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CASE MANAGEMENT

JUN 06 2018

BOARD OF PUBLIC UTILITIES  
TRENTON, NJ



*June 13, 2018*

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JUN 06 2018

State of New Jersey  
DIVISION OF RATE COUNSEL  
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BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

PHIL MURPHY  
*Governor*

STEFANIE A. BRAND  
*Director*

SHEILA OLIVER  
*Lt. Governor*

June 4, 2018

**Via Hand Delivery**

Ms. Aida Camacho-Welch, Secretary  
New Jersey Board of Public Utilities  
44 South Clinton Avenue, 9<sup>th</sup> Floor  
P.O. Box 350  
Trenton, NJ 08625-0350

Re: **I/M/O the Petition of New Jersey American Water Company, Inc. for Approval of Increased Tariff Rates & Charges for Water & Wastewater Service, Change in Depreciation Rates & Other Tariff Provisions**  
**BPU Docket No. WR17090985**  
**OAL Docket No. PUC 14251-2017 S**

Dear Secretary Camacho-Welch:

Please accept this letter in lieu of more formal submission as the reply of Rate Counsel to New Jersey American Water Company's ("NJAW" or "the Company") opposition to Rate Counsel's Motion to Reject the Company's Proposed Provisional Rates ("Motion"). As the Company insists it will impose provisional rates on the first day the Board's Suspension Order expires, Rate Counsel respectfully requests that its Motion be decided by the Board as quickly as possible.

*CMS*  
*M. Lupo, Esq.*  
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### Introduction

Initially, the Company misstates Rate Counsel's motion. Rate Counsel does not challenge the validity of the Provisional Rates Rule, but rather the application of the rule to the specific facts of this case. The bulk of the Company's objection is a distraction from the real issue before the Board, *i.e.*, whether the proposed provisional rates go beyond what is just and reasonable. For the reasons articulated in Rate Counsel's moving papers, as well as below, the interim rates are not just and reasonable, and the Board should exercise its statutory authority to protect the ratepayers from unjust or unreasonable rates.

In Toms River Water Co. v. N.J. Bd. Of Public Utilities, 82 N.J. 201 (1980), which both the Company and Rate Counsel agree includes the Supreme Court's primary – or only – discussion of the implementation of provisional rates prior to the conclusion of a base rate case, the Court stated:

Consistent with its delegated duties of “general supervision and regulation of and jurisdiction and control over all public utilities...” N.J.S.A. 48:2-13, the Board must devise appropriate administrative mechanisms for regulating utilities which elect to implement proposed tariffs at the end of a suspension period.

Id. at 212. Although the Toms River decision was issued in 1980, it was not until 2017 that the Board established the administrative mechanisms called for by the Court. The nearly 40-year delay was likely due to the fact that most cases are resolved through settlement before the end of the suspension period and because there have been few, if any, attempts made by utilities to implement such provisional rates. Although this case presents the first opportunity for the Board to flesh out how its new regulations will be applied in practice, NJAW essentially argues that the Board lacks discretion and Rate Counsel lacks standing to raise any issues whatsoever regarding

its proposed plan for interim rates. The Company maintains that as long as it believes it has met the requirements of the regulation, no further review may occur. According to the Company, Board Staff may object but only insofar as it believes the Company failed to meet the filing requirements set forth in the regulation. For everyone else, and for issues other than the filing requirements, the Company argues that its provisional rates may not be questioned or challenged- even by the Board itself.

This is inconsistent with the Board's own statements in adopting the regulations. Indeed, if the Company's interpretation of the regulations was correct, the regulations would be ultra vires, as they would exceed the Board's authority under relevant statutory law. The Board has clearly retained its authority to review the rate and the procedures employed by the utility and Rate Counsel also retains all of its statutory rights and responsibilities. The fairness and efficiency of the administrative ratemaking process must still be maintained, Toms River, supra, and Rate Counsel's motion simply asks that the Board ensure that issues of due process and fundamental fairness be applied. Id.

**ARGUMENT**

**POINT I**

**RATE COUNSEL HAS AUTHORITY TO RAISE THE ISSUES IN THIS MOTION AND THE BOARD HAS AUTHORITY TO REVIEW THE PROVISIONAL RATES AND THE COMPANY'S PLAN FOR IMPLEMENTATION**

N.J.S.A. 52:27EE-48 provides that Rate Counsel may represent and protect the public interest:

in proceedings before and appeals from any State department, commission, authority, council, agency or board charged with the regulations or control of any business, industry, or utility regarding a requirement that the business, industry or utility provide a service or regarding the fixing of a rate, toll, fare, or charge for a product or service.

There can be no rational argument that this matter does not involve the fixing of a rate. There also can be no argument that the Board's regulation can somehow modify or trump Rate Counsel's enabling statute. An administrative agency cannot alter a statute via regulation.

Schwerman Trucking Co. v. Department of Environmental Protection, 125 N.J. Super. 14 (App. Div 1973).

Moreover, the Board clearly did not intend to exclude Rate Counsel from the process, as the rule requires utilities to provide notice to Rate Counsel of any planned provisional rate. N.J.A.C. 14:1-5.12(f). Indeed, the Toms River Court found such notice was required to provide "due process and fundamental fairness." 82 N.J. at 213. It is unclear what purpose the notice requirement would serve if Rate Counsel was then precluded from taking any action as a result of the notice. If, as the Company suggests, the intent was to exclude Rate Counsel, then the regulation would not satisfy the requirements of due process, as precluding ratepayers from

participating in proceedings to fix a rate to be charged to them is inconsistent with both the Constitution and legislative intent. As the Appellate Division stated in In re Board's Review of the Applicability & Calculation of a Consol. Tax Adjustment, 2017 N.J. Super. Unpub. LEXIS 2315, \*20-21:

Although agencies enjoy leeway to choose among rulemaking, adjudicatory hearings, and hybrid informal proceedings to fulfill their statutory mandates, *Provision of Basic Generation Serv., supra*, 205 N.J. at 347, leeway is not a license to ignore the APA's requirements. The Board has discretion to utilize various procedures to fulfill its statutory mandate, but our Supreme Court has held that "administrative action, and an agency's discretionary choice of the procedural mode of action, are valid only when there is compliance with the provisions of the [APA] and due process." *Ibid.*;

*See also*, In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 519 (1987) ("Subject to the strictures of due process and of the Administrative Procedure Act, an agency may choose how to proceed."); In re Provision of Basic Generation Service for Period Beginning June 1 2008, 205 N.J. 339, 362 (2011) ("insisting that the BPU turn square corners in its provision of adequate notice of its possible actions affecting ratepayers."). Thus, any argument that Rate Counsel lacks standing or that the rule precludes Rate Counsel from seeking relief from the Board is without merit and must be rejected.<sup>1</sup>

Similarly, the BPU has an overriding obligation to ensure that rates are just and reasonable and that the ratemaking process is fair and consistent with the requirements of due process. N.J.S.A. 48:2-21. That obligation remains a bedrock foundation of any regulation adopted by the Board. Furthermore, there can be no doubt that the BPU recognized this and did

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<sup>1</sup> The Company is also incorrect in its assertion that Rate Counsel's only remedy was to challenge the regulation on its face, and that once the regulation was adopted and the time to appeal expired, Rate Counsel was forever barred from seeking relief from the Board on any particular provisional rate. (NJAW Brief, p.5) The Company does not cite any cases in support of this position. This is likely because it is well-established that a party is not required to bring a facial challenge and its failure to do so does not bar a subsequent as-applied challenge. *See, e.g. Lake Valley Associates, LLC v. Township Of Pemberton*, 411 N.J. Super. 501 (App. Div. 2010).

not intend, in enacting these regulations, to abrogate this fundamental duty. Contrary to the arguments raised by NJAW, the Board did not "reject" Rate Counsel's concerns in this regard when they were raised during the rulemaking process. Rather, the Board expressed its view that the process set forth in the regulation would not cause Rate Counsel's concerns to come to fruition because "[n]o provision of these amendments waives the Board's statutory authority, including its authority to ensure just and reasonable rates." 50 N.J.R.625(b), p.7.

The transcripts of the Board Agenda meeting where the rule proposal was discussed confirm that nothing in the rule was intended to abrogate the Board's fundamental role in ensuring fairness and the justness and reasonableness of rates. See, Transcript of Board Agenda, June 30, 2017, (Exhibit A attached hereto). As Commissioner (now President) Fiordaliso stated, the rule:

in no way diminishes, and I don't want to be misconstrued -- and I'm not going to be here forever, but I'm thinking of future Boards -- in any way going to dilute any power this Board has in determining those provisional rates. Because as I read the revised rule, it pretty much follows what the statute already says. [Exh. A, p.7, l.4-10]

Commissioner Fiordaliso stated further:

And I just want to underline the fact that in no way do these rules dilute the Board's authority or the Board's protection of the general public because that's extremely important to us. And we have had a history and national organizations have rated the New Jersey Board of Public Utilities kind of square in the middle as far as fairness in treating those we regulate and in also protecting the general public. [Exh. A, p.8, l. 13-20]

Commissioner Chivukula stated:

The way I look at this rule is that we are not giving up any -- the Board is not giving up any control and not limiting any authority or restricting the Board's authority. But I think one of the advantages of this particular rule is that we're trying to create a framework for the provisional ratemaking so that the Board has some oversight of the process. [Exh. A, p.9, l.24 - p.10, l. 5]

Accordingly, NJAW's argument that "[t]he only objection that the Provisional Rate rules permit is one by the Staff of the Board regarding an alleged failure to comply with the Rule's notice provisions," (NJAW Brief, p. 2) must be rejected. It is clear that the Board did not intend such a restrictive reading of its regulation and that it intended to maintain its overriding authority to ensure just and reasonable rates and fairness in the ratemaking process. Any interpretation of the rule otherwise would run counter to the Board's and Rate Counsel's underlying enabling statutes, principles of fundamental fairness and due process, and the obligation of the agency to "turn square corners" in addressing matters of importance to ratepayers.

## **POINT II**

### **THE BOARD SHOULD REJECT THE PROPOSED PLAN FOR PROVISIONAL RATES IN THIS CASE**

Contrary to the assertions of NJAW in its brief, Rate Counsel is not arguing that provisional rates are never allowed. Rate Counsel's Motion is based on the specific circumstances in this case, and the fact that the Company's chosen procedures made it impossible for the matter to be addressed within the suspension period. Under those circumstances, Rate Counsel submits that allowing the provisional rates to take effect would be unjust and unreasonable and would violate principles of fundamental fairness. In addition, Rate Counsel maintains that the Company's proposed plan for the refund of any over-collections and interest is not sufficient and should be rejected.

As noted in Rate Counsel's initial brief, the Company chose to file its case on September 15, 2017 with only five months of actual test year data. Its test year ended on March 31, 2018,

and the Company filed its 12+0 update with full test year actual data on April 23, 2018. Thus, the period of time between the date when the full year actual data was available and the date when the suspension period will end, was less than 60 days. This is an insufficient amount of time to litigate the matter at the Office of Administrative Law (OAL) and for the Board to review any decision from the OAL. While the Board may allow companies to file with “at least” five months of actual data, this does not mean the Board cannot take that into account when reviewing the fairness of proposed provisional rates. In Re Elizabethtown Water Company Rate Case, WR8504330 (May 23, 1985) (Exhibit B attached hereto).

The Company’s selective quotation from Elizabethtown fails to acknowledge that the Board’s Order in that case actually supports Rate Counsel’s position. Contrary to the impression the Company conveys, the Board in Elizabethtown carefully weighed the proposed test year, arriving at what it believed “strikes the appropriate balance by enabling the parties to develop a substantive record based on sufficient actual data, but also providing petitioner with the opportunity to propose rates which should reflect conditions at the time the Board makes a determination...” Exh. B, p.2. The Board thus established a “general guideline” that “rate case petitions should contain when filed, six months actual test year data and six months estimated data or at a minimum, five months actual and seven months estimated data.” Id. Because the Company chose to file with the bare minimum of actual data, it would not be unreasonable for the Board to find that it was not then entitled to institute provisional rates of its choosing on the first day after the suspension period ends. It would be entirely reasonable for the Board to harmonize the two rules with the goal of striking an appropriate and fair balance, particularly where, as here, the inability to resolve this matter within the suspension period is not due to any



regulatory lag or any delay on the part of any other party. It is based solely on the decision of the Company to file its case in such a way that full test year actual data would not be available until seven months into the nine month suspension period.

Rate Counsel recognizes that, once this matter is fully litigated, ratepayers will be entitled to refunds for any over-recovery with interest. However, that fact is insufficient to make ratepayers whole or to relieve them from the burden that comes with essentially requiring them to lend money to the utility for the interim period. Although NJAW argues that its provisional rates are approximately 60% of their total request and therefore are reasonable, Rate Counsel maintains that based on the information that has been developed in discovery, this amount is still substantially more than what is likely to be supported by the record. While the Legislature may have intended to allow the utilities to be relieved of the burden of regulatory lag, the purpose of the statute, and the Supreme Court's decision in Toms River, was to promote fairness in the ratemaking process, not to allow the Company to manipulate the process to obtain a forced loan from ratepayers.<sup>2</sup>

The hardship to ratepayers is real. NJAW's rates have been increasing steadily. The Company has been coming in for a rate case on average every two years and has taken full advantage of the DSIC between cases. Of NJAW's 27 million customers, only 1900 were

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<sup>2</sup> Indeed, the Company continues to manipulate the process in an effort to foreclose a fair hearing for ratepayers, filing a motion this week to preclude Rate Counsel's witnesses from responding to the Company's rebuttal testimony, even though that was the first time full test-year actual data was provided by the Company. That Motion will be addressed by the Administrative Law Judge, but it demonstrates an overall strategy by the Company to foreclose meaningful review of its filing on a timely basis.

enrolled in the Company's low-income service charge discount program in 2016.<sup>3</sup> While the statute and regulation were aimed at preventing unfairness when a rate proceeding lasts too long, the balance of fairness shifts when the ability to push the proceedings beyond the suspension period is in the control of, and is exercised, by the Company. As the Supreme Court noted in Lambertville Water Co. v. New Jersey Bd. of Public Utility Comm'rs, 79 N.J. 449, 456 (1979), The Board "has broad discretion to fix an effective date in the light of circumstances." The Board should exercise that discretion to protect the general public from NJAW's manipulation of the rate case process.

The Board should also deny the Company's proposed plan because it does not follow the requirements of the regulation "to the letter." The regulation requires a detailed plan for how over-recoveries will be returned to ratepayers with interest "no later than the customer billing cycle 30 days after the effective date of the Board Order concluding the rate case." N.J.A.C. 14:1-5.12(h). The Company's plan does not indicate how it will meet that timeline or any dates whatsoever that will ensure this timeframe will be met. All the "plan" says essentially is that the over-collection will be calculated. This is not the level of detail that should be required under the regulation. The Company should be required to submit timelines to demonstrate that the refund dates will be met.

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<sup>3</sup> <https://amwater.com/njaw/customer-service-billing/low-income-program>. The company also offers assistance through its H2O program but that program, funded at least in part through donations from other customers, only distributed \$39,130 to 169 households in 2016.

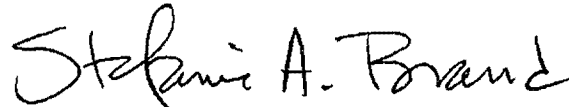
Ms. Aida Camacho-Welch

June 4, 2018

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Accordingly, Rate Counsel respectfully requests that the Board reject NJAW's provisional rate plan.

Respectfully submitted,



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Stefanie A. Brand

Director, Division of Rate Counsel

c: Honorable Joseph L. Fiordaliso, President (via hand delivery)  
Honorable, Mary-Anna Holden, Commissioner (via hand delivery)  
Honorable Diane Solomon, Commissioner (via hand delivery)  
Honorable Upendra Chivukula, Commissioner (via hand delivery)  
Honorable Bob Gordon, Commissioner (via hand delivery)  
Honorable Jacob Gerstman, ALJ (via UPS Overnight Mail)  
Service List (Via Electronic & USPS Regular Mail)

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STATE OF NEW JERSEY  
BOARD OF PUBLIC UTILITIES  
TRENTON, NEW JERSEY

BOARD AGENDA

DATE: FRIDAY, JUNE 30, 2017

ITEM 90

MISCELLANEOUS

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DOCKET NO.: AX17050468

IN THE MATTER OF THE  
PROPOSED AMENDMENTS TO  
N.J.A.C. 14:1-5.12, ET SEQ. -  
TARIFF FILINGS FOR PETITIONS  
WHICH PROPOSE INCREASES IN  
CHARGES TO CUSTOMERS  
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BEFORE: PRESIDENT RICHARD S. MROZ  
COMMISSIONER JOSEPH L. FIORDALISO  
COMMISSIONER MARY-ANNA HOLDEN  
COMMISSIONER DIANNE SOLOMON  
COMMISSIONER UPENDRA J. CHIVUKULA

J.H. BUEHRER & ASSOCIATES  
884 BREEZY OAKS DRIVE  
TOMS RIVER, NJ 08753  
(732) 295-1975

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1 PRESIDENT MROZ: Let's move on to the agenda  
2 now. We'll move to Item 90 which is a matter regarding  
3 amendments to our Administrative Code regarding filings  
4 and petitions for purpose of increasing charges to  
5 customers regarding provisional rates.

6 And Ms. Covie, our Chief of Staff, is going  
7 to present this matter.

8 COMMISSIONER FIORDALISO: Good morning.

9 MS. COVIE: Good morning, Commissioners.

10 The matter before you is Agenda Item 90, a  
11 rule proposal, that sets procedures under circumstances  
12 when a utility elects to implement provisional rates.

13 Under current law, after a utility files a  
14 rate case, the utility can begin charging ratepayers  
15 the utility's proposed new rates, even before the Board  
16 reaches a final decision in the case.

17 The rates are provisional under these  
18 circumstances, because if the implemented rates exceed  
19 the amounts later approved by the Board, the utility  
20 must refund to its customers any overcharges.

21 A utility can only begin imposing provisional  
22 rates after the expiration of the suspension period  
23 that the Board may order pursuant to  
24 N.J.S.A. 48:2-21(d). The Board routinely orders the  
25 application of two suspension periods in a rate case

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1 and they work to prevent a utility from charging its  
2 new proposed rates for at least nine months after the  
3 utility's filing of its rate case. Thereafter,  
4 however, the utility has the statutory right to begin

5 charging its new rates, subject to refund, as both the  
6 State Supreme Court and the Board itself has  
7 recognized.

8 In most cases, utilities do not implement  
9 provisional rates for various reasons. Nevertheless,  
10 the pending proposal attempts to provide guidance to  
11 utilities should they choose to implement provisional  
12 rates.

13 The proposal is timely, as the Board has been  
14 placed on notice in a currently pending rate case that  
15 a utility intends to implement provisional rates after  
16 the expiration of the suspension periods.

17 Prior to presenting this rule proposal to the  
18 Board, staff promulgated a straw proposal to interested  
19 parties, conducted a stakeholder meeting, and solicited  
20 written comments. This process assisted board staff in  
21 the development of this rule proposal.

22 This rule proposal allows a utility to  
23 implement its full requested rates or some lesser  
24 portion thereof, after the expiration of the suspension  
25 periods on a provisional basis.

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1 Substantively, the proposed rule makes clear  
2 that if a utility implements provisional rates after  
3 the expiration of the suspension periods, the utility  
4 will be required to provide refunds to their customers  
5 if the implemented provisional rates exceed the rates  
6 approved by the Board in the utility's underlying rate  
7 case.

8                   Importantly, the rule proposal requires that  
9 a utility seeking to implement provisional rates  
10 provides notice thereof to all relevant parties,  
11 including ratepayers, the Board, rate counsel, parties  
12 to the rate case, local elected officials, etcetera.  
13 Additionally, the utility would be required to file  
14 with the Board and serve on rate counsel a copy of its  
15 proposed tariff, and importantly, a plan for providing  
16 refunds should they be necessary.

17                   The rule proposal also contains provisions  
18 relating to the calculation of interest, should the  
19 utility owe refunds to its customers.

20                   Finally, the rule emphasizes that the Board  
21 will not require any utility to implement provisional  
22 rates, and nothing within the proposal shall be  
23 construed as endorsing a provisional rate as a final  
24 rate. In other words, a utility's implementation of a  
25 provisional rate will have no impact on the Board's

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1 discretion in determining final rates.

2                   Staff recommends that the Board approve this  
3 rule proposal. If the Board approves it, the proposal  
4 will then be transmitted to OAL for publication in the  
5 New Jersey Register and, thereafter, the public will  
6 have an opportunity to submit written comments,  
7 consistent with the Administrative Procedures Act.

8                   Thereafter, if the rule is to move forward,  
9 staff will come back to the Board for a second vote on  
10 final adoption.

11                   For the time being, however, today's vote

12 merely authorizes the proposal for publication and to  
13 collect public comment. The rule does not go into  
14 effect today and will not go into effect unless the  
15 Board votes to adopt the rule after the Administrative  
16 Procedures Act process is complete.

17 COMMISSIONER FIORDALISO: I'll move it.

18 COMMISSIONER HOLDEN: Second.

19 PRESIDENT MROZ: We have a motion and a  
20 second.

21 Thank you for the presentation, Ms. Covie.

22 Let me make a couple comments initially. I  
23 mentioned earlier that we are always here at the Board  
24 striving to ensure consistency and regulatory  
25 consistency around our decisions. And this matter has

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1 come up because over time some of applicants have  
2 sought to implement rates or considered them, and we've  
3 also been in a situation where applicants have sought  
4 the implementation of rates in other rate matters where  
5 we are dealing with them in an accelerated time frame.

6 Regardless, because it was very clear to me,  
7 at least, that since there is no foundational aspect to  
8 move a filing that would be made in this kind of  
9 circumstance, that being provisional rates, where we  
10 have not concluded a rate case and not even basic  
11 elements of notice provisions that I thought -- I feel  
12 and I'm supportive of this rule proposal so that  
13 parties are on notice of the process and the terms  
14 under which they need to notify parties if they are



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15 intending to implement rates.

16 So I think this is a worthy proposal to  
17 ensure that we have in place the basic -- the basics of  
18 filings that would need to be if an applicant saw fit  
19 to implement rates which they can ultimately do under  
20 state law.

21 I'll now ask my colleagues for any comments  
22 or questions.

23 Commissioner Fiordaliso.

24 COMMISSIONER FIORDALISO: Yes.

25 PRESIDENT MROZ: I'll take that as an

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1 endorsement rhetorical of other comments or questions.

2 Do you have questions or comments?

3 COMMISSIONER FIORDALISO: If you want to read  
4 it that way, that's fine.

5 First of all, I want to thank staff. I want  
6 to thank our Executive Director, Paul, and I want to  
7 thank our Chief Counsel and I want to thank our Chief  
8 of Staff.

9 We have had many, many discussions here and  
10 I'm not going to say anything here that I didn't say to  
11 any of you privately in our discussions in trying to  
12 resolve this particular case because, initially, I was  
13 opposed. In the form that it was presented to us, I  
14 was opposed.

15 I understand that one of our EDCs has -- and  
16 I'm going to use the word -- threatened to institute  
17 provisional rates. And this is something that  
18 apparently has prompted the suggestion that we look at

19 these rules.

20 In my mind, first of all, I don't like to be  
21 threatened. Secondly, everything in this rule, as we  
22 finally came down to a consensus -- and, again, I want  
23 to thank those three staff in particular for working  
24 with us and in trying to come up with language that  
25 would be acceptable to make. So I appreciate that.

8

1 One of the reasons I was opposed to it was  
2 the fact that the statute already provides in my mind  
3 and in what I just agreed to what this rule states.

4 It in no way diminishes, and I don't want to  
5 be misconstrued -- and I'm not going to be here  
6 forever, but I'm thinking of future Boards -- in any  
7 way going to dilute any power this Board has in  
8 determining those provisional rates. Because as I read  
9 the revised rule, it pretty much follows what the  
10 statute already says.

11 So my initial reaction when the initial  
12 language was presented to me was: What are we trying  
13 to fix? Is there something that's broken that we're  
14 trying to fix?

15 I have -- I was in college -- that's before  
16 they had ballpoint pens -- I had a fraternity  
17 brother --

18 PRESIDENT MROZ: Inkwells.

19 COMMISSIONER FIORDALISO: Yeah, inkwells.

20 -- I had a fraternity brother who went in and  
21 started a business. And he started a business as some

22 would refer to it as flipping hamburgers. And he was  
23 very successful. Flipping hamburgers was making him a  
24 lot of money because he did a good job at it. So he  
25 got this bright idea and, well, if I'm doing so well

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1 flipping hamburgers, if I expand the business and add  
2 other items to the menu, I'll really make a killing.  
3 Guess what happened? He fixed something or thought he  
4 was fixing something that wasn't broken and ultimately  
5 went bankrupt.

6 There's an analogy there somewhere and I'm  
7 not going to try and explain it.

8 But the point is I still in my mind -- in the  
9 back of my mind question what we're trying to fix.

10 But we all worked hard. We all worked  
11 diligently in trying to come up with language that was  
12 acceptable to us internally.

13 And I just want to underline the fact that in  
14 no way do these rules dilute the Board's authority or  
15 the Board's protection of the general public because  
16 that's extremely important to us. And we have had a  
17 history and national organizations have rated the  
18 New Jersey Board of Public Utilities kind of square in  
19 the middle as far as fairness in treating those we  
20 regulate and in also protecting the general public.

21 So in the future, if there are any things  
22 that have to be changed, it's nice to talk to us about  
23 it. It's nice to pick up the phone once in a while and  
24 discuss items that aren't a docketed item, because I  
25 wouldn't discuss that with you nor would my colleagues,

1 but talk about things, seeing where we can find common  
2 ground in certain areas, but don't wait till the 11th  
3 hour to come to us and say this is what we want,  
4 otherwise we are going to do this. That doesn't sit  
5 well with me.

6 so in the future I can see us working better  
7 together because, again, as far as protecting the  
8 people and ensuring the vitality of our regulated  
9 entities because that's part of our job too, we're  
10 willing to sit here and work with you. And if it's  
11 going to enhance the economic well-being of the  
12 9 million people who work in the State of New Jersey or  
13 live in the State of New Jersey rather, you have an  
14 ally here, but let's talk about it.

15 I will support this. And some day maybe  
16 someone will be able to explain to me what we fixed.

17 Thank you.

18 PRESIDENT MROZ: Thank you for your comments,  
19 Commissioner.

20 Any other comments?

21 Commissioner Chivukula.

22 COMMISSIONER CHIVUKULA: Thank you,  
23 Mr. President.

24 The way I look at this rule is that we are  
25 not giving up any -- the Board is not giving up any

1 control and not limiting any authority or restricting  
2 the Board's authority. But I think one of the  
3 advantages of this particular rule is that we're trying  
4 to create a framework for the provisional ratemaking so  
5 that the Board has some oversight of the process.

6 So I support this.

7 PRESIDENT MROZ: Thank you.

8 Thank you, Commissioner.

9 Commissioner Holden.

10 COMMISSIONER HOLDEN: I echo your comments.

11 Yes, we all worked on this little  
12 wordsmithing here and there. This does give more  
13 specificity and clarity of notice. One of the big gaps  
14 is what the provisional rate increase would cover and  
15 that is spelled out on base rates. But it also makes  
16 me think over the forced vacation that we may all be  
17 having that we take a look at our Administrative Code  
18 to see if there are other gaps.

19 So I have no life so that's what I will be  
20 reading over vacation and see if there are other  
21 how-tos that need to be put in place.

22 PRESIDENT MROZ: Any other comments or  
23 questions?

24 No other comments or questions so let's take  
25 a vote.

♀

12

1 SECRETARY ASBURY: Commissioner Fiordaliso?

2 COMMISSIONER FIORDALISO: Yes.

3 SECRETARY ASBURY: Commissioner Holden?

4 COMMISSIONER HOLDEN: Yes.

90 Misc June 30 2017

5 SECRETARY ASBURY: Commissioner Solomon?

6 COMMISSIONER SOLOMON: Yes.

7 SECRETARY ASBURY: Commissioner Chivukula?

8 COMMISSIONER CHIVUKULA: Yes.

9 SECRETARY ASBURY: President Mroz?

10 PRESIDENT MROZ: Yes.

11 SECRETARY ASBURY: So moved.

12 (Whereupon recommendation of staff was approved.)

13 (Item 90 - Miscellaneous concluded.)

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1 CERTIFICATE

2

3 I, Lorin Thompson, a Notary Public and  
4 Shorthand Reporter of the State of New Jersey, do  
5 hereby certify as follows:

6 I do further certify that the foregoing is a  
7 true and accurate transcript of the testimony as taken

Page 11

8                                   90 Misc June 30 2017  
9       stenographically by and before me at the time, place  
10       and on the date hereinbefore set forth.

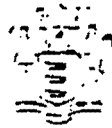
11                               I do further certify that I am neither a  
12       relative nor employee nor attorney nor counsel of any  
13       of the parties to this action, and that I am neither a  
14       relative nor employee of such attorney or counsel, and  
15       that I am not financially interested in the action.

16  
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\_\_\_\_\_  
Notary Public of the State of New Jersey  
My commission expires July 26, 2021

Dated: June 30, 2017

5-23-



State of New Jersey  
 BOARD OF PUBLIC UTILITIES  
 1100 RAYMOND BLVD  
 NEWARK, NEW JERSEY 07102

IN RE ELIZABETHTOWN WATER )  
 COMPANY RATE CASE )

DECISION ON MOTION  
 FOR DETERMINATION OF  
TEST YEAR AND APPROPRIATE  
TIME PERIOD FOR  
ADJUSTMENTS

DOCKET NO. WR8504330

(APPEARANCES ATTACHED)

BY THE BOARD:

Petitioner has filed, on April 23, 1985, a motion to settle the test year applicable to the above docketed rate proceeding, and to settle the appropriate time period and standards that should apply to out-of-period adjustments. The motion was filed as a consequence of the impasse which developed at pre-hearing/settlement conferences held by Board's staff on April 18 and 19, 1985, with regard to the test year questions. The Board therefore retained the test year questions and on May 1, 1985 transmitted the case to the Office of Administrative Law (OAL) for hearing as a contested case, advising the OAL that the Board would resolve the test year question as expeditiously as possible so as not to delay the proceedings.

Petitioner's base rate case petition, filed on April 1, 1985, was supported by schedules proposing a test year ending December 31, 1985 with pro forma changes through December 31, 1986. Rate Counsel, in response to said motion, proposed a test year ending September 30, 1985 "which matches all aspects of the ratemaking process"<sup>1/</sup>. Staff, in response to said motion, filed a position paper proposing a test year ending September 30, 1985, with petitioner to be afforded the opportunity to place in the record known and measurable changes for expenses six months beyond the end of the test year, rate base adjustments three months beyond the end of the test year if such rate base adjustments are within service six months after the close of the test year, and changes in capitalization through new financing to be reflected in the record three months beyond the close of the test year. Staff's position is premised on the expectation that the rate case would be ripe for Board determination in January, 1986. It is not appropriate or necessary to recite the various proposals and counterproposals made by the parties in an attempt to resolve the issues at hand. Suffice it to say that the test year questions remain unresolved by agreement and require Board determination at this time.

The Board has before it two distinct, though related issues, the first being a determination of the appropriate test year for this proceeding and the second being to what extent and under what standard petitioner should be afforded the opportunity to make a record in support of proposed adjustments which extend beyond the end of the test year.

<sup>1/</sup> Rate Counsel Response, dated May 7, 1985 at p. 17.



With regard to the first issue, the Board has balanced the competing interests and positions of the parties and concludes that a test year ending September 30, 1985 is reasonable and appropriate to govern these proceedings. Such a test year is current rather than fully historic, but rejects the concept of a fully forecasted test year. It strikes the appropriate balance by enabling the parties to develop a substantive record based upon sufficient actual data, but also providing petitioner with the opportunity to propose rates which should reflect conditions at the time the Board makes a determination in this matter and during the period of future rates.

Based upon the above considerations, the Board concludes that as a general guideline for major utilities, rate case petitions should contain when filed, six months actual test year data and six months estimated data or at a minimum, five months actual and seven months estimated data.

The consequence of the above determination, is that petitioner must conform its present filing by now submitting at least five months actual test year results. Furthermore, petitioner must submit full test year results for the period ending September 30, 1985 as soon thereafter as practicable but no later than December, 1985 so that the parties will be able to examine them prior to Board decision.

With regard to the second issue, that is the appropriate time period and standard to apply to out-of-period adjustments, the standard that shall be applied and shall govern petitioner's filing and proofs is that which the Board has consistently applied the "known and measurable" standard. Known and measurable changes to the test year must be (1) prudent and major in nature and consequence, (2) carefully quantified through proofs which (3) manifest convincingly reliable data. The Board recognizes that known and measurable changes to the test year, by definition, reflect future contingencies; but in order to prevail, petitioner must quantify such adjustments by reliable forecasting techniques reflected in the record. In Re: New Jersey Bell Telephone Co., Docket No. 7711-1136 (January 31, 1978). Certainly, the Board's power to recognize adjustments beyond the test year is well-settled, so long as its judgment is grounded on sufficient relevant evidence. State v. New Jersey Bell, 30 N.J. 16 (1959) at p. 29.

Based upon the foregoing, the Board determines, for the purposes of this proceeding, that petitioner shall have the opportunity to make a record with regard to (a) known and measurable changes to income and expense items for a period of nine months beyond the end of the test year; (b) changes to rate base for a period of six months beyond the end of the test year, provided there is a clear likelihood that such proposed rate base additions shall be in service by the end of said six-month period, that such rate base additions are major in nature and consequence, and that such additions be substantiated with very reliable data; (c) changes to capitalization for a period three months past the end of the test year, provided that such changes are major in nature and consequence, and that the results of said proposed financing are actual prior to the Board's determination in this case.

As a consequence of the above, petitioner shall conform its current filing to reflect proposed adjustments to the test year according to the above enunciated standard and the above delineated time periods. We note in passing that we do not find the test year determinations in the 1980 Elizabethtown Water Company Rate Case (BPU Docket No. 802-76) and the 1984 Elizabethtown Water Company Rate Case (BPU Docket No. 8312-1072) to be dispositive of the issues now at hand, due to the particular circumstances of those cases. The first reflected, in part, a period of high and continuing inflation, while the second reflected complex disposition of revenue requirement and over-earnings questions which are now before the Superior Court, Appellate Division of this State.

Therefore, the above determinations reflect: (a) the Board's ruling on the appropriate test year in this docket; (b) the guidelines that should apply to the test year to be filed in future by all major New Jersey Public Utilities; (c) the standard to apply to out-of-period adjustments; and (d) the specific time periods to apply under the circumstances of this case to out-of-period adjustments.

The parties are directed to exercise all due diligence to insure that this rate case may be ripe for final Board disposition in January of 1986. If contingencies develop which make the above timetable inappropriate, the Board should be advised at the earliest opportunity. If it appears that petitioner's proposed capital financing will be accomplished prior to Board determination but after December 30, 1985, appropriate application may be made to the Board for consideration of the rate-making implications of said financing.

DATED: May 23, 1985

BOARD OF PUBLIC UTILITIES  
BY:

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BARBARA A. CURRAN  
PRESIDENT

*George H. Barbour*  
GEORGE H. BARBOUR  
PRESIDENT

ATTEST:

*Blossom A. Peretz*  
BLOSSOM A. PERETZ  
SECRETARY

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

*Blossom A. Peretz*  
Blossom A. Peretz  
Secretary

In the Matter of the Petition of New  
Jersey American Water Co. Inc. for  
Approval of Increased Tariff Rates and  
Charges for Water and Wastewater  
Service, Change in Depreciation Rates and  
Other Tariff Modifications  
BPU Docket No. WR17090985  
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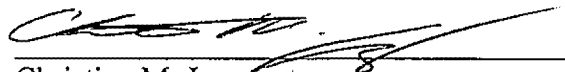
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CERTIFICATION OF SERVICE

I, Christine M. Juarez, hereby certify that I have served the Division of Rate Counsel's Reply Letter Motion by hand delivery to Ms. Aida Camacho-Welch, New Jersey Board of Public Utilities ("Board of Public Utilities") Secretary and the Commissioners of the Board of Public Utilities and by electronic mail and UPS Overnight Mail to Honorable Jacob Gertsman and ALJ Ira G. Megdal, Esq. and by electronic and USPS Regular Mail to all parties on the attached service list.

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.

  
Christine M. Juarez  
Assistant Deputy Rate Counsel

Dated: June 4, 2018

**In the Matter of the Petition of New  
Jersey American Water Co. Inc. for  
Approval of Increased Tariff Rates and  
Charges for Water and Wastewater  
Service, Change in Depreciation Rates and  
Other Tariff Modifications  
BPU Docket No. WR17090985  
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