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Director

11/29/18

November 28, 2018

VIA HAND DELIVERY
Aida Camacho-Welch, Secretary
State of New Jersey, Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
P.O. Box 350
Trenton, New Jersey 08625-0350

Re: I/M/O Proposed Amendment to N.J.A.C. 14:1-5.12 – Tariff Filings or Petitions Which Propose Increases in Charges to Customers
BPU Docket No. AX17050469
Proposal Number: PRN 2018-018

Dear Secretary Camacho-Welch:

Please accept this letter as the comments of the New Jersey Division of Rate Counsel ("Rate Counsel") regarding the above-referenced rulemaking. These comments are being filed pursuant to a Notice to Reopen Public Comment Period for Re-proposed Amendment: N.J.A.C. 14:1-5.12. The proposed rule would alter the Board of Public Utility's ("BPU" or "Board") existing Consolidated Tax Adjustment ("CTA") policy and significantly reduce the benefit ratepayers have received for decades received pursuant to that policy. We hope the Board carefully considers Rate Counsel's comments and proceeds accordingly in the best interests of ratepayers.

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Procedural Background

On January 16, 2018 pursuant to the directive on remand of the New Jersey Superior Court Appellate Division the BPU published a new regulation proposing modifications to the Board's current CTA policy. (PRN 2018-007, hereinafter "January Proposal") The January Proposal was noticed on the Board's published agenda, discussed at the agenda meeting and approved for publication by the Board. At the agenda meeting one commissioner noted: "a lot of work went into this one and good catches and I think it's nice and tight the way it's done." T3:L7 – T4:L9 (December 19, 2017). A sixty day comment period was set. The January Rule Proposal added a new filing requirement to any petitions filed with the BPU that seek to increase base rates. The new filing requirement required all such petitions to include a calculation of a proposed consolidated tax adjustment ("CTA") using the formula specified in the draft regulation. Specifically, the proposed rule required that all petitions for base rate increases include a proposed CTA calculation "using the rate base method." Id. The January Rule Proposal also included a review period for the CTA calculation of five consecutive tax years, allowed the calculated rate base adjustment to be reduced "by up to 25 percent of the full CTA," and excluded an electric utility's transmission income from the CTA calculation. Id. In other words, the January Proposal allocated 75% of the calculated CTA benefit to ratepayers.

On March 16, 2018, pursuant to the date established in the New Jersey Register, Rate Counsel and the Large Energy Users Coalition (NJLEUC) filed comments on the January Proposal. At that time Rate Counsel commented, inter alia, on the provision allocating to ratepayers only 75% of the CTA. Rate Counsel commented positively on the Board's apparent decision to reject Staff's recommendation to allocate more of the CTA to shareholders, but

argued that with the "rate base methodology" ratepayers only receive a small fraction of the total consolidated tax benefit and that to further reduce that benefit by 25% was unfair.

In February, with apparently selective notice and without public discussion or approval at a public agenda meeting, a new proposal was published in the New Jersey Register. That proposal (PRN 2018-018, hereinafter the "February Proposal") was characterized as a "reproposed amendment," but was virtually identical to the January proposal, with comments to be filed by April 6, 2018. The only substantive difference from the January Proposal was the unmarked deletion of one word. This deletion, however, materially changed the originally proposed regulation. The removal of the word "adjustment" reduced ratepayers' share of the CTA from 75% to 25%, a material difference that if adopted will cost ratepayers tens if not hundreds of millions of dollars a year as compared to the January Proposal.[1] As detailed in the attached letter dated August 21, 2018, Rate Counsel was not made aware of the February proposal until August 16, 2018, during a phone conversation between Rate Counsel and senior staff at the BPU. In that letter, Rate Counsel argued that the failure to provide notice constituted a violation of N.J.A.C. 1:30-5.2(a)(3), which requires the Board to send notice of the proposed agency action to "interested persons." Given that the rule was proposed to comply with a remand by the Appellate Division in an appeal filed by Rate Counsel, there can be no doubt that Rate Counsel was an interested party. Rate Counsel's letter also noted that the Board's February Proposal failed to comply with other aspects of the Administrative Procedure Act ("APA"), such as a required explanation of why the Board decided to materially change the January Proposal.

[1] For example, in a 2015 fully litigated base rate case for Jersey Central Power & Light Company ("JCP&L"), the difference between ratepayers receiving 75% or 25% of the calculated benefit amounted to approximately $10 million per year. See I/M/O Jersey Central Power & Light Co. For Review & Approval of Increases & Other Adjustments to its Rates, BPU Docket No. ER12111052, (3/18/15), Attachment C ("JCP&L Order").

Through August of 2018, the Board took no action on the proposed rule. Subsequently, the Board, on October 1, 2018, published a "Notice to Re-open Public Comment Period" of the "reproposed amendment" published on February 5, 2018. These comments are being filed pursuant to that "reproposal."

Discussion

I. Failure to Comply With the Administrative Procedure Act

Initially, it appears that this rulemaking proposal misses the fundamental point of the Appellate Division's decision and remand in I/M/O the Board's Review of the Applicability & Calculation of a Consolidated Tax Adjustment, 2017 N.J. Super. Unpub. LEXIS 2315 (App. Div. Sept. 8, 2017) ("Appellate Division Decision"). The reason the Appellate Division reversed the Board was not "procedural" but rather due to a failure to provide due process. That finding of a lack of due process was based upon the Board's failure to provide the underlying reasons for its proposal so that Rate Counsel and other parties could respond. The mechanical application of the rulemaking process here, with no additional information or explanation does not correct this fundamental flaw. Rate Counsel is still unaware of the basis for the Board's decision and is still unable to provide evidence to refute this proposal. As explained more fully below, there is no record cited to support many of the statutorily required explanatory impact statements and the rule itself is unclear and unsupported by any record. Because the defects that led to the Appellate Division Decision have not been cured, Rate Counsel is prejudiced in its ability to respond.

Moreover, the February Proposal, and the subsequent "Notice to Reopen Public Comment Period" published in the New Jersey Register on October 1, 2018, fail to comply with the requirements of the APA. The January Proposal added a new filing requirement to any

petitions filed with the BPU that seek to increase base rates, mandating that all such petitions include a calculation of a CTA using the formula specified in the draft regulation. Specifically, the January Proposal required that all petitions for rate increases include a proposed CTA calculation "using the rate base method." Id. The January Proposal also included a review period for the CTA calculation of five consecutive tax years, allowed the calculated rate base adjustment to be reduced "by up to 25 percent of the full CTA," and excluded an electric utility's transmission income from the CTA calculation. Id. As noted, Rate Counsel filed comments on the January Rule Proposal on March 16, 2018. While disagreeing with the 25% reduction in benefits to ratepayers contained in the January Rule Proposal, Rate Counsel stated that it was "pleased to see that with this draft rule the Board rejected Staff's prior recommendation to allocate seventy-five percent of calculated benefits to shareholders." Rate Counsel Comments at 8.

When Rate Counsel filed its comments on March 16, 2018, it was unaware that, without providing notice to Rate Counsel and other interested parties,[2] the Board published a "Reproposed Amendment" to N.J.A.C. 14:1-4.12 in the February 5, 2018 New Jersey Register (as noted above, the "February Proposal"). The February Proposal contained substantive changes to the January Proposal, drastically reducing ratepayers' share of consolidated tax savings from seventy-five percent to twenty-five percent. 50 N.J.R. 709(a). The publication of the February Amendment was deficient in that it failed to comply with the requirements for "substantive changes" to a draft rule as set forth in the APA. Rate Counsel advised the Board of these deficiencies by letter dated August 21, 2018. The Board, however, has simply re-opened

[2] By letter dated August 22, 2018, the New Jersey Large Energy Users Coalition advised the Board that it too did not receive notice of the February 5, 2018 reproposal.

the comment period on the February Proposal, without correcting any of the flaws of its prior proposals.

Specifically, the February Proposal involved a "substantive change" to the proposed rule, necessitating that the Board comply with the requirements of N.J.S.A. 52:14B-4.10. There is no question that the draft rule published in February constituted a "substantive change" under N.J.S.A. 52:14B-4.10, which defines "substantive change" as:

> any changes to a proposed rule that would significantly: enlarge or curtail who and what will be affected by the proposed rule; change what is being prescribed, proscribed or otherwise mandated by law; or enlarge or curtail the scope of the proposed rule and its burden on those affected by it.

The January Proposal allocated 75% of the calculated consolidated tax adjustment to ratepayers, while the February Proposal allocated only 25% of the calculated adjustment to ratepayers. This change will result in tens, if not hundreds of millions of dollars in additional rate increases annually to ratepayers compared to the January Proposal.[3] This changes "what is being prescribed, proscribed or otherwise mandated by law" and will "enlarge...the scope of the proposed rule and its burden on those affected by it," thereby constituting a "substantive change" under N.J.S.A. 52:14B-4.10.

The October 1, 2018 notice ("October Notice") simply re-opened the comment period on the February Proposal. Like the February publication, the October Notice provided no explanation of the differences between it and the January Proposal. There was no other Board action on the proposed rule between the February Proposal and the October Notice. The failure to properly identify these substantive changes is a fatal flaw in the October Notice. When a state agency decides to make "substantive changes" to a draft rule, it must submit a public notice to

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[3] See, e.g., JCP&L Order, supra, Attachment C, illustrating that the difference between ratepayers receiving 75% or 25% of the CTA benefit is $10 million per year.

the Office of Administrative Law setting forth the proposed changes. N.J.S.A. 52:14B-4.10(b). This public notice must include:

> (1) a description of the changes between the rule as originally proposed and the new proposed changes; (2) the specific reasons for proposing the additional changes; (3) a discussion of how the new proposed changes would alter the impact statements and analyses included in the notice of proposal; (4) a report listing all parties submitting comments on the originally proposed rule provisions subject to the proposed additional changes, summarizing the content of the submissions on those provisions, and providing the agency's response to the data, views and arguments contained in the submissions; and (5) the manner in which interested persons may present their views on the new proposed changes. N.J.S.A. 52:14B-4.10(b).

Neither the February Proposal nor the October Notice included any of these required elements. If the Board wishes to proceed with the new allocation set forth in the February Proposal, it must meet all statutory requirements, including an explanation of its reasons for substantially decreasing ratepayers' share of consolidated tax savings. Absent compliance with the requirements of the APA, interested parties are left with no explanation of the basis for the Board's decision to reduce ratepayers' share of consolidated tax savings from 75% to 25%. This rulemaking process should not continue unless and until the Board corrects these and the additional deficiencies identified below.

II. Comments on the Proposed Rule's Explanatory Statements and Analysis

Rate Counsel offers the following comments on the impact statements and analyses, organized by section:

A. Economic Impact Statement

The Board's Economic Impact Statement states:

> *There may be an economic impact to utility rate payers and utilities as a result of this proposed amendment. The rule requires that utilities share with ratepayers a portion of any tax savings earned through a utility's consolidated tax filing. The vast majority of states have abolished the CTA. The amendment also provides applicable utilities with a five-year look back period, a sharing allocation of the tax savings, and the elimination of transmission income from the CTA calculation.*

This statement is deficient for the following reasons:

This statement fails to provide the expected economic impact of the proposed rule. In proposing a draft rule, an agency is required to "make available for public viewing through publication...a description of the expected socio-economic impact of the rule...." N.J.S.A. 52:14B-4(a)(2). The economic impact statement in the draft rule fails to satisfy this statutory obligation. The first sentence of the economic impact statement is a conclusory statement, not a description of the expected economic impact. The remainder of the statement explains the content of the draft rule, but again fails to explain its anticipated economic impact. N.J.A.C. 1:30:2.1 requires a proposed rule to "be sufficiently complete and informative as to permit the public to understand accurately and plainly the legal authority, purposes and expected consequences of the adoption...." By failing to include the expected economic impact of the proposed rule, the draft rule fails to satisfy this requirement. In addition, by failing to explain the expected economic impact of the draft rule, the Board's statement is inconsistent with the Appellate Division Decision. The Appellate Division Decision specifically held that:

> Compliance with the requirements provides the stakeholders with the Board's analysis and assessment of the economic impact of a proposed rule and the Board's response to a stakeholder's data, comments and arguments before a rule is adopted. Moreover, compliance provides the stakeholders with the opportunity to present evidence and address the Board's economic impact assessment and response to the stakeholder's

> data, comments and argument. In other words, the statutory requirements guarantee that Rate Counsel and the stakeholders are fully informed of the Board's position concerning a rule's economic impact and the Board's response to the submitted data, comments and arguments, thus permitting Rate Counsel and the stakeholders an opportunity to present further evidence and argument. When the requirements are ignored, the Board gathers information and comment, but Rate Counsel and the stakeholders are deprived of the right granted by the APA to consider and contest the Board's assessment of economic impact and responses to the submissions prior to the adoption of a rule.

Appellate Division Decision, supra, slip op. at 25-26.

The Appellate Division specifically held that the Board must afford Rate Counsel and other stakeholders the opportunity to review the Board's position concerning a rule's economic impact in order to be able to present evidence and argument concerning it. By failing to describe the Board's position on the draft rule's economic impact, the draft rule deprives Rate Counsel of the ability to review the expected economic impact and present evidence in agreement or in opposition to it on behalf of the State's ratepayers. By failing to explain the anticipated economic impact, the draft rule deprives ratepayers of their substantive rights under the APA, and is contrary to the Appellate Division Decision.

Furthermore, the rule's claimed economic impact is simply incorrect. There is no doubt that the draft rule will substantially reduce ratepayers' share of consolidated tax benefits compared to the current methodology, and increase rates accordingly. For example, in the JCP&L Order, supra, the Board adopted a consolidated tax adjustment based on the same formula as contained in the February Proposal, which resulted in a revenue requirement reduction of only $5.36 million per year. Had the Board utilized the long established existing methodology, the ratepayers' share of the CTA would have been a revenue requirement reduction of approximately $56 million. Thus, in that instance the formula contained in the draft rule reduced ratepayers' share of consolidated tax benefits, increasing rates in the process by

more than $50 million per year, just for this one utility. It is axiomatic that higher rates have an economic impact on all ratepayers that pay them. Many ratepayers are customers of multiple utilities further compounding the impact. Given the tremendous economic impact of the draft rule, the draft rule's economic impact statement is clearly deficient and must be remedied.

B. Jobs Impact Statement

The Board's Jobs Impact Statement states:

> *It is not anticipated that the proposed amendment will result in the creation of new jobs or the loss of existing jobs. The proposed amendment will not have an impact on any other sector of the economy of the State of New Jersey.*

The jobs impact statement is flawed. The draft rule will decrease ratepayers' share of the tax benefits of consolidated tax filings as compared to the Rockland methodology, thus increasing utility rates. Because all of the State's large utilities participate in consolidated tax filings, the draft rule will increase electric, natural gas, water and wastewater rates throughout the State. This includes virtually every employer in the State of New Jersey. Once again, it is axiomatic that rising utility rates negatively impact all other sectors of the New Jersey economy. Accordingly, the proposed rule will have a negative impact on all sectors of the New Jersey economy, and may result in the loss of existing jobs. The Jobs Impact Statement is deficient and must be remedied.

C. Regulatory Flexibility Statement

The Board's Regulatory Flexibility Statement states:

> *The proposed amendment will not impose any recordkeeping, reporting, or other compliance requirements on small businesses. A small business, as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:B-16 et seq., is a business that has fewer than 100 full-time employees. With regard to utilities that qualify as small businesses under the Act, this amendment simply provides clarity to an existing statutory right that may*

be exercised by utilities voluntarily and, as such, will not impose any requirements on small businesses.

This statement is unclear. The statement does not explain what is meant by the "existing statutory right that may be exercised by utilities voluntarily...." Accordingly, Rate Counsel is unable to offer appropriate feedback on this section. N.J.A.C. 1:30:2.1 requires a proposed rule to "be sufficiently complete and informative as to permit the public to understand accurately and plainly the legal authority, purposes and expected consequences of the adoption...." At a minimum, the rule should cite to the statutory authority referenced in this section. Due to the vagueness of the Regulatory Flexibility Statement, interested stakeholders are not sufficiently informed of the expected impact on small businesses that the Board anticipates from the draft rule.

D. Housing Affordability Impact Analysis

The Board's Housing Affordability Impact Analysis states:

The proposed amendment will have no impact on the affordability of housing in New Jersey and will not evoke a change in the average costs associated with housing because the proposed amendment pertains to CTA calculations.

The Housing Affordability Impact Analysis is flawed. The analysis states that "[t]he proposed amendment will have no impact on the affordability of housing in New Jersey...." This statement is simply not true. The proposed rule will result in higher utility rates for electric, natural gas, water and wastewater customers throughout the State of New Jersey compared to the current methodology. Higher utility rates result in higher housing costs.

The statement that the proposed amendment "will not evoke a change in the average costs associated with housing because the proposed amendment pertains to CTA calculations" is also

not true. The CTA calculations in this proposed rule will result in higher utility rates throughout the State. Higher utility rates result in higher housing costs. Furthermore, under N.J.S.A. 52:14B-4.1b(a),the Board is required to provide an estimated increase or decrease in the average cost of housing. The proposed rule attempts to satisfy this requirement by claiming there will be no impact on the cost of housing, which simply is not true. Utility bills are a fundamental part of any housing affordability analysis. Since the draft rule will result in higher electric, gas, water and wastewater rates throughout the State, it follows that most of the State's ratepayers will experience higher housing costs and a decrease in housing affordability as a result of this proposed rule. The draft rule has no analysis of whether rents or home ownership costs in New Jersey will increase because of higher utility bills. In failing to acknowledge or properly analyze the proposed rule's effect on housing affordability, the proposed rule appears to not comply with N.J.S.A. 52:14B-4.1b(a). The lack of analysis or any basis whatsoever for the Board's statement makes it insufficient to satisfy the statutory requirement for the proposed rules.

III. Comments on Proposed CTA Formula Contained in Draft Rule

A. The Proposed Five Year Lookback Period is Too Short and Will Lead to Volatile Results.

The Board has never explained the basis for its selection of the five year lookback period contained in the draft rule. It is firmly established law that the savings associated with a utility's participation in a consolidated tax group must be shared with a utility's ratepayers, since ratepayers compensate the utility for taxes as if the utility filed alone. I/M/O the Revision in Rates Filed by New Jersey Power & Light Company, Increasing Its Rates For Electric Service, 9 N.J. 498, 528 (1952) (a utility "is entitled to an allowance for actual taxes and not for higher taxes that it would pay if it filed on a different basis.") The draft rule fails to explain how the use of a five year lookback satisfies this legal mandate. There is no record or reasoned analysis to support adopting a rule that limits the lookback period to only five years, nor is there any basis in tax law or regulatory policy. The proposed five year lookback is arbitrary and should be changed to reflect a longer time period.

In order to avoid volatility, and the disproportionate impact of an outlier year, the draft rule should use a lookback period much longer than five years. The proposed five year look back period will produce volatile results and does not give an accurate picture of the actual taxes paid over time by the holding company. Using a five year look back period, negative net income of one or two years can easily outweigh the positive income of the prior years, resulting in no consolidated tax adjustment. The five year look back period provides a distorted picture of the true economic activity of the utility and the holding company and will result in collection of millions of dollars each year from ratepayers for the payment of hypothetical taxes. The five year look back period thus results in an inaccurate measurement of consolidated tax benefits and is unfair to ratepayers.

B. Rate Counsel Recommends Changing the Proposed Lookback Period to Twenty Years.

Rate Counsel recommends that the Board utilize a twenty year lookback period, as a longer time period produces a more accurate picture of a company's negative and positive net income, resulting in a more accurate picture of the amount of taxes actually paid. A twenty year period is consistent with the pre-Tax Cuts & Jobs Act ("TCJA") carry-forward period, which allowed losses to be carried forward for 20 years.[4] 26 U.S.C. § 172 (2014). Unlike the five years contained in the draft rule, the twenty year look back period recommended by Rate Counsel has a basis in tax law and in regulatory policy.

Rate Counsel's proposed twenty year look back period also maintains one of the Board's original objectives in establishing the prior methodology:

> Further, the rate base approach recommended by Staff properly compensates ratepayers for the time value of money that is essentially lent cost-free to its affiliates in the form of tax advantages used currently and takes into account the fact that loss affiliates could utilize their net operating loss on a stand-alone-basis under the carry back and carry forward provisions of the Internal Revenue Code.

I/M/O The Verified Petition of Jersey Cent. Power & Light For Review & Approval Of An Increase In & Adjustments To Its Unbundled Rates, BPU Docket Nos. ER02080506 et. al., Board Order dated May 17, 2004.

Furthermore, the Board should utilize a lookback period longer than five years in order to smooth out the effect of outlier years. The twenty year lookback period recommended by Rate Counsel will minimize the effect of unusual tax years. If the Board adopts a five year lookback, one or two unusual tax years will have an inordinate influence on the results of the CTA calculation, and will distort the picture of a utility's tax situation. A twenty year look back period will produce less volatile results and more accurately reflect a utility's actual tax situation.

[4] Under the TCJA, net operating losses can now be carried forward indefinitely. 26 U.S.C. § 172 (2018). Rate Counsel is not, however, advocating for a review period longer than twenty years.

C. The Proposed 75% Allocation to Shareholders is Arbitrary and Deprives Ratepayers of Their Legally-Mandated Share of the Tax Advantage Enjoyed by Utility Holding Companies.

As noted above, the APA requires the Board to explain why it has made a substantive change to the proposed regulation, changing the proposed allocation to shareholders from 25% to 75%. As ratepayers compensate the utility for taxes based on its tax liability as if filing alone, this single change will result in tens, if not hundreds of millions of dollars annually in ratepayer-funded phantom income tax expense. If the Board wishes to continue with this proposed allocation, it must abide by the APA and re-publish the proposed rule to explain its basis for making this substantive change.

In addition, the change in allocation deprives ratepayers of their fair share of consolidated tax savings. As noted above, it is settled law that the savings associated with a utility's participation in a consolidated tax group must be shared with a utility's ratepayers. I/M/O N.J. Power & Light Co., supra, 9 N.J. at 498. The existing methodology, which has been used by the Board for years, already includes an allocation between ratepayers and shareholders. The proposed rule whittles down ratepayers' share of the consolidated tax savings to such an extent that the sharing with ratepayers will become practically meaningless. Indeed, it is difficult to envision that the New Jersey Supreme Court, in I/M/O N.J. Power Co., supra, would have viewed the proposed regulation as satisfying its prohibition on ratepayer-funded phantom tax expense. One need only look to the JCP&L case, BPU Docket No. ER12111052, supra, to see the magnitude of the reduction in benefits to ratepayers. In the JCP&L matter, ratepayers received only one-tenth of the savings – a decrease of approximately $50 million per year - that they would have under the prior methodology, which itself already included a sharing between ratepayers and shareholders.

Under the rate base methodology being retained in the draft rule, ratepayers do not get the entire tax benefit, only a share based on the positive net income of the utility. The consolidated income tax benefit is allocated among all companies that had cumulative taxable income from 1991 to the present, based on each entity's share of the aggregated positive taxable income. All companies with cumulative positive taxable income receive a portion of the tax benefit, based on each company's share of cumulative taxable income. For example, if the New Jersey utility was responsible for 10% of the cumulative positive taxable income since 1991, then the New Jersey utility would be allocated 10% of the consolidated tax benefit. Under the prior methodology, the remaining 90% would be allocated either to non-regulated entities in New Jersey or to companies (both regulated and non-regulated) in other states. Because the calculation already involves a sharing, an additional 75% reduction to ratepayers' share is unreasonable.

Thus, the proposed 75/25 sharing mechanism ignores the fact that the CTA is a rate base deduction that compensates ratepayers only for the time value of the benefit provided to the consolidated group. Given the methodology used by the BPU for determining consolidated tax adjustments, utility base rates include the full income tax expense based on the utility's level of revenues and expenses found by the Board to be reasonable. Ratepayers are paying 100% of this *pro forma* income tax expense even though in many cases these amounts are not being paid to the IRS. Because the consolidated tax adjustment is a rate base adjustment and not a direct expense reduction, the benefit to ratepayers reflects only the time value of the benefit provided to the consolidated group. As noted by the Board in the 1993 JCP&L base rate case adopting the base rate methodology:

> The rate base approach properly compensates ratepayers for the time value of money that is essentially lent cost-free to the holding company in the

form of tax advantages used currently and is consistent with our recent Atlantic Electric decision.[5]

Attached hereto is a summary that sets forth the percentage allocated to each regulated New Jersey utility of the consolidated tax benefit. Using the rate base methodology, shareholders get all of the loss benefit allocated to the unregulated affiliates and all of the benefit that should go to the regulated affiliates in jurisdictions without a CTA. The draft rule proposes to further reduce by 75% the allocated share of the tax benefit allowed ratepayers. Under this proposal, the corporate parent would end up retaining the overwhelming majority of the tax benefit. By allocating only one quarter of the benefit of the consolidated tax adjustment to ratepayers, the draft rule includes an unnecessary and inequitable additional sharing.

D. Transmission Assets Of The Utility Should Continue To Be Included In The Calculation Of The CTA.

Transmission is a regulated service. Transmission rates are regulated by FERC and paid by New Jersey ratepayers. FERC regulates in a totally different way than the BPU, and FERC formula rates do not include a consolidated tax adjustment. Thus, if transmission assets are excluded from the Board's consolidated tax calculation, ratepayers will never receive the tax benefits accrued through the use of ratepayer funds. Ratepayers are entitled to share in the benefits of the consolidated tax filing. If transmission assets are removed from the calculation, then regulated rates are subsidizing unregulated and unprofitable ventures with no benefit to New Jersey ratepayers. Rate Counsel recommends that the Board continue to include transmission assets in the consolidated tax adjustment.

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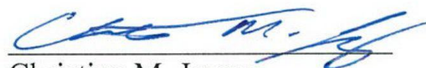
[5] I/M/O the Petition of Jersey Central Power & Light Company for Approval of Increased Base Tariff Rates and Charges for Electric Service and Other Tariff Revisions, BPU Docket No. ER91121820J, Decision and Order (June 15, 1993).

Conclusion

For all of the reasons stated above, this rulemaking process should be proceed only in a manner that ensure compliance with all statutory provisions of the APA. Furthermore, specifics of the CTA calculation must be changed in order for ratepayers to receive an equitable portion of consolidated tax benefits. Specifically, the time period used in the draft rule should be extend to twenty years to avoid volatility, the additional 75% allocation to shareholders should be eliminated, and transmission assets of a utility should be included in the formula for calculating CTAs.

Respectfully submitted,

STEFANIE A. BRAND, DIRECTOR
Division of Rate Counsel

By: 
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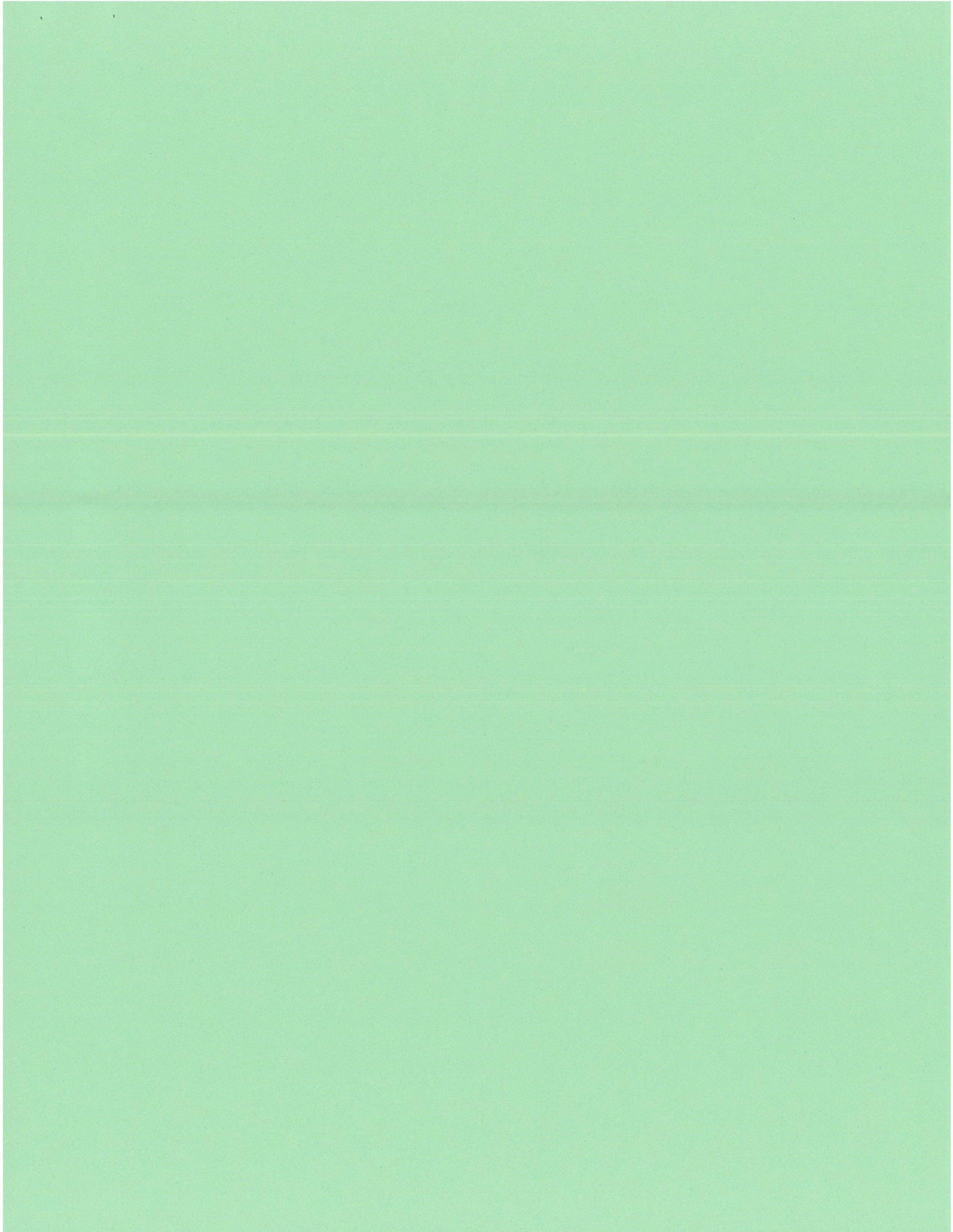

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

STEFANIE A. BRAND
Director

August 21, 2018

Via Hand Delivery
Aida Camacho-Welch, Secretary
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Trenton, New Jersey 08625-0350

Re: <u>I/M/O Proposed Amendment to N.J.A.C. 14:1-5.12 – Tariff Filings or Petitions Which Propose Increases in Charges to Customers</u>
BPU Docket No. AX17050468
Proposal Number: PRN 2018-007

Dear Secretary Camacho-Welch:

Please accept this letter from the New Jersey Division of Rate Counsel ("Rate Counsel") regarding the above-referenced matter. This letter is a follow-up to a phone call that took place on August 16, 2018 between Rate Counsel and senior staff of the Board of Public Utilities ("BPU" or "Board"). During that call, Rate Counsel confirmed to Board Staff that the comments submitted by Rate Counsel on March 16, 2018 solely addressed the rule proposal for the above-referenced matter that was published in the New Jersey Register on January 16, 2018. Rate Counsel never had the opportunity to comment on the draft rule published on February 5, 2018 because Rate Counsel did not become aware of the existence of this second version of the rule until late May 2018.

The January 16, 2018 publication of the proposed rule was the only publication for which Rate Counsel received notice. Rate Counsel staff subsequently learned that a separate, and substantively different, version of the rule had been published on February 5, 2018. By the time that Rate Counsel finally learned of the February publication, the comment period had been over for approximately seven weeks. Despite being the statutory representative of ratepayers in New Jersey, Rate Counsel was never provided with notice of the February publication, and therefore was unable to submit comments on that version of the draft rule. The Board's failure to provide notice to Rate Counsel of the February publication constituted a violation of N.J.A.C. 1:30-5.2(a)(3), which requires the Board to e-mail or mail either the notice of proposal or a statement of the substance of the proposed agency action to "interested persons" and "those persons on the agency's electronic mailing list..." Given that the rule was being proposed to comply with a remand by the Appellate Division in an appeal brought by Rate Counsel, there can be no doubt that Rate Counsel was an interested party who should have been notified of the re-proposal.

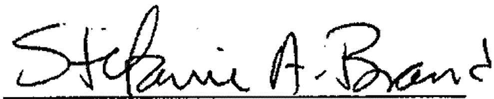
Moreover, Rate Counsel is writing to express to the Board its belief that the February 5, 2018 publication failed to comply with the requirements for "substantive changes" to a draft rule as set forth in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et. seq. The draft rule published in January allocated 75% of the calculated consolidated tax adjustment to ratepayers, while the draft rule published in February allocated only 25% of the calculated adjustment to ratepayers. This change will result in tens, if not hundreds of millions, of dollars in additional rate increases annually to ratepayers compared to the January draft rule. This changes "what is being prescribed, proscribed or otherwise mandated by law" and will "enlarge...the scope of the proposed rule and its burden on those affected by it," thereby constituting a "substantive change" under N.J.S.A. 52:14B-4.10.

The draft rule published on February 5, 2018, did not include any of the required elements of the public notice, and was therefore deficient. In addition, the notice requirements set forth in N.J.A.C. 1:30-5.2 were also not met for the February publication. If the Board wishes to proceed with the new allocation set forth in the February draft rule, it must meet all of these

requirements, including an explanation of its reasons for substantially decreasing ratepayers' share of consolidated tax savings.

By this letter, Rate Counsel requests that these deficiencies be cured before any final rule is adopted, and that the Board provide to Rate Counsel copies of all comments from the public received in response to both the January draft rule and the February draft rule. These comments have not been placed on the BPU's website, and Rate Counsel respectfully requests that it be provided copies within ten days of the Board's receipt of this letter.

Respectfully submitted,



Stefanie A. Brand
Director, Division of Rate Counsel

I/M/O Proposed Amendment to N.J.A.C. 14:1-5.12- Tariff Filings or Petitions Which Propose Increases in Charges to Customers

BPU Docket No. AX17050468
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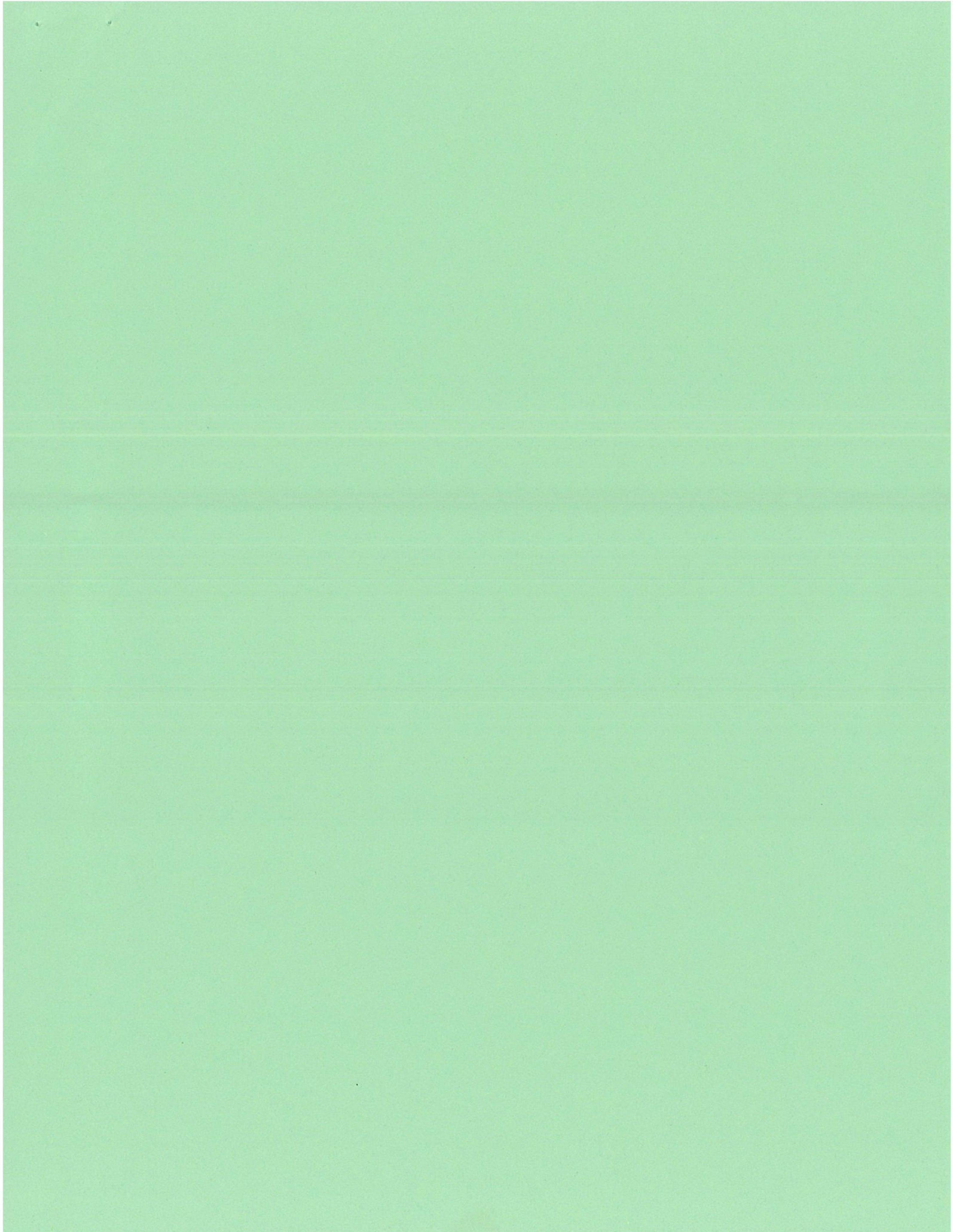

SUMMARY OF CTA ADJUSTMENTS

Rate Base Adjustments - Reflects Current Sharing Methodology

	5 Years	15 Years	20 Years	Since 1991	% of Tax Benefit Allocated To Utility (20 Yrs.)
Atlantic City Electric	$0	$84,949,821	$168,834,450	$214,074,243	26.64%
RECO	$15,847,477	$7,959,191	$8,549,175	$8,240,137	2.90%
JCP&L	$0	$287,093,108	$433,593,208	$457,340,796	14.91%
PSE&G (Total)	$0	$31,595,481	$66,842,707	$78,594,917	47.67%
South Jersey Gas	$0	$9,161,320	$14,707,040	$15,823,390	59.58%
Elizabethtown Gas Co.	$0	$34,565,629	$42,934,836	$45,895,733	10.55%
New Jersey Natural Gas	$9,980,319	$20,572,909	$23,002,203	$24,005,688	56.14%
Aqua	$14,546,104	$3,166,841	$4,262,222	$4,468,160	8.00%
New Jersey American	$113,763,398	$188,027,335	$183,571,240	$181,956,792	25.56%
United Water	$37,103,240	$120,176,297	$94,611,731	$90,516,401	34.57%
Atlantic City Swerage	$142,828	$351,194	$721,035	$1,512,021	100.00%

Estimated Revenue Requirement Impact (Assuming 50% debt at 6.0%, 50% equity at 9.75% and 40.85% tax rate.)

	5 Years	15 Years	20 Years	Since 1991
Atlantic City Electric	$0	$9,549,853	$18,979,960	$24,065,708
RECO	$1,781,535	$894,753	$961,078	$926,336
JCP&L	$0	$32,274,312	$48,743,499	$51,413,145
PSE&G (Total)	$0	$3,551,887	$7,514,295	$8,835,450
South Jersey Gas	$0	$1,029,893	$1,653,330	$1,778,827
Elizabethtown Gas Co.	$0	$3,885,784	$4,826,630	$5,159,487
New Jersey Natural Gas	$1,121,963	$2,312,757	$2,585,852	$2,698,661
Aqua	$1,635,238	$356,009	$479,149	$502,300
New Jersey American	$12,789,006	$21,137,578	$20,636,634	$20,455,142
United Water	$4,171,056	$13,509,928	$10,636,022	$10,175,635
Atlantic City Swerage	$16,056	$39,480	$81,057	$169,978