on *page 1 of its December 13, 2017 Motion To Intervene*:

"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.**" (Emphasis added).

This admission alone by NJAWC places it far short of being "eligible" for intervention status, as the movant, since NJAWC is not substantially, specifically or directly affected by Middlesex's rate request. In fact, NJAWC *admits* Middlesex's rate request will have **no impact – zero effect – on NJAWC**. This alone is sufficient to disqualify NJAWC from intervention status in this case under the clear language of the N.J.A.C. 1:1-16.1(a) criteria.

NJAWC attempts to avoid this absence of eligibility under the N.J.A.C. 1:1-16.1(a) criteria by essentially arguing for a new "**customer of a customer**" criteria (without expressly acknowledging that new criteria by name) in order to enable NJAWC – a customer of the Township of Marlboro by virtue of a contract – intervention "solely to advance the interests" of NJAWC's customers. See NJAWC Motion at 1 (Exhibit B to Middlesex's Appeal papers). Putting aside the regulatory recklessness of a "**customer of a customer**" criterion for intervention in any utility rate case, Middlesex in its responding papers to NJAWC's motion and in its Emergent Interlocutory Appeal – using NJAWC's own data – calculated that if

Middlesex's rate request were granted in full and fully passed on to Marlboro, and such increase was then fully passed on by Marlboro to NJAWC, an individual NJAWC customer would incur a paltry 2/3 of one cent monthly increase, or little more than 8 cents per year per customer, increase in rates. This too, falls far short of the N.J.A.C. 1:1-16.1(a) eligibility criteria of ***substantial, specific and direct affection***. NJAWC has failed to demonstrate that it meets any one of these three elements let alone all three.

Turning to the N.J.A.C. 1:1-16.3(a) intervention standards criteria, Judge Caliguire – in determining that an NJAWC intervention would not cause confusion or undue delay – unfortunately relied on facts that were not on the record before her and indeed do not exist at all. Instead, Judge Caliguire relied on a supposition that Middlesex, as a proper intervenor in NJAWC's rate case, had executed a Non-Disclosure Agreement (“NDA”) in that case, carefully crafted so that it was suitable for a competitor. As previously stated, Middlesex has not executed any such NDA in the NJAWC rate case not in small part because ***Middlesex has not been offered an NDA in NJAWC's rate case.***

But in any event, such an NDA for a competitor would have to be negotiated in some detail. This has not been done by NJAWC in its own rate case and it certainly has not yet been attempted here precisely because of the confusion and potential havoc that such a process might cause. While NJAWC claims in its January 26, 2018 response that it will simply agree not to seek any document identified by Middlesex as “trade secret and confidential” that offer does not negate the fact that there will absolutely be confusion and delay caused solely by the need for Middlesex to review all information provided to the parties to date to identify such documents. Indeed, no such designation exists in the NDA provided to the parties in this case. To date, Middlesex has produced responses to hundreds of discovery requests and produced hundreds (if not thousands) of documents in support hereof. Middlesex believes it clear that the Order Granting Intervention's reliance on a fiction, too, places NJAWC well short of the N.J.A.C. 1:1-16.3(a) criteria that its intervention will not cause a “prospect of confusion or undue delay”.

In addition, with respect to the N.J.A.C. 1:1-16.3(a) criteria of an intervenor having an “interest sufficiently different from that of any party”, the Township of Marlboro has now moved to intervene in this proceeding in a Motion filed after the date of Judge Caliguire's Order. In its January 26, 2018 response, NJAWC does not dispute that the Township has a statutory right to intervene in this rate proceeding, as it has in numerous past Middlesex base rate proceedings for over more than a decade. Even under the broadest of interpretation of standing, the Township of Marlboro's intervention in this case – expected to be granted by statutory right alone – renders NJAWC's interests as wholly redundant to Marlboro, its own water supplier (and the supplier of the supplier of NJAWC's customers about whose interests NJAWC says it wishes to advance by its intervention in this Middlesex base rate case).

Again, none of this is disputed by NJAWC in its January 26, 2018 response. Instead, NJAWC again argues how it calculates how its supplier, the Township of Marlboro, might calculate the impact of any Middlesex rate case based solely on NJAWC's interpretation of its own freely negotiated contract with its supplier, Marlboro, should Middlesex be granted its entire request, should Marlboro calculate the increase as NJAWC suggests it will, and should Marlboro make no other adjustments based on its other costs or contract interpretation. Yet even with all that, it still amounts to a mere 2/3 of one cent per month per NJAWC customer.

NJAWC also repeatedly deflects from its lack of distinctiveness from Marlboro by referencing its “regulatory responsibility” under N.J.A.C. 14:9-7.6(b)8. As noted by Middlesex in its opposition to NJAWC’s Motion To Intervene and Interlocutory Appeal papers, the mere fact that NJAWC has negotiated and freely entered into a supply contract with Marlboro cannot bootstrap standing into a utility rate case – the criteria of N.J.A.C. 1:1-16.1(a) and 1:1-16.3(a), including having “an interest sufficiently different from that of any party” must still be met. If NJAWC believed it has a “regulatory responsibility” to intervene or question its supplier’s (in this case Marlboro’s) proposed increases, one would have thought NJAWC would have detailed its efforts with Marlboro in its papers. NJAWC has not.

### **Conclusion**

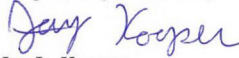
In order to meet the criteria to be eligible for intervention in a utility rate case, an aspiring intervenor must meet **every single one** of the following criteria as set forth in N.J.A.C. 1:1-16.1(a) and N.J.A.C. 1:1-16.3(a), no more and no less:

- Statutory right to intervene or substantially, specifically **and** directly affected by the outcome;
- Interest must be sufficiently different from any other party so as to add measurably and constructively to the scope of the case; and
- The intervention must not generate a prospect of undue confusion or delay.

Failure to meet **just one** of the above criteria is sufficient to disqualify a movant from eligibility for intervention status in any utility rate case (water, electric, gas or telecommunications). **NJAWC does not just fail one of the above criteria; it fails all of the criteria based on facts NJAWC does not even dispute in its January 26, 2018 response.**

For these reasons and the reasons set forth in our papers filed as our Emergent Interlocutory Appeal, Middlesex respectfully requests that the Board reject the interpretation of the criteria for intervention proposed by NJAWC, uphold the clear criteria for intervention anchored and firmly rooted in both N.J.A.C. 1:1-16.1(a) and N.J.A.C. 1:1-16.3(a) and overrule and reverse Judge Caliguire's Order granting NJAWC intervention status in this rate case.

Respectfully submitted,



Jay L. Kooper  
Vice President, General Counsel & Secretary  
Middlesex Water Company

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BPU Docket No. WR17101049  
OAL Docket No. PUC 16144-17

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