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TRENTON, NJ

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November 30, 2018

Client/Matter No. 21561-2

RECEIVED
CASE MANAGEMENT
DEC 03 2018
BOARD OF PUBLIC UTILITIES
TRENTON, NJ

Aida Camacho-Welch, Secretary
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. AX1750469 AX 17050469
Proposal Number PRN 2018-018

Dear Secretary Camacho-Welch:

The New Jersey Large Energy Users Coalition ("NJLEUC") provides these comments pursuant to the "Notice to Reopen Public Comment Period for Reproposed Amendment to N.J.A.C. 14:1-5.12; Tariff Filings or Petitions Which Propose Increases In Charges to Customers". NJLEUC opposes the proposed rule because it would significantly alter the Board's longstanding policies and guidelines regarding utility consolidated tax adjustments ("CTAs"), and dramatically reduce, if not totally eliminate, the benefits ratepayers would be eligible to receive pursuant to those policies and guidelines.

Procedural Background and Due Process Issues

This rulemaking follows action by the Superior Court, Appellate Division, which vacated the Board's December 17, 2014 Order adopting similar CTA guidelines in a prior stakeholder proceeding ("CTA Order"). The Appellate Division reversed the Board upon a finding that the Board had failed to provide a factual and legal basis for the amended CTA guidelines, violating the due process rights of participating stakeholders. The Appellate Division remanded the issue to the Board to conduct a rulemaking and to develop the necessary record to support the Board's proposed guidelines.

CMS
J. Boyd, Esq. A. Morgan, Esq.
S. Peterson

In accordance with the Appellate Division's directive, on January 18, 2018, the Board published a proposed rule in the New Jersey Register. The proposed rule contained, among other things, a proposed sharing arrangement that allocated 75% of calculated CTA benefits to ratepayers and the remaining 25% to the utilities. On March 18, 2018, NJLEUC submitted comments that, among other things, viewed as a positive step the Board's departure from the sharing arrangement contained in the CTA Order, which would have allocated 75% of the CTA benefits to the utilities, and only 25% to ratepayers. Rate Counsel provided similar comments on the same day. On information and belief, NJLEUC and Rate Counsel were the only parties to offer comments regarding the rule proposed on January 18, 2018, notwithstanding the very active participation of the utilities in all prior proceedings regarding the CTA, including the appeal. At the time NJLEUC submitted its comments, it was not aware—because no actual notice had been provided to it—that the Board had published a "Reproposed Amendment" to the rule in the February 5, 2018 New Jersey Register.

On August 21, 2018, Rate Counsel addressed a letter to the Board indicating that Rate Counsel had just learned of the February "Reproposed Amendment" and the fact that the amendment included a materially different allocation of the CTA benefits—reversing the prior allocation so that now ratepayers would only receive a 25% share, while the utilities would now receive 75%. The amendment represented a material change vis-à-vis the prior proposal, as it would reallocate tens of millions of dollars to the utilities and result in significant annual rate increases to ratepayers. When such material changes are proposed, the Administrative Procedure Act requires that notice, detailing the nature of and basis for the proposed changes, be provided to the Office of Administrative Law, and that the Board provide actual notice to parties such as Rate Counsel and NJLEUC that are "interested persons" and "persons on the agency's electronic mailing list". See, N.J.S.A. 52:14B-4.10(b) and N.J.A.C. 1:30-5.2(a)(3).

This did not occur here. Rate Counsel's letter provided the only notice that NJLEUC received regarding the second rulemaking, notwithstanding NJLEUC's active participation in the Board's various CTA proceedings and the appeal of the CTA Order. Had NJLEUC been notified of the second rule proposal, NJLEUC would have offered comments critical of the modified allocation formula, consistent with NJLEUC's longstanding arguments, grounded in a succession of appellate decisions, regarding the need for a fair and equitable sharing of CTA benefits.

Further, because the remand was ordered largely due to the Board's failure to develop a record to support its CTA proposal—thereby denying stakeholders their due process right to respond--the Board had an affirmative obligation to explain why these material changes to the Board's CTA policy were being proposed, including the factual, legal and policy basis for them, as well as the reasons for the material change made between the January and February versions of the proposed rule. The Board has not provided any such explanations.

Nor has the Board publicly posted or directly shared with NJLEUC the comments provided by other parties in response to the proposed rules. Although the Board had earlier represented that the comments submitted in response to the rulemaking would be posted on the Board's website, on information and belief this has not occurred. As of this date, the state of any such official record to cure the deficiencies cited by the Appellate Division remains uncertain at best. The apparent failure to post the comments received in response to the rules proposed in January and February on the Board's website, or to otherwise make the responses public, has denied interested parties like NJLEUC an opportunity to respond to the comments of those who support the rule. As it now stands, NJLEUC is unaware of any factual, legal or policy basis for the proposed rule, the Board's explanation for the material change between the January and February versions of the rule and for the rule generally, and the positions advanced by other commenters, either for or against the rule.

None of these infirmities have been cured by the October 1, 2018 notice, which merely re-opened the comment period for the February proposal. As was the case in February, no explanation is provided regarding the material change between the January, February and October proposals or the basis for the changes, the proposal fails to satisfy the requirements of the Administrative Procedure Act, and the Board has not shared the comments received by others in support of the proposals. In these circumstances, the proposed rule continues to be fatally flawed.

Comments

This rulemaking represents the latest step in an ongoing effort by the utilities to eliminate or significantly curtail the use of CTAs in utility rate cases. In recent years, participation in consolidated tax arrangements—which enable utilities to pay less federal income tax than would have been the case had the utilities filed as stand-alone entities--has resulted in several New Jersey utility holding companies paying little or no federal income taxes, while others have received tax refunds. The CTA is the mechanism that affords utility ratepayers the ability to share the benefits that their utilities obtain from participation in consolidated tax arrangements, thereby contributing to the establishment of utility rates that are just and reasonable.

The proposed rule departs from the law and past BPU practice, and will virtually eliminate the benefits the CTA provides in the ratemaking calculus. Under the proposed rule, ratepayers served by utilities that file consolidated returns would be compelled to pay fictitious income tax expenses, assessed at the statutory rate, even though the utilities may not actually pay taxes to the IRS. These ratepayers would therefore subsidize utility affiliates and be denied any recognition for the tax revenues they contribute to offset affiliate losses, an outcome that is singularly inconsistent with longstanding appellate court decisions. These consistent appellate court decisions distinguish New Jersey from other jurisdictions that do not utilize CTAs, jurisdictions that have been cited by certain utilities to suggest that New Jersey's CTA policy is out of the mainstream.

The rationale underlying the courts' decisions is compelling. It is a fundamental premise of utility ratemaking that a utility may pass along to customers only those expenses and costs that the utility actually incurs. If a utility were permitted to charge rates that are based on hypothetical, fictitious or inflated statements of operating expenses, such as inflated income tax payments that exceed the taxes actually paid by the utility, it would result in rates that are not just and reasonable. Therefore, our Supreme Court has ruled that if a utility charges ratepayers for taxes as if the utility paid the full corporate income tax rate, the utility must share the savings that result from the utility's consolidated filing. I/M/O the Revision in Rates Filed by New Jersey Power & Light Company, Increasing Its Rates For Electric Service, 9 N.J. 498 (1952).

In In re Lambertville Water Company, 153 N.J. Super 24 (App. Div. 1977), rev'd in part on other grounds, 79 N.J. 449 (1979), the Appellate Division rejected the utility's attempt to claim income tax expense at the maximum corporate rate because the utility had paid less than the maximum rate through participation in a consolidated tax arrangement:

> We agree that Lambertville is not entitled to a deduction in the amount of 48% of net income merely because that is an amount paid to its parent company as a result of inter-company policy or agreement. Such payment does not truly represent the tax payable to the Internal Revenue Service. If Lambertville is part of a conglomerate of regulated and unregulated companies which profits by consequential tax benefits from Lambertville's contributions, utility customers are entitled to have the computation of those benefits reflected in their utility rates.
>
> It is only the real tax figure which should control, rather than that which is purely hypothetical. And the P.U.C. Commissioners therefore have the power and function to take into consideration the tax savings flowing from the filing of the consolidated return and determining what proportion of the consolidated tax is reasonably attributable to Lambertville.
>
> Lambertville, *supra,* 153 N.J. Super at 28, (citations omitted).

The appellate courts have also accorded the Board the authority and discretion to determine the method by which a utility's effective tax rate is determined. In Toms River Water Company v. Board of Public Utilities, 158 N.J. Super 57, 61 (App. Div. 1978), the Appellate Division, citing *Lambertville*, observed that "(w)e do not undertake to direct the Board to utilize any particular method in arriving at a just conclusion, except to note that the method to be utilized must have a rational relationship with the requisite objective namely, the determination of the actual tax liability".

For more than 30 years, the Board properly responded to the clear and consistent legal authority provided by these and other appellate precedents and has implemented a CTA in all utility base rate cases. These precedents clearly distinguish New Jersey from other states which, for unexplained reasons, apparently permit utilities to include phantom, fictitious tax expenses that significantly overstate actual utility expenses and result in unjust and unreasonable rates and utility shareholder windfalls.

It is noteworthy that Pennsylvania has also long endorsed the use of CTAs in utility rate cases. An unbroken line of appellate decisions have adopted the "actual taxes paid" doctrine and held that utilities may pass along to customers only expenses or costs that are actually incurred because any other approach would permit utilities to obtain inflated rates from customers under the guise of recovering operating expenses. See, Cohen v. Pennsylvania Public Utility Commission, 468 A.2d 1143, 1150 (1983) and Barasch v. Pennsylvania Public Utility Commission, 548 A.2d 1310, 1315 (1988). The Pennsylvania Supreme Court and Pennsylvania Public Utility Commission therefore have consistently adopted an expansive CTA policy that attributes to ratepayers all tax savings that a utility obtains from participation in a consolidated tax arrangement with affiliated entities. Barasch v. Pennsylvania Public Utility Commission, 493 A.2d 653, 656 (1985); Met-Ed Industrial Users Group v. Pennsylvania Public Utility Commission, 960 A.2d 189, 196 (2008) ("Where a utility realizes federal income tax savings because of its participation in a consolidated return, Pennsylvania law requires that those savings be passed on to the ratepayers by means of an adjustment to the utility's allowance for tax expense...This principle of law is known as the 'actual taxes paid' doctrine.")

In contrast to the Pennsylvania approach, the Board has adopted a "rate base" approach to the CTA that treats the tax benefits derived by a utility holding company under a consolidated tax agreement as cost-free capital contributed by utility ratepayers. This approach incorporates a sharing of consolidated tax benefits that compensates ratepayers for the time value of money that is deemed to have been "loaned" free of charge to the utility holding company. *See*, I/M/O the Petition of Atlantic City Electric Company for Approval of Amendments to its Tariff to Provide for an Increase in Rates and Charges for Electric Service, Phase II, BPU Docket No. ER90091090J, Order dated October 20, 1992, I/M/O the Petition of Jersey Central Power and Light Co. for Approval of Increased Base Tariff Rates and Charges for Electric Service and Other Tariff Revisions, BPU Docket No. ER91121820J, Order dated June 15, 1993, and I/M/O the Petition of Jersey Central Power and Light Company for Review and Approval of an Increase in and Adjustments to Its Unbundled Rates and Charges for Electric Services, and for Approval of Other Proposed Tariff Revisions in Connection Therewith, BPU Docket No. ER02080506, Order dated May 17, 2004. These decisions required the affected utilities to include in customer rates a fair share of the tax benefits derived from the utility's participation in a holding company consolidated tax arrangement.

The Board's current consolidated tax savings policy and methodology to determine the "fair share" and time value of ratepayer benefits in utility consolidated tax arrangements is set forth in I/M/O the Verified Petition of Rockland Electric Company for Approval of Changes in Electric Rates, Its Tariff for Electric Service, its Depreciation Rates, and for Other Relief, BPU Docket No. ER02100724, Final Decision and Order, April 20, 2004 ("Rockland Order"). The Rockland Order makes clear that the CTA policy and methodology established by the Order would remain in effect until altered by a future action of the Board.

When viewed against this backdrop of clear and consistently applied CTA policy, the current rulemaking is a matter of significant concern. Other than conclusory statements and unsupported statements of belief, the Board has yet to offer any evidential, policy or legal support for the significant departure from past practice reflected in the Board's CTA Order and this rulemaking. This is problematic because the findings set forth in the CTA Order, which were the subject of the appeal and are now incorporated into the proposed rule, depart dramatically from the Board's longstanding CTA policies and applicable law. The proposed rule would (i) shorten the time period for calculation of capital loss carry forward savings from the current 25 years to 5 years; (ii) allocate to ratepayers only *up to* 25% of the CTA savings currently allocated to ratepayers; and (iii) eliminate the significant income associated with the electric utilities' multi-billion dollar transmission assets from the calculation of the CTA.

No explanation is offered regarding the rationale for the rule, why the significant changes to the Board's longstanding CTA policy are justified and necessary, why the specific modifications adopted are appropriate, and how the modifications would result in just and reasonable rates. There is no question that any agency action must be based upon "sufficient credible evidence present in the record". See, Close v. Kordulak Brothers, 44 N.J. 589, 599 (1965). However, no record—other than historic, unsupported utility protests and statements of the Board's "beliefs"--exists to support the proposed rule.

On information and belief, the amended CTA methodology set forth in the proposed rule would result in a negligible, if any, CTAs for many utilities that file consolidated tax returns. It is known that in recent years, a number of utility holding companies have paid no federal income taxes whatsoever while others have received substantial tax refunds. Although the newly-enacted federal tax law could exacerbate this situation by increasing the number of utilities that pay little or no federal income taxes, the rule would permit these utilities to continue to charge ratepayers for the payment of "phantom" taxes. The payment of phantom tax expenses are inconsistent with the case law and fundamental ratemaking principles and would result in unjust and unreasonable rates. Because the CTA assures that ratepayers share the tax benefits enjoyed by their utilities, it must be preserved in a manner that is fair to all stakeholders.

The Proposed Rule

1. Limit the review period for the CTA calculation to five consecutive tax years, including the complete tax year within the utility's proposed test year.

NJLEUC opposes this proposed rule because it would establish an arbitrary time period that is unduly limited in scope and has no basis in the record of the stakeholder proceeding, rulemaking comments, tax law or utility regulatory policy. Nor is the abbreviated carry forward period supported by any reasoned analysis of its merit, consistency with law, or effect on the *Rockland* CTA calculation, and whether the revised calculation would result in an equitable sharing of tax benefits between ratepayers and utility shareholders.

It is particularly noteworthy that the five-year review period is inconsistent with Section 172 of the Internal Revenue Code ("Code"), the relevant section of the Code. Section 172 allows consolidated tax groups to carry forward, for *twenty* years, capital losses incurred after 1997, and for *fifteen* years, capital losses incurred prior to 1998. 26 U.S.C. 172 (2014). The Code therefore authorizes tax losses to be carried as potential offsets against gains realized in future tax years for extended fifteen or twenty year periods, depending upon when the losses were incurred. Pursuant to Section 172, if carried losses are not offset against gains during the prescribed time periods, the losses expire and would no longer be includable in the calculation of a CTA.

The abbreviated five-year review period of the proposed rule stands in stark contrast to the extended time periods prescribed by the Code. No amendments have been made to the Code that would support the proposed rule's significant departure from the Code's requirements, nor has any explanation been offered to justify the rules' adoption of the abbreviated review period. The abbreviated review period would not fully reflect the tax contribution of utility ratepayers and the benefits ratepayers should receive in order for the resulting rates to be considered just and reasonable. Rather, it is evident that the five-year review period would contribute to rate volatility and the likely elimination of CTAs for the ratepayers of several of the State's electric and gas utilities, a result that is neither justified nor warranted as a matter of law or policy.

NJLEUC continues to urge the Board to instead adopt a capital loss carry forward time period for CTAs that is consistent with Section 172 of the Code. Application of the Code's extended review period would be consistent with the Board's underlying rationale for the *Rockland* 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 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 Central Power and Light For Review and Approval of an Increase In and Adjustment To Its Unbundled Rates, BPU Docket No. ER02080506, Board Order dated May 17, 2004.

By firmly rooting its revised CTA policy in the Code, the Board's continued use of an extended capital loss review period would have a substantial basis in state and federal law. The extended review period would enable ratepayers to avert rate volatility and obtain a fair share of the tax benefits that derive from revenues they pay to their utilities, which are used to offset the long term losses of utility affiliates. As a matter of equity and fairness, ratepayers' ability to share in the tax benefits their revenues make possible should be coextensive with the utilities' ability to reap tax benefits derived from those revenues.

NJLEUC acknowledges that the Board's current *Rockland* methodology is inconsistent with the Code's treatment of loss carry forwards and requires modification. The Board's current approach, which permits CTAs to include tax losses incurred beginning in 1991, permits a capital loss carry-forward period that exceed the periods prescribed by the Code, and that will further expand with the passage of time. Fairness dictates that tax losses should not be taken into account in perpetuity, but should instead be limited to the time periods prescribed by Code Section 172.

The proposed five-year review period for CTA calculations is flawed because it would arbitrarily truncate the Code's full carry forward period. If the five-year provision is adopted, it would force taxpayers to pay fictitious tax expenses, which would result in rates that are unjust and unreasonable. This is precisely the outcome that the Supreme Court has long rejected. I/M/O the Revision in Rates Filed by New Jersey Power & Light Co., 9 N.J. 498, 528 (1952).

In sum, while it is acknowledged that the Board's current CTA policy requires modification to align with the Code, the proposed five-year review period for calculating CTA benefits vastly overshoots the mark and has no basis in law, fact or compelling public policy. Quite to the contrary. The five-year review period should be rejected because it is arbitrary and capricious, contrary to law and Board policy, and would deprive utility ratepayers of most, if not all, of the CTA benefits to which they are currently entitled.

2. The calculated CTA shall be allocated so that the rate base adjustment may be reduced by up to 25 percent of the full CTA.

The proposed rule is objectionable not only because it lacks factual, legal or regulatory policy support, but because it inexplicably reverses the progress of the January proposed rule and would adopt an allocation formula that has the potential to completely deny any CTA benefit to ratepayers. NJLEUC continues to oppose any sharing of the limited CTA benefits currently payable to ratepayers under the *Rockland* methodology. NJLEUC is not aware of any legal precedent, policy or evidential support developed in any rate case, regulatory or rulemaking proceeding that would support the proposed sharing formula, nor has any rationale or supporting statement been offered in support of the proposed rule explaining why it is reasonable for ratepayers to potentially be deprived of all or a significant portion of their current limited benefit.

For reasons unexplained, each iteration of the sharing formula that has been proposed by the Board further reduces the potential CTA benefit to ratepayers. In this latest iteration, ratepayers *may* receive a rate base reduction of *up to* 25% of the full CTA benefit, meaning that ratepayers are not even assured a full 25% share and, in fact, could receive considerably less. *Indeed, under the express language of the proposed rule, it would be possible for ratepayers to receive no CTA benefit at all.* Such an inequitable forfeiture of benefits would completely deny ratepayers compensation for the revenues they contribute to utility consolidated tax arrangements and result in unjust and unreasonable rates that violate longstanding law.

The proposed sharing arrangement would be particularly unfair to ratepayers because the *Rockland* methodology is already predicated on an unequal "sharing" of consolidated tax benefits between utility shareholders and ratepayers. The *Rockland* methodology's "rate base" method treats the revenues contributed by utility ratepayers as cost-free capital that is "loaned" to the consolidated tax group. Ratepayers are credited only for the carrying costs associated with the "loan", rather than providing ratepayers with an actual share of the significant tax benefits the utilities obtain from a consolidated filing.

It should therefore be underscored that that the proposed rule would not provide ratepayers with up to 25% of the *total* CTA benefit obtained by the utilities. Nor would ratepayers be compensated for a percentage of the actual excess of income taxes paid in rates relative to the utility's allocated share of the actual taxes paid as part of a consolidated tax arrangement. Rather, ratepayers would only receive an allocated, reduced share of the consolidated tax benefit based on the positive net income of the utility, which generally represents only a small fraction of the total tax benefit to the consolidated tax group. Unlike the Pennsylvania "actual taxes paid" approach, here ratepayers do not directly benefit from the lower income tax expenses that result from consolidated tax arrangements, even though they pay full pro forma income tax expenses that may not actually be paid to the Internal Revenue Service. As noted, certain utility holding companies have paid no federal taxes at all in certain tax years while others have received substantial tax refunds.

The Board has consistently found the *Rockland* approach to represent an equitable and appropriate sharing arrangement for consolidated tax benefits in utility rate proceedings. See, I/M/O Petition of Atlantic City Electric Company for Approval of Amendments to Its Tariff to Provide for an Increase in Rates and Charges for Electric Service Phase II, BPU Docket No. ER90091090J (Order dated October 20, 1992). The Board could have adopted the more expansive Pennsylvania "all CTA benefits to ratepayers" approach, which would utilize a consolidated tax adjustment that results in a reduction to the pro forma income tax expense a utility is permitted to recover from ratepayers in its revenue requirement. However, the *Rockland* approach only partially compensates ratepayers for the revenues they generate, making it unreasonable for the Board to further reduce these benefits by 75% or more, particularly in such an arbitrary fashion. The sharing arrangement contained in the proposed rule would virtually assure that the vast majority of the consolidated tax benefit in a future rate case would be allocated to utility shareholders.

In these circumstances, in which the Board has already limited the scope of the tax relief available to ratepayers, there is no basis for a further sharing of the CTA. Ratepayers should receive 100% of the benefit currently allocated to them under the *Rockland* methodology. At minimum, ratepayers should receive the 75% share prescribed in the January rulemaking.

3. The transmission portion of an electric distribution company's income shall not be included in the calculation of the CTA.

NJLEUC continues to oppose the removal of the transmission portion of utility income from the calculation of the CTA. The fact that the Board lacks regulatory jurisdiction over utility transmission assets has no relevance to the tax treatment afforded to aggregation groups that include regulated and non-regulated entities. No legal or policy rationale or record support has been provided to justify depriving ratepayers of CTA benefits derived from the income associated with the steadily increasing, multi-billion dollar investments that have been made in utility transmission infrastructure. These huge investments have resulted in significantly higher transmission rates being charged to ratepayers and corresponding increased income to the utilities.

Further, no explanation has been offered for the fact that the proposed rule would only permit electric utilities to exclude transmission-related income from their CTA calculation while comparable treatment is denied similarly situated natural gas and water utilities. The unexplained granting of this "special status" only to electric utility transmission assets provides a further basis for a finding that the proposed rule is arbitrary and capricious as it would deny ratepayers any tax-related benefit from this very significant and rapidly expanding asset class.

The fact that the Board does not regulate transmission assets should have no bearing on ratepayers' entitlement to share the tax benefits associated with the income from these significant investments. It is no doubt the case that most consolidated tax arrangements—and certainly all involving New Jersey's utility holding companies--include diverse businesses engaged in both regulated and unregulated activities. In fact, several court decisions have found consolidated tax arrangements that include regulated utilities and their unregulated affiliates to be "rational" and not provide a basis for denial of CTA benefits. Therefore, if the regulatory status of these businesses does not provide a basis for their exclusion from the calculation of a CTA, it follows logically that the regulatory status of the assets owned by the businesses, and the income derived from those assets, should likewise be irrelevant. No New Jersey precedent has been located or cited that supports the exclusion of electric utility transmission assets from CTAs based solely upon the regulatory status of these assets, or provides a basis for the "special status" that the proposed rule would afford this asset class.

In fact, several appellate decisions support the conclusion that the regulatory status of utility assets has no bearing upon their inclusion in the calculation of a CTA. For example, Lambertville involved a water utility that was part of a "multinational conglomerate with approximately 200 subsidiaries consisting both of regulated and unregulated companies". Lambertville, supra, at 153 N.J. Super 28. The conglomerate elected to file a consolidated return for all of its affiliated companies, thereby enabling the companies to pay only a fraction of the taxes that would otherwise have been paid had they filed separately. It is noteworthy that while the court remanded the matter to the Board to articulate the basis for its tax calculation, the Court did not hold or suggest it was inappropriate for the consolidated tax group to include both regulated and unregulated entities and their respective asset classes.

Similarly, in Toms River, supra, 158 N.J. Super 57, at 60-61, the Court deemed "rational" the consolidated tax group approach of a water conglomerate that included both regulated and unregulated affiliates. Although the court noted that alternative approaches could also be deemed rational in appropriate circumstances, "the method to be utilized must have a rational relationship with the requisite objective, namely the determination of the actual tax liability" and the Board had to articulate its rationale for the selection of a specific method of computation.

The Lambertville and Toms River decisions did not address or endorse the approach adopted by the proposed rule. Nor did they turn on the regulatory status of the participants in the consolidated tax group or whether the assets they own and devote to the provision of service to ratepayers are regulated by the Board or FERC. Indeed, such an approach would be unprecedented in New Jersey.

Further, the tariffs that the Board approves for the electric utilities include rates for transmission services. The tariffs permit the utilities to collect their approved transmission, distribution and other rates from ratepayers in a single bill. These rates provide the positive revenues that are utilized by the utilities' consolidated tax groups to offset the losses incurred by their affiliates. Therefore, the proper focus for CTA calculation purposes should be on the total revenues generated by the utility for all services rendered, rather than a focus that distinguishes the assets that contribute these revenues based upon their regulatory status.

The fact that FERC formula rates for transmission service do not include a CTA should eliminate any concern that ratepayers could "double dip" the tax benefits associated with utility transmission assets. However, if transmission assets are not included in the CTA calculation, the many billions of dollars that ratepayers pay to support this large and rapidly expanding asset class will not provide any tax benefit whatsoever to ratepayers. No explanation is offered why this result is necessary or appropriate, or how it will result in just and reasonable rates.

In sum, the proper focus of analysis for tax purposes should be on the tax gains (or, less likely, losses) generated by the utility's transmission assets, as opposed to the regulatory status of those assets. Because they pay rates that support utility transmission assets, Ratepayers should be permitted to share the tax benefits associated with those assets that accrue to the utilities through their consolidated tax filings. No policy or legally cognizable rationale has been provided for the exclusion of income associated with electric utility transmission assets from the CTA calculation. Therefore, NJLEUC urges that transmission-related income should continue to be included in the CTA calculation.

Conclusion

For all of the foregoing reasons, this rulemaking does not comply with the directives issued by the Appellate Division nor the Administrative Procedure Act, and must do so for a final rule to be properly adopted. When these issues have been cured, the rule adopted by the Board should result in a CTA calculation that is fair and equitable to ratepayers, complies with existing law and results in just and reasonable rates. The current rule proposal does not strike the balance required by current law and regulatory policy and therefore should be rejected.

Respectfully submitted,

New Jersey Large Energy Users Coalition

By: ____________________________

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Docs #3469675-v1

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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