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April 13, 2020

By Electronic Mail
Honorable Aida Camacho-Welch, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Re: In the Matter of the Petition of Atlantic City Electric Company for Approval of a Voluntary Program for Plug-In Vehicle Charging
BPU Docket No. EO18020190

Dear Secretary Camacho-Welch:

Please accept for filing this Motion to Dismiss by the New Jersey Division of Rate Counsel ("Rate Counsel"), pursuant to the April 9, 2020 Prehearing Order with Procedural Schedule in the above-referenced matter. Copies of this motion are being provided to all parties on the service list by electronic mail only.

Please acknowledge receipt of this Motion to Dismiss.

Thank you for our consideration and attention to this matter.

Respectfully submitted,

STEFANIE A. BRAND
Director, Division of Rate Counsel

By: /s/ Brian Weeks
Brian Weeks, Esq.
Deputy Rate Counsel

BW
Enclosure
cc: Service List

In the Matter of the Petition of Atlantic City Electric Company for Approval of a Voluntary Program for Plug-In Vehicle Charging
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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Petition of Atlantic City Electric Company for Approval of a Voluntary Program for Plug-In Vehicle Charging	))))))	**BPU Docket No. EO18020190**

DIVISION OF RATE COUNSEL
MOTION TO DISMISS

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Dated: April 13, 2020

TABLE OF CONTENT

PRELIMINARY STATEMENT

Atlantic City Electric (“ACE”) has filed the petition in this case seeking to provide thirteen “Offerings” designed to provide incentives for customers to buy and own Electric Vehicles (“EVs”) and Electric Vehicle Service Equipment (“EVSE”) such as charging infrastructure. The first two Offerings and the last Offering are requests for permission to provide incentives through tariff provisions and changes. Offerings 3-12, however, include a grab bag full of ideas and incentives that involve the Company building certain EVSE itself, discounting the cost of building EVSE for customers, buying equipment for customers that the customers will then own, and unspecified “innovative” projects. For all of these Offerings, ACE seeks recovery of and recovery on its investments. The total net cost of these Offerings is estimated to be $42 million, which ACE seeks to recover through regulated rates from all of its customers, whether they participate in the proposed programs or not.

In this motion, Rate Counsel seeks dismissal of the non-tariff Offerings, *i.e.*, Offerings 3-12. With respect to Offering 9, Rate Counsel seeks to limit the Offering to “make-ready” work on the utility side of the meter only. Rate Counsel’s motion is based on the long-held legal principle that utilities may only seek recovery of “used and useful utility property” that is dedicated to the public service. It is also based on the lack of statutory authority for the Board of Public Utilities (“BPU” or “Board”) to allow utilities to use regulated rates to fund competitive services, as defined in the Electric Discount and Energy Competition Act (“EDECA”), N.J.S.A. 48:3-49 et seq., and the lack of authority for these programs in the recently enacted Plug-in Vehicle Act (“PIV Act”), P.L. 2019, c. 362, N.J.S.A. 48:25-1-11. For purposes of this motion, Rate Counsel has accepted the descriptions of the proposed Offerings as set forth in ACE’s petition. For the reasons set forth at length below, the proposed programs that are the subject of

this motion cannot be approved as a matter of law, and Rate Counsel respectfully requests that its motion be granted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

ACE initiated this matter with a Verified Petition filed on February 22, 2018, pursuant to N.J.S.A. 48:2-21 and N.J.A.C. 14:1-5.11. That petition sought approval by the Board for a Plug-In Vehicle ("PIV") charging program whereby ratepayers would provide over $12 million in funding for PIV incentives for equipment not owned by ACE. On March 26, 2018, the Board issued an Order retaining jurisdiction over this matter and designating Commissioner Upendra J. Chivukula as the presiding officer with authority to rule on certain motions. Multiple parties sought intervention status. On April 6, 2018, Rate Counsel moved to stay ACE's Petition until the conclusion of the Board's Electric Vehicle ("EV") Stakeholder Group process. ACE filed its opposition to that motion on April 16, 2018, and Rate Counsel replied on April 23, 2018. ChargePoint, Inc, which has since been granted intervenor status, joined Rate Counsel's motion to stay on April 26, 2018.

On December 17, 2019, ACE filed an Amended Petition in which the Company proposes to vastly expand the scope of its Original Petition to a total net cost to ratepayers of an estimated $42 million. The Amended Petition seeks to place non-utility property that is not used and useful in the public service into rate base and to permit ACE to offer EV services already available in the competitive market. ACE's program would use ratepayer funds to allow ACE to undercut competitors, eliminating their ability to provide those services at competitive prices without ratepayer funding.

On January 17, 2020, the Governor signed into law the Plug-In Vehicle Act ("PIV Act"), which sets goals and authorizes incentives to increase the use of PIVs in New Jersey. N.J.S.A.

[1] Due to the intertwined nature of the procedure and facts in this matter, they have been combined for the convenience of the Board.

48:25-1 -11. The legislation directs the Board to undertake certain statewide tasks, including promulgating rules, conducting studies and allocating $30 million per year from the Societal Benefit Charge ("SBC") to subsidize the purchase of certain types of EVs and EVSE in New Jersey. N.J.S.A. 48:25-7.[2] The Board is authorized to use these funds to create the Plug-in Electric Vehicle Fund and distribute rebates for the purchase of electric vehicles as well as incentives for in-home electric vehicle equipment. Id. Significantly, other than SBC funds, the PIV Act does not authorize or direct the Board to allow the investment of any ratepayer funds in its implementation. In fact, the PIV Act does not provide any role or authority for regulated public utilities to invest in or subsidize EVs or EVSE. Despite this change in law, ACE seeks to pursue its amended petition.

Shortly after signing the PIV Act, on January 27, 2020, Governor Murphy unveiled the State's 2019 Energy Master Plan ("2019 EMP"),[3] which seeks to cost-effectively generate 100% clean energy and reduce GHG emissions more than 80% below 2006 levels by 2050. 2019 EMP, pp. 11-12. The 2019 EMP intends to reach these goals "largely through electrifying the transportation and building sectors, promoting energy efficiency, and meeting more than a doubling of load growth with 94% carbon-free electricity." Id.

The 2019 EMP assigns the Board a "rigorous" set of goals, while also upholding the Board's mission to provide a "safe, reliable, resilient and affordable" energy system for all New Jersey residents. Id. at p. 11. For example, the Board is to help support the purchase or lease of

[2] The PIV Act also allows the Board to include funds appropriated by the Legislature and utilize any return on investment of moneys deposited in the fund for the Plug-In Electric Vehicle Fund. N.J.S.A. 48:25-7a.

[3] State of New Jersey, "2019 New Jersey Energy Master Plan, Pathway to 2050," available at http://d31hzlhk6di2h5.cloudfront.net/20200127/84/84/03/b2/2293766d081ff4a3cd8e60aa/NJBPU_EMP.pdf.

330,000 ZEVs[4] by 2025. Id. at p. 29. The 2019 EMP anticipates that fully electrifying the transportation and building industries in New Jersey will increase the use of electricity enormously, by as much as 2.3 times by 2050. Id. at p. 176. The Board must work with the EDCs to develop Integrated Distribution Plans, within a year, to plan for, finance and implement the electric distribution system upgrades required for expanded EV charging. Id. at pp. 14, 176 & 194. The 2019 EMP envisions the EDCs upgrading their distribution systems to accommodate the huge anticipated load increase from EVs, but does not discuss having utilities subsidize the purchase of EVs or EVSE. Id. at p. 14 ("New Jersey must plan for, finance, and implement distribution system upgrades that will be required to handle increased electrification ...").

On April 9, 2020 Commissioner Chivukula issued a Prehearing Order, granting motions to intervene by the Natural Resources Defense Council, ChargePoint, Inc. and Greenlots, Inc. and motions to participate by Public Service Electric and Gas Co. and Jersey Central Power and Light Co., and denying the motion to participate by Greenlots. The Order declined to address the motion to intervene by Tesla, Inc., stating that its attorney is not admitted to practice in New Jersey and his appearance would be subject to a further motion under N.J.A.C. 1:1-5.2. Tesla's attorney moved for reconsideration, representing that he is in fact admitted to practice in New Jersey. The Order denied Rate Counsel's motion to stay under N.J.A.C. 14:1-8.7(c) and because there is no good cause at this time to stay the Amended Petition.

[4] The term "ZEV" refers to any motor vehicle that does not emit pollutants from its tailpipe. ZEVs use engines powered by a variety of fuels including but not limited to electricity and hydrogen. Only electrically powered motor vehicles are at issue in ACE's Amended Petition.

Summary of ACE's Amended Petition

The facts set forth below are those set forth in ACE's petition and thus are undisputed. ACE's Amended Petition proposes thirteen separate "Offerings," extending over multiple years, at a total net cost to ratepayers of an estimated $42,107,000, which is nearly three times the cost in ACE's Original Petition. Amended Petition, pp. 1-3. As described below and in ACE's Petition, in addition to rate incentives, the Company proposes to offer EVSE rebates for up to 1,500 residential customers. Further, ACE proposes to offer rebates and rate incentives for EVSE installation and operation for: up to 200 EVSE at multiple dwelling units ("MDUs")[5]; up to 150 EVSEs at workplaces or public garages; and up to 150 EVSEs for fleet use. ACE also proposes to own and operate up to 45 direct current fast chargers ("DCFCs")[6] and up to 200 "Level 2"[7] chargers. These offerings are in addition to ACE's proposed offerings for New Jersey Transit and school buses. Ratepayers would subsidize both the purchase of all of the EVs and EVSE proposed by ACE, as well as the charging of the EVs. Id. at p. 11, Table 1. The thirteen Offerings are as follows:

Offering 1: "Whole House" Time-of-Use Residential Rates – Rate Schedule "RS-PIV." This proposal would permit an unlimited number of qualified Basic Generation Service ("BGS") residential customers that own PIVs to be billed under Rate Schedule "RS-PIV" instead of the standard residential service classification "RS." This new rate schedule provides for a "whole house" time of use ("TOU") rate that incentivizes participating residential customers to shift their electric load - including load associated with charging PIVs - to off-peak hours. A second meter would not be necessary. The estimated cost of the Offering is $120,000.

Offering 2: Off-Peak, Off-Bill Incentive for Residential Customers with Existing, Installed EVSE – Rider "REVCP." This proposal would include up to 300 residential customers with existing, installed PIV chargers, or who acquire a PIV charger on their own. Participants would be enrolled in Rider "REVCP" which would provide an off-bill incentive of 5 cents per kWh for off-peak PIV charging, netted against any on-peak PIV charging. A second meter would not be required. A mobile device (provided by ACE) installed in a customer's PIV would allow ACE to measure off-peak charging. The estimated cost of the Offering is $192,000.

[5] Amended Petition, p. 9.
[6] Amended Petition, p. 2.
[7] Level 2 chargers provide 240 volts of alternating current. Amended Petition, p. 12

Offering 3: Level 2 EVSE and Installation Rebates for Residential Customers without Existing Chargers, Plus Off-Peak Incentive – Rider "REVCP." This proposal would be available to up to 1,500 residential customers, on a first-come, first-served basis, who do not have a Level 2 charger or do not otherwise acquire one on their own. ACE would provide a rebate equivalent to 50% of the cost of Smart Level 2 charger, plus a rebate for 50% of the cost of installation. Participants would also be enrolled in Rider "REVCP" with the same off-bill, off-peak charging incentive described in Offering 2. The use of a smart charger is required to provide charging data to ACE. The estimated cost of the Offering is $3.396 million.

Offering 4: Rebates for Level 2 EVSE and Installation, and Demand Charge Offset Incentive for MDUs with dedicated on-site parking, currently without existing EVSE – Rider "CEVCP." This proposal targets customers who own or operate condominiums and apartment complexes where dedicated parking can be made available for PIV charging infrastructure. ACE proposes to extend this offer to encompass up to 200 EVSEs. ACE would provide a rebate equivalent to 50% of the cost of a Smart Level 2 EVSE, plus a rebate for up to $10,000 towards installation costs (less any other applicable rebates). Participating customers would also receive a demand charge offset incentive, calculated as 50% of the EVSE nameplate capacity, multiplied by the customer's demand charge from the customer's applicable rate schedule. Participating customers would remain on their existing service, meter, and tariff, and a second meter is not required. The estimated cost of the Offering is $1,804,000.

Offering 5: Rebates for Level 2 EVSE for Workplaces, Plus Demand Charge Offset Incentive – Rider "CEVCP." This proposal targets customers that own or operate office buildings or garages where dedicated parking can be made available for EVSE. The proposal has two components: (1) ACE would provide a rebate equivalent to 50% of the cost of Smart Level 2 EVSEs to qualifying customers and (2) ACE would provide the customer with a demand charge offset incentive, calculated in the same manner as the demand charge incentive under Offering 4. ACE proposes to extend this offer to encompass up to 150 EVSEs. Participating customers would be permitted to obtain rebates for up to six EVSEs, located at up to three different sites. Participating customers would remain on their existing service, meter, and tariff, and a second meter is not required. The estimated cost of the Offering is $806,000.

Offering 6: Rebates for Level 2 EVSE for Electric Vehicle Fleets, Plus Demand Charge Offset Incentive – Rider "CEVCP." This proposal targets commercial and government agency operators of light duty vehicle fleets. Similar to Offering 5, this offering has two parts: (1) ACE would provide a rebate equivalent to 50% of the cost of Smart Level 2 EVSEs to qualifying customers and (2) ACE would provide the customer with a demand charge offset incentive, calculated in the same manner as the demand charge incentive under Offerings 4 and 5. ACE proposes to extend this offer to encompass up to 150 EVSEs. Participating customers would be permitted to obtain rebates for up to six EVSEs, located at up to three different sites. Participating customers would remain on their existing service, meter, and tariff, and a second meter is not required. The estimated cost of the Offering is $806,000.

Offering 7: Public Charging – Utility-Owned and Operated DCFCs – Rate Schedule "PC-PIV." This proposal seeks to install up to 45 DCFCs, for public use, at an estimated 15 locations

along main transportation corridors in ACE's service territory, serving local and long-distance travelers as well as PIV drivers that lack access to home charging. ACE intends to target underserved areas such as low and middle-income ("LMI") and environmental justice ("EJ") communities. Regarding specific sites, ACE intends to target government-owned sites but will also consider commercially-owned properties where the subject chargers would be available at all times to PIV drivers. The DCFCs under this offer would be owned and maintained by ACE. The electricity provided would be from 100% renewable sources through the Green Adder found in Offering 13. The estimated cost of the Offering is $4.576 million, to allow ACE to enter this competitive market.

Offering 8: Public Charging – Utility-Owned Level 2 EVSEs – Rate Schedule "PC-PIV." This proposal seeks to install up to 200 Level 2 EVSEs, for use by the public, at an estimated 65 neighborhood locations within ACE's service territory. ACE intends to target underserved areas, such as LMI and EJ communities. The Level 2 chargers will be owned and maintained by ACE. The electricity provided would be from 100% renewable sources through the Green Adder found in Offering 13. The estimated cost of the Offering is $7.336 million, to allow ACE to enter this competitive market.

Offering 9: Demand Charge Incentive and "Make Ready" Work Incentives for Non-Utility Owned Public DCFCs – Rider "NOUPDCFC." This proposal seeks to induce the construction of new, non-utility publicly available DCFCs by private, competitive, non-utility owner/operators and consists of two parts. The first part, an off-bill demand incentive, would reduce the effective cost of electricity to a known "set point" of 20 cents per kWh, until the Offering expires. Under the second part, a "make-ready" work incentive, ACE would perform the electrical upgrades and work up to the point of the charger connection, at no direct cost to the non-utility owner/operator. ACE seeks to extend this offer to up to 30 locations within its service territory, where each location could support up to 4 chargers (up to a maximum of 120 chargers, in aggregate). Offering 9 would be limited to commercially-owned property where the owner commits to making the charger(s) available for public use at all times, with priority to non-utility applicants in underserved areas. The estimated cost of the Offering is $4.071 million, to incentivize a select group of private entities operating for-profit charging stations.

Offering 10: The Innovation Fund – Rider "CTCP." ACE proposes an "Innovation Fund," by which interested persons or groups could seek funding from the Company to support innovative projects designed to further PIV charging and support electrification of the transportation sector, such as PIV car share hubs, urban residential charging hubs, Vehicle-to-Grid ("V2G") charging demonstrations, port electrification, battery/resiliency pilots, and other similar uses. Funding would be awarded based on an application and review process conducted by the Company, with assistance and input from "key internal and external stakeholders," and projects designed to serve underserved and/or LMI and EJ communities would be "desired and encouraged." Funding would take the form of a grant issued by ACE in an amount up to 50% of the cost of the project. The project costs to which the grant would apply would be the net project cost after applying all other applicable incentives, grants, awards, and discounts. The estimated cost of the Offering is $2 million, for grants to support research and development of PIV charging infrastructure.

Offering 11: Electric School Bus Fund – Rider "CTCP." ACE proposes to provide funding to school districts to cover the incremental cost of an electric school bus over a diesel-fueled school bus, estimated at $250,000 per bus, and the cost of the associated charging infrastructure, up to $25,000 per EVSE. ACE proposes to cover the incremental cost of purchasing up to 20 electric school buses, with a limit of two buses per school district, and would give preference to school districts in LMI and/or EJ communities. The school district would be required to commit to purchase a new electric school bus (and pay the costs not covered by the Offering), keep it in service at least five years, and to provide ACE with access to the charging data. ACE would partner with the New Jersey School Board Association to formalize the criteria, identify potential districts, and establish the procurement process for dispersing funds and obtaining electric school buses. The estimated cost of the Offering is $5.5 million, for electric school buses to be owned by local school districts.

Offering 12: New Jersey Transit Bus Electrification – Rider "CTCP." ACE proposes to provide funding for charging infrastructure at a New Jersey Transit bus depot in its service territory. Specifically, ACE proposes to provide up to $250,000 in distribution engineering and upgrades as needed by the selected bus depot, and $2.25 million for high-powered charging station equipment. The Offering will be contingent on New Jersey Transit's ability to fund the elements of the project not covered by ACE's Offering (i.e., planning, electric buses, feasibility studies, etc.). ACE proposes to work in close collaboration with New Jersey Transit to develop the specific project details, scheduling, and deployment of funds. The estimated cost of the Offering is $2.5 million, for infrastructure to be owned and utilized by New Jersey Transit.

Offering 13: The Green Adder – Rider "PIV-Green." ACE proposes to allow customers participating in Offering 1, at their election, to receive electricity from 100% renewable sources (through the proposed "PIV-Green" Rider). To effectuate this Offering, ACE will procure renewable energy credits ("RECs") consistent with the amount of electricity delivered to customers that voluntarily participate in the Green Adder. ACE estimates that the Green Adder would increase a participating customer's rate by $0.0543 per kWh, but this will be dependent on REC procurement costs and ACE proposes that these additional costs associated with the Green Adder will be borne exclusively by the customers participating in Offering 1 who elect to participate in the Green Adder. With respect to Offerings 7 and 8, all electricity supplied though ACE-owned and operated public chargers would by default be derived from 100% renewable sources. The additional costs associated with the Green Adder under Offerings 7 and 8 will be borne exclusively by users of the utility-owned chargers. ACE does not seek to recover the cost of the Green Adder from other ratepayers.

Offerings 3 to 12 each require ratepayers to fund infrastructure that is not used, useful or for the most part even owned by ACE, and to subsidize other customers for specialized services not necessary for the Company to provide safe and adequate utility service. As demonstrated below, ACE's proposal is in violation of well-established state law and is not authorized by any

statutory authority. For these reasons, the Board should enter an order dismissing Offerings 3 through 12 of ACE's petition as a matter of law.

Standard of Review

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). A summary decision motion may be granted

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.
>
> N.J.A.C. 1:1-12.5(b).

A contested case before the OAL "can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed facts, as developed on motion or otherwise indicate that a particular disposition is required as a matter of law." In re Robros Recycling Corp., 226 N.J. Super. 343, 350, (App Div.), certif. denied, 113 N.J. 638 (1988).

ARGUMENT

POINT I

RATEPAYERS MAY ONLY BE CHARGED FOR PROPERTY OWNED BY THE UTILITY THAT IS USED AND USEFUL IN THE PROVISION OF UTILITY SERVICE.

In its Amended Petition, ACE seeks return on and recovery of investments that will not be owned by the Company. Much of the investment proposed in this proceeding is for EVSE that will not be owned by ACE, but rather by customers of the Company. The individuals or

parties owning the equipment will benefit from its use, however, all of the Company's ratepayers will pay for it. This equipment will not be utilized to provide safe and adequate utility service, but rather will be used to charge personal vehicles. Not only will ratepayers be paying for equipment to be owned by private individuals, ratepayers will also pay for ACE to earn a return on the property it will never own. As set forth below, the law is clear that, ratepayers can only pay for utility property that is used and useful in the provision of safe and adequate service. ACE's proposals fail to meet this basic requirement and therefore should be denied.

A. The Used and Useful Principle

It is well-established law on both the State and Federal level that investment that is recoverable in utility rates is limited to "the fair value of the property used and useful in the public service." Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365 (Sup. Ct. 1942); accord, I/M/O Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 217 (1950); In re N.J. Power & Light Co., 9 N.J. 498, 509 (1952); Verizon Communications v. Fed. Communications Comm'n, 535 U.S. 467, 484 (2002); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). This mandate encompasses two individual but related requirements. First, the property in question must consist of assets of the public utility. As the New Jersey Supreme Court has held, "[i]t is established that the rate base in a proceeding of this nature is the fair value of the property of the public utility…." In re N.J. Power & Light Co., supra, 9 N.J. at 209 (emphasis added). Furthermore, the property of the public utility must be "used and useful in the public service." Id.

The used and useful principle has its origins in the underlying justification for regulating public utilities by governmental bodies. The United States Supreme Court has held that:

> [l]ooking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public

> interest, it ceases to be *juris privati* only'….Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.
>
> Munn v. Illinois, 94 U.S. 113, 125-26 (1877) (quoting Lord Hale, *De Portibus Maris*).

Accordingly, owners of property that is "clothed with a public interest" – such as the property of a public utility - can be required to submit to regulation by the government. Id. This concept has been used to justify the regulation of public utilities for well over a century.

While owners of property that affect the public interest may be required to submit to governmental control, the power of government regulators is circumscribed by the Constitution. The Fifth and Fourteenth Amendments to the United States Constitution prohibit a State from depriving any person of property without due process of law. It is well settled that corporations such as public utilities are persons within the meaning of the Fourteenth Amendment. Smyth v. Ames, 169 U.S. 466, 522 (1898). Accordingly, public utilities must be sufficiently compensated for the use of their property under the Fifth and Fourteenth Amendments; to do otherwise would amount to a taking of private property without just compensation. Id. at 523. As the United States Supreme Court has stated:

> the Constitution fixes limits to the ratemaking power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation.
>
> St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 51 (1936).

Public utilities are compensated for the use of their property by being allowed to charge a reasonable rate for their services. See, e.g. , Duquesne Light Co. v. Barasch, supra, 488 U.S. at

307. ("[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property servicing the public which is so 'unjust' as to be confiscatory")

While public utilities are entitled to just compensation under the Fifth and Fourteenth Amendments, our courts were equally concerned with the rights of the ratepaying public. Indeed, "the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests." Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). While shareholders are entitled to reasonable rates in return for devoting their property to public use, the public is protected against "unreasonable exactions" solely in order to pay dividends to shareholders. Smyth, supra, 169 U.S. at 544-45. The balance required between the rights of the public and the rights of regulated utilities gave rise to the development of the "used and useful" principle. This principle, which endures to the present day, limits a utility's compensation to the value of utility property that is used and useful in the public service. See, e.g., Duquesne Light Co. v. Barasch, supra, 488 U.S. at 307.

The used and useful principle serves to benefit both the shareholders of public utility corporations, and the public that pays those utilities' rates. In sum, "[w]hat the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it…than the services rendered by it are reasonably worth." Smyth v. Ames, supra, 169 U.S. at 547.[8]

In following the Federal jurisprudence, the used and useful principle has long been the law in the State of New Jersey. In 1942 the New Jersey Supreme Court in Atl. City Sewerage

[8] The "fair value" approach to utility compensation adopted in Smyth was replaced by a historical cost approach in Fed. Power Comm'n v. Hope Natural Gas Co., supra, 320 U.S. at 605. However, the "used and useful" principle that first originated in Smyth remains in effect today.

Co. v. Bd. of Pub. Util. Comm'rs, supra, 128 N.J.L. at 365, held that "[t]he rate base is the fair value of the property used and useful in the public service." The Court further opined:

> A corporation of this particular class performs a public function; and the public cannot be called upon for more than the fair value of the service rendered. The utility is entitled to a just return upon the fair value of the property at the time of its employment for the convenience of the public, and the public to protection against unreasonable exactions….A rate based upon an excessive valuation or upon property not used or useful in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied.
>
> Id. at 365-66 (emphasis added).

Citing the exact language above, Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs was re-affirmed by the State Supreme Court in 1950 in I/M/O Petition of Pub. Serv. Coordinated Transp., supra, 5 N.J. at 217, and again in 1974 in In re Proposed Increased Intrastate Indus. Sand Rates, 66 N.J. 12, 22 (1974).

In Industrial Sand, the Supreme Court specifically discussed the Constitutional principles underlying the used and useful principle:

> The law has thus developed, no doubt, because the system of rate regulation and the fixing of rates thereunder are related to constitutional principles which no legislative or judicial body may overlook. For if the rate for the service supplied be unreasonably low it is confiscatory of the utility's right of property, and if unjustly and unreasonably high…it cannot be permitted to inflict extortionate and arbitrary charges upon the public. And this is so even where the rate or limitation on the rate is established by the Legislature itself.
>
> In re Proposed Increased Intrastate Indus. Sand Rates, supra, 66 N.J. at 23-24.

As the Industrial Sand Court noted, because of its Constitutional nature, the used and useful principle and its corollary that rates be just and reasonable, cannot be overridden by either legislation or regulatory or judicial decisions. Rates which permit recovery for used and useful utility property must be just and reasonable, or otherwise risk being deemed confiscatory of a utility's property rights or customers' right against unreasonable exactions.

Under the law, in addition to serving the public, property must also actually be owned by the public utility in order to be eligible for rate relief. This concept is so fundamental to the setting of rates that our courts seem to have hardly envisioned the request contained in ACE's Petition, that a public utility would seek rate relief for property owned by others. Our State Supreme Court has opined that "[p]roperty affected with a public interest, such as the assets of a public utility, fulfill a societal need while providing an investment opportunity. In general, investors may expect a utility to earn a reasonable rate of return on its assets." In re Valley Rd. Sewerage Co., 154 N.J. 224, 240 (1998) (emphases added); accord Duquesne Light Co., supra, 488 U.S. at 307 ("the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.") (emphasis added).

As with our courts, the Board has, for decades, followed the used and useful principle. See, e.g., I/M/O Petition of Suez Water Arlington Hills Inc. For Approval of an Increase in Rates, BPU Docket No. WR16060510, Order dated 11/13/17 (adopting recommendation of ALJ's Initial Decision to disallow rate recovery for a pump that had been removed from service, on the basis that it was no longer used and useful); I/M/O Parkway Water Co. For an Increase in Rates & Charges For Water Service, BPU Docket No. WR05070634, 2006 N.J. PUC LEXIS 165 (adopting ALJ's recommendation to disallow from rates all costs associated with seven wells that had been contaminated by radionuclides, on the basis that such property was no longer used and useful); In re Electric Utility Nuclear Performance Standards, 120 P.U.R. 4th 620 (1990) ("Generally, utilities include the value of property used and useful in the provision of utility service in rate base.") These are just several of the many Board decisions that have followed the used and useful principle, the entirety of which are too numerous to list.

In 2017, the Board decided a fully litigated matter that presented the exact same issue raised in this motion as to whether a utility can recover in rates an investment in customer-owned property. The Board definitively decided that such recovery is not allowed. I/M/O Petition of Rockland Electric Co. For Approval of an Advanced Metering Program; and For Other Relief, BPU Docket No. ER16060524, Order dated 8/23/17 ("RECO AMI Order").[9] In the RECO matter, Rockland Electric Company requested pre-approval to install advanced meters throughout its entire service territory. As part of its installation plan, Rockland proposed to perform work on the customer side of the electric meter in order to facilitate installation of the new meters. Similarly here, ACE proposes to subsidize customer-owned EVs and EVSE. Rockland proposed to capitalize such costs in rate base where, similar to ACE's Petition, Rockland would earn a return of and a return on customer-owned property.

The Board found Rockland's proposal to be contrary to New Jersey law. Even though the Board believed such work was necessary for the safe installation of AMI, the Board agreed with Rate Counsel that the Company's proposal "violates settled New Jersey case law." Rockland AMI Order at 22. The Board specifically found that:

> [w]ith respect to the cost of such work, the Board HEREBY FINDS that RECO's proposal is contrary to settled New Jersey case law. Accordingly, the Board HEREBY DENIES RECO's request to capitalize such costs. Costs related to this work shall not be recovered from the Company's ratepayers.
>
> Id.

It is noteworthy that the Board did not deny cost recovery of the customer-owned property to Rockland solely on the basis that Rockland proposed to "rate base" the investment. Instead, in holding that "[c]osts related to this work shall not be recovered from the Company's ratepayers," the Board denied cost recovery in any form.

[9] Available at https://www.bpu.state.nj.us/bpu/pdf/boardorders/2017/20170823/8-23-17-2F.pdf

B. Application of the Used and Useful Principle to ACE's Petition

ACE's proposals 3-12 are in clear violation of the used and useful principle. Most of them center around ACE using funds to be recovered in rates to invest in property that will be privately owned by entities other than ACE. All of them involve investments that are not necessary for the provision of safe, adequate and proper utility service. In Offering 3, ACE proposes to expend approximately $3.396 million to purchase and install Level 2 chargers in residential homes. Up to 1,500 residential customers would benefit from this program. ACE will not own or operate the chargers. Rather, individual residential customers of ACE will own and receive the benefit of the chargers installed at half price to them, with the balance of the costs to be recovered from other ratepayers – who will have no access to these chargers. In Offering 4, ACE proposes to spend about $1.804 million for charging equipment to be owned by the owners and operators of apartment and condominium complexes—not ACE. Similarly, in Offering 5, ACE proposes to spend up to $806,000 for charging equipment to be owned by customers that own or operate office buildings or garages. Again, none of the equipment will be owned by ACE. Similarly, in Offering 6, ACE proposes to spend up to $806,000 for charging equipment owned by commercial and government operators of light duty vehicle fleets. Not only will these investments not be owned by the utility, they will not be used for the provision of utility service. They will be used to power private personal vehicles or vehicles in commercial or government fleets. While certainly those vehicles and fleets will *use* electricity, that is not sufficient to be considered as "useful" in the provision of utility service. If it were, then the utilities would be free to purchase any equipment that uses electricity and provide it to some customers while charging the rest.

In Offerings 7 and 8, ACE will invest up to nearly $12 million, to be recovered from ratepayers, for utility owned charging infrastructure. While ACE will own this infrastructure, it is not needed to provide safe and reliable utility service to ACE's ratepayers. Interestingly, utility ownership and operation of charging stations was specifically deleted from the PIV legislation.[10] Thus, as discussed further below, not only does this proposal violate the used and useful principle, there is no statutory authority to allow it.

Similar concerns exist with Offering 9, by which ACE will perform the installation work up to the point of the DC fast chargers for private, non-utility entities operating for-profit charging stations. Offering 9 would also provide those private entities an off-bill demand incentive that would reduce their effective cost of electricity. Those fast chargers will not be owned by ACE nor will they be used for the provision of safe adequate and proper utility service.[11]

In Offering 10, ACE will provide funds up to $2 million for "innovation" grants. None of this investment will result in any property owned by ACE or used for utility service. The petition essentially seeks seed money from ratepayers for research and development projects. This too does not involve utility owned property that is used and useful in the public service. In Offering 11, ACE proposes to spend up to $5.5 million to buy and then donate school buses that will not provide utility service and will never be owned by ACE. In other words, ACE is simply seeking permission to use funds collected through rates to purchase buses. It is hard to imagine any argument that this aspect of the petition relates to the provision of safe, adequate and proper

[10] Compare A4819, Section 10, p. 17 http://www.njleg.state.nj.us/2018/Bills/A5000?4819_I1.HTM with P.L. 2019, ch. 362.

[11] Some "make ready work" on the utility side of the meter may be permitted consistent with the "used and useful" principle. This motion seeks only to dismiss the petition to the extent it seeks authority to do such work on the customer side of the meter. Such work on the utility side of the meter should be addressed through the main extension rules. See Point IV, below.

service. Similarly, in Offering 12, ACE proposes to expend $2.5 million for charging infrastructure to be utilized by New Jersey Transit to charge its buses. There can be no argument that the purchase of buses for school districts or chargers for NJ Transit qualifies as the provision of utility service that may be paid for through rates.

Our courts have made clear that rate recovery is limited to investment in assets owned by the utility. Because most of the charging infrastructure ACE requests recovery of in its Amended Petition will indisputably be owned by private parties, and not ACE, ACE cannot recover such costs in rates as a matter of law. See In re N.J. Power & Light Co., supra, 9 N.J. at 209 ("It is established that the rate base in a proceeding of this nature is the fair value of the property of the public utility that is used and useful in the public service at the time of its employment therein…."); accord In re Valley Rd. Sewerage Co., supra, 154 N.J. at 240 ("In general, investors may expect a utility to earn a reasonable rate of return on its assets.") (emphasis added). Because this charging infrastructure will never be dedicated to the public service, the public cannot be charged for any investment in it by the utility without it constituting an "unreasonable exaction" from ratepayers in order to pay dividends to shareholders. Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, supra, 128 N.J.L. at 365 ("The utility is entitled to a just return upon the fair value of the property at the time of its employment for the convenience of the public, and the public to protection against unreasonable exactions.") The Board in the 2017 RECO AMI Order and in many before it recognized this limitation, finding that ratepayers cannot be asked to pay for work performed on non-utility property, and denying any form of rate recovery for investment in property that was not owned by the utility. RECO AMI Order at 22.

In addition to not being owned by ACE, the customer-owned charging infrastructure ACE proposes is not dedicated to the public service, and therefore ratepayers cannot be required

to pay a return on and of such costs by law. See, e.g., Atl. City Sewerage Co., supra, 128 N.J.L. at 365-66. ACE will have no rights to use, alter or enhance the equipment for the public's benefit. Control and maintenance of the equipment will be in the private owner's purview. This infrastructure will never be employed for the public's convenience, and will not enhance or even encompass the facilities used by ACE in providing safe, adequate, and proper service. The public simply will never be granted an interest in the use of this privately owned infrastructure, which is a prerequisite for being used and useful utility property. Munn v. Illinois, supra, 94 N.J. at 125-26. As our courts have said, "[t]he public is entitled to demand that no more money be extracted from it than the services rendered by the utility are reasonably worth." In re Valley Rd. Sewerage Co., 285 N.J. Super. 202, 210 (1995).

ACE's proposal to use ratepayer money for infrastructure to be owned by others, and earn a return of and on its investment in the process, is contrary to law. Ratepayers cannot be forced to pay for Offerings 3 through 6 and 9 through 12 of ACE's Amended Petition, which add no used and useful public utility assets to ACE's infrastructure. Ratepayers also cannot be forced to pay for Offerings 7 and 8, wherein ACE would own the charging infrastructure. This infrastructure also will not be used and useful in the provision of public utility service; rather, as explained below, Offerings 7 and 8 would use ratepayer funds to subsidize ACE's entrance into the competitive market of charging EVs. The Constitutional and judicial limitations on what can be collected in rates exist to avoid "unreasonable exactions" from ratepayers such as the one ACE requests here. Accordingly, Offerings 3-12 of ACE's Amended Petition should be dismissed as a matter of law.

POINT II

BPU HAS NO STATUTORY AUTHORITY TO APPROVE FUNDING OFFERINGS 3-12 THROUGH RATES

It is axiomatic that the authority of an administrative agency like the Board of Public Utilities is defined by the Legislature in the agency's enabling act. As our Supreme Court has stated, "an administrative agency only has the powers that have been 'expressly granted' by the Legislature and such 'incidental powers [as] are reasonably necessary or appropriate to effectuate' those expressly granted powers." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562, (1978) (quoting In re Regulation F-22 Office of Milk Indus., 32 N.J. 258, 261 (1960)). While the BPU's authority over the regulation of public utilities is broad, it is not limitless**.** See In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009). The Board's authority is set forth in Title 48 of the New Jersey Statutes which establishes the parameters surrounding the Board's exercise of its authority over public utilities.

A public utility is defined in Title 48 as follows:

> The term "public utility" shall include every [entity] … that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.
>
> N.J.S.A. 48:2-13(a).

The statute gives the BPU general regulatory supervision over public utilities with certain enumerated exceptions. Id. In 1999, EDECA introduced competition to New Jersey's retail electricity generation market. The Legislature drafted EDECA to foster the role of competition "to deliver energy services to consumers in greater variety and at lower cost than traditional,

bundled public utility service." N.J.S.A. 48:3-50(a)(2). EDECA specifically maintained BPU jurisdiction over transmission and distribution, but carved out "competitive services" from the bundled utility services subject to BPU supervision. As stated in N.J.S.A. 48:2-13(d):

> Unless otherwise specifically provided pursuant to P.L. 1999, c. 23 (C. 48:3-49 et al.), all services necessary for the transmission and distribution of electricity and gas, including but not limited to safety, reliability, metering, meter reading and billing, shall remain the jurisdiction of the Board of Public Utilities. The board shall also maintain the necessary jurisdiction with regard to the production of electricity and gas to assure the reliability of electricity and gas supply to retail customers in the State as prescribed by the board or any other federal or multi-jurisdictional agency responsible for reliability and capacity in the State.

While retaining the Board's broad jurisdiction to regulate public utilities, EDECA limited the Board's authority over "competitive services." EDECA defines a "competitive service" as "any service offered by an electric public utility or a gas public utility that the [B]oard determines to be competitive pursuant to section 8 or section 10 of P.L.1999, c.23 (C.48:3-56 or C.48:3-58) or that is not regulated by the [B]oard." N.J.S.A. 48:3-51. EDECA specifically prohibited the Board from regulating competitive services except, as noted above, to ensure reliability. As stated in N.J.S.A 48:3-56, "the board shall not regulate, fix, or prescribe the rates, tolls, charges, rate structures, rate base, or cost of service of competitive services." EDECA does allow electric and gas utilities to provide certain competitive services, but only with Board approval and only under limited and specifically enumerated circumstances. N.J.S.A. 48:3-58. The Board must make certain findings before a utility may provide competitive services, including a finding that the provision of the competitive service shall not interfere with the provision of regulated non-competitive services and that the rate charged for the competitive service does not require subsidization through regulated rates. N.J.S.A. 48:3-58. In fact, one of the specific purposes of EDECA was to "ensure that rates for non-competitive public utility

services do not subsidize the provision of competitive services by public utilities." N.J.S.A. 48:3-50.

Pursuant to these statutory provisions, electric vehicle charging is clearly a "competitive service." First, the purchase and installation of EVSE and the charging of EVs are not among the functions of a public utility in New Jersey that are regulated by the Board. Thus, under the definition in N.J.S.A. 48:3-51, they are competitive services. Second, EVSE installation and EV charging are not competitive services that a regulated utility may provide subject to Board approval under N.J.S.A. 48:3-55. Those services include metering, billing, safety and reliability services, and similar services that the utility had offered prior to January 1, 1993 when their services were "unbundled." N.J.S.A. 48:3-55(f). EDECA expressly prohibits an electric public utility from providing any competitive service that was not approved or pending as of July 1, 1998. N.J.S.A. 48:3-55(i). That date passed over 20 years ago. Therefore, EV-related services are not among the competitive services that EDECA authorizes the Board to allow a public utility to provide.[12]

Finally, and perhaps most importantly, in the recently enacted PIV Act, the Legislature specifically provided that owning and operating EVSEs is not a public utility function. N.J.S.A. 48:25-10, states:

> Unless otherwise provided in Title 48 of the Revised Statutes, or any other federal or State law, an entity owning, controlling, operating, or managing electric vehicle service equipment shall not be deemed an electric public utility solely because of such ownership, control, operation, or management. The charging of a plug-in electric vehicle shall be deemed a service and not a sale of electricity by an electric power supplier or basic generation service provider pursuant to P.L.1999, c.23 (C.48:3-49 et al.).

[12] The fact that other private companies including intervenors in this case Charge Point and Tesla seek to provide these services on an unregulated basis is further indication that these services are competitive.

Thus, under the plain language of EDECA and the PIV Act, the construction, ownership and operation of EV charging stations is not a regulated public utility service, but a "competitive service" not regulated by the Board. Further, the Board is without authority to declare that EV charging is a competitive service that an electric public utility may provide, since none of the criteria for the Board to allow ACE to provide these competitive services have been met. There can be no doubt that ACE specifically intends to utilize rates for non-competitive services to subsidize these competitive offerings in direct contradiction of both the language and the purpose of EDECA. Therefore, offerings 3-12 in the Amended Petition should be dismissed.

Other provisions of Title 48 do not provide such authority either.

The Plug-in Vehicle Act

The PIV Act directs the Board to undertake certain statewide tasks, including promulgating rules, conducting studies and allocating $30 million a year from funds collected through the Societal Benefit Charge to provide incentives for the purchase of certain types of EVs and EVSE in New Jersey. N.J.S.A. 48:25-7. Outside of the SBC, the legislation sets forth only two other sources of funding for these incentives: funds appropriated by the Legislature and any return on investment of moneys that have been deposited into the Plug-In Electric Vehicle Fund. N.J.S.A. 48:25-7(a). Outside of those specifically enumerated sources, the PIV Act does not authorize the Board to allow utilities to invest any ratepayer funds in its implementation. In fact, the PIV Act does not provide any role for public utilities in subsidizing purchases or other activity related to EVs or EVSE. The PIV Act delegated to the Board the responsibility to adopt policies, programs and rules to develop a comprehensive approach to the expansion of EVs in New Jersey. However, while the legislature authorized the Board to allocate $300 million of SBC funds to promptly begin subsidizing the purchase and installation of EVs and EVSE, the

PIV Act did not authorize the Board to allow subsidies of EV-related activities through electric utility rates. In fact, language allowing the utilities to construct charging infrastructure through regulated rates was included in the original version of the bill that ultimately became the PIV Act, but that authority was removed by the Legislature before enactment.[13] In fact, as noted above, the PIV Act specifically lists the sources of funds that the BPU may use to provide incentives for EV and EVSE development and regulated rates are not among them. N.J.S.A. 48:25-7. Since the PIV Act does not authorize the Board to approve the ratepayer-funded projects proposed by ACE, those portions of the Amended Petition should be dismissed.

The Clean Energy Act

The Clean Energy Act also provides no statutory authority for the relief sought in ACE's Amended Petition. The Clean Energy Act directs the Board to require each EDC to annually reduce its customers' use of electricity by two percent. N.J.S.A. 48:3-87.9. The statute states that calculating those reductions must take into account the growth in the use of EVs. N.J.S.A. 48:3-87.9(c). That is the extent of the discussion of EVs in the Clean Energy Act. ("CEA"). The CEA only sets forth how EV load will be factored into the energy savings and demand reduction calculations. It did not otherwise direct or authorize EDC involvement in funding EV purchasing, charging or infrastructure.

N.J.S.A. 48:3-98.1 ("Section 13 of RGGI")

Finally, N.J.S.A. 48:3-98.1, often referred to as Section 13 of the Regional Greenhouse Gas Initiative ("RGGI") Act, also does not support ACE's Amended Petition. Through the

[13] Compare A4819, Section 10, p. 17, http://www.njleg.state.nj.us/2018/Bills/A5000?4819_I1.HTM with P.L. 2019, ch. 362.

RGGI Act, the Legislature granted limited authority to allow public utilities to recover through utility rates their investments in non-utility property, but only for Board-regulated energy efficiency, energy conservation or Class I renewable energy projects. Framed as an exception to the prohibition on regulated utilities performing "competitive services" under EDECA, N.J.S.A. 48:3-98.1 provides:

> Notwithstanding the provisions of any other law or rule or regulation to the contrary:
>
> (1) an electric public utility or a gas public utility may provide and invest in energy efficiency and conservation programs in its respective service territory on a regulated basis pursuant to this section, regardless of whether the energy efficiency or conservation program involves facilities on the utility side or customer side of the point of interconnection;
>
> (2) an electric public utility or a gas public utility may invest in Class I renewable energy resources, or offer Class I renewable energy programs on a regulated basis pursuant to this section, regardless of whether the renewable energy resource is located on the utility side or customer side of the point of interconnection.
>
> N.J.S.A. 48:3-98.1(a)1 and 2.

The RGGI Act defines an "energy efficiency and energy conservation program" as

> any regulated program, including customer and community education and outreach, approved by the board pursuant to this section for the purpose of conserving energy or making the use of electricity or natural gas more efficient by New Jersey consumers, whether residential, commercial, industrial, or governmental agencies.
>
> N.J.S.A. 48:3-98.1(d).

EV charging is not energy efficiency, energy conservation or Class I renewable energy as defined in N.J.S.A. 48:3-98.1(d). In fact, the use of EVs will increase electricity consumption. Thus, since the plain language of N.J.S.A. 48:3-98.1 does not apply to EV charging, that statutory provision is not sufficient to bestow authority on the BPU to allow ACE to participate in the proposed competitive services on a regulated basis.

In sum, there is no statutory authority in either EDECA, the PIV Act, the Clean Energy Act, the RGGI Statute or any other statute that provides specific authority for the BPU to allow ACE to perform the competitive services outlined in the Amended Petition on a regulated basis and fund them through rates. Absent such authority, the Board may not approve Offerings 3-12 and those aspects of ACE's Amended Petition should be dismissed.

POINT III

THE BOARD MAY NOT EXTEND ITS AUTHORITY TO FURTHER POLICY GOALS OUTSIDE OF THE JURISDICTION GRANTED TO IT BY THE LEGISLATURE

The Board may not utilize general policy goals or documents to provide authority where the Legislature has not. The Board may only expand its expressly enumerated powers to "'incidental powers [as] are reasonably necessary or appropriate to effectuate' those expressly granted powers." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562, (1978) (quoting In re Regulation F-22 Office of Milk Indus., 32 N.J. 258, 261 (1960)). Thus, the 2019 Energy Master Plan, general concerns regarding environmental goals and general statutory goals are insufficient to grant the necessary authority for the Board to approve ACE's Amended Petition.

As noted above, it is well established that the Board cannot implement state policy through the Board's ratemaking powers without an explicit grant of authority from the Legislature. See In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009). In Centex Homes, the Court reviewed the Board's amendments to its Main Extension regulations that sought to implement the goals of the State's Development and Redevelopment Plan ("State Plan") to foster "smart growth." The Court recognized that the State Plan carries no regulatory effect and, therefore, "a state agency may only make modifications to its regulations to reflect

the State Plan 'if such modifications are within the scope of the agency's authority. If the necessary modifications would exceed the agency's authority, it should seek to obtain the authority through normal legislative . . . processes.'" Id., citing In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 357 (App. Div. 2002). The Court recognized that the regulation functioned "to protect the environment and encourage smart growth," Centex Homes at 261, but that the legislative intent of the statute governing the Board's Main Extension rules "does not have land use or environmental concerns as its main purpose." Id. at 262.

The Board argued "that it has a statutory mandate under N.J.S.A. 48:2-23 to 'conserve and preserve' the environment," and therefore properly included environmental concerns in its Main Extension rule amendments. Centex Homes, 411 N.J. Super. at 253. The Court acknowledged that "the BPU's powers extend beyond those expressly granted by the statute 'to include incidental powers that the agency needs to fulfill its statutory mandate,'"; however, "we cannot say that the language of N.J.S.A. 48:2-23 demonstrates a legislative intent to integrate an environmental factor into the [main extension] analysis in such a way as to drastically change the function of the statute from a regulation of public utilities to the regulation of urban and suburban sprawl." Id. at 264-5. "While the BPU was 'intended by the Legislature to have the widest range of regulatory powers over public utilities,' that power has never been cast in environmental terms." Id. at 265-66, quoting A.A. Mastrangelo, Inc. v. Comm'r of the Dep't of Envtl. Prot., 90 N.J. 666, 685 (1982). The Court continued, "the cases examining the environmental language of N.J.S.A. 48:2-23 have never construed it to provide a general mandate as broad as is urged by the BPU in this case." Centex Homes, at 266. The Court concluded:

> Surely, the language of the State Planning Act suggests that the BPU, as an "agency," should use the plan in exercising its discretionary authority where its

> decisions affect land use. However, we find that the language of the State Planning Act does not evince a legislative intent that the State Planning Act be integrated into the BPU's non-discretionary legislative mandate to determine the allocation of costs for service extensions in designated areas of the State Planning Map. If the Legislature wishes to grant the BPU authority to take smart growth principles into account in ordering service extensions, it should explicitly say so, as it did by amending CAFRA.
>
> Id. at 267.

Thus, in the absence of enumerated authority, BPU cannot use general policy goals or environmental concerns to grant itself authority the Legislature did not bestow upon it. Moreover, any reliance on the 2019 EMP to support a change in utility law and statutes would likewise be invalid. The 2019 EMP, like the State Plan, has no regulatory effect. See, N.J.S.A. 52:27F-14, -15. Thus, the Board can only enforce it to the extent such enforcement is within the scope of the Board's authority. As explained above, allowing ACE to collect a return on and of property that will not be owned by the utility or will not be used or useful in the provision of safe and adequate utility service is beyond the scope of the Board's authority, and there is no statute that grants BPU regulatory authority to allow utilities to provide incentives for EVs or EVSE through regulated rates. The Board can utilize the 2019 EMP in exercising its discretionary authority; however, the 2019 EMP cannot be used to expand BPU's authority beyond that granted by the Legislature. Accordingly, the 2019 EMP provides no authority to the Board to approve Offerings 3-12 of ACE's Amended Petition.

POINT IV

ACE MAY PERFORM "MAKE READY" WORK ON THE UTILITY SIDE OF THE METER, BUT ONLY IN CONFORMANCE WITH THE BOARD'S MAIN EXTENSION RULES.

Offering 9 of the Amended Petition includes "make ready" incentives to install direct current fast chargers ("DCFCs"), a type of EVSE. ACE describes "make-ready" work as "the electrical infrastructure required to install a [direct current fast charger], up to the point of the charger connection." Amended Petition, p. 19. As explained above, ACE's proposals to subsidize EV charging do not comport with fundamental ratemaking principles. Its proposal for ratepayers to subsidize the "make ready" portion of EVSE installation costs should also be rejected, since it does not comport with Board rules governing extensions to provide regulated services, the "Main Extension Rules." N.J.A.C. 14:3-8.1 to-8.14. The Main Extension Rules govern the payment of deposits by an applicant for extension of new utility service to a property currently unserved by that utility, and whether and at what rate the regulated utility must refund those deposits after service has commenced.

The Board has authority to determine whether a public utility service extension to a new customer is reasonably practical and economically viable.

> The board may, after hearing, upon notice, by order in writing, require any public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and when the financial condition of the public utility reasonably warrants the original expenditure required in making and operating the extension.
>
> N.J.S.A. 48:2-27 (emphasis added).

The purpose of the Main Extension Rules is to ensure that the cost of extending a public utility's facilities is borne initially by the customer requesting the service, and ultimately by the utility, in the event that the extension generates "sufficient business." Van Holten Group v.

Elizabethtown Water Co., 121 N.J. 48, 52 (1990). The Main Extension Rules apply to new service extensions by all regulated utilities, to provide service to all residential and nonresidential customers. N.J.A.C. 14:3-8.1. Public utilities are to negotiate with the customer the cost of a service extension and its refund, but if they cannot agree the utility may petition the Board to calculate the amount of the deposit and any annual refund. N.J.A.C. 14:3-8.5(a).

The Main Extension Rules allocate to the customer requesting the extension the risk that the expected load might not materialize, and allows the utility to require that customer to pay a deposit to cover the cost of the extension. Then, as the new use begins generating revenues for the utility, the customer who paid to install the extension may receive annual refunds, up to the cost of the extension. Application of the Main Extension Rules to Offering 9 of ACE's Amended Petition is necessary to protect ratepayers from the risk of imprudent investments in EVSE that will not generate sufficient business. ACE has shown no reason to deviate from the Main Extension Rules or to guarantee a certain payment to the owner of the EVSE. In fact, ACE has cited no authority for the Board to waive its own Main Extension Rules to allow EV-related subsidies. Such action would be an ultra vires act by the Board. See Centex Homes, supra, 411 N.J. Super. 244. Accordingly, to the extent Offering 9 permits "make-ready" work on customer-owned property, it should be dismissed; and make-ready work on utility property may only be authorized consistent with the Board's Main Extension Rules.

CONCLUSION

For the reasons set forth above, Rate Counsel respectfully requests that the Board enter an order dismissing Offerings 3 through 12 of ACE's Amended Petition as a matter of law.

Respectfully submitted,

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By:_____
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