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May 4, 2020

VIA ELECTRONIC MAIL
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Aida Camacho-Welch
Secretary of the Board
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:

On behalf of Atlantic City Electric Company, enclosed herewith for filing is an electronic copy of a Brief in Opposition to Rate Counsel's Motion to Dismiss in the above-referenced matter.

Consistent with the Order issued by the Board in connection with *In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, Order dated March 19, 2020, these documents are being electronically filed with the Secretary of the Board and the New Jersey Division of Rate Counsel. No paper copies will follow.

Thank you for your consideration and courtesies. Feel free to contact me with any questions or if I can be of further assistance.

Respectfully submitted,

Andrew J. McNally

Enclosure

cc: Service List (via electronic mail)

IN THE MATTER OF THE PETITION OF ATLANTIC CITY ELECTRIC COMPANY FOR APPROVAL OF A VOLUNTARY PROGRAM FOR PLUG-IN ELECTRIC VEHICLE CHARGING	**STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES** **BPU DOCKET NO. EO18020190**

ATLANTIC CITY ELECTRIC COMPANY'S OPPOSITION TO THE DIVISION OF RATE COUNSEL'S MOTION TO DISMISS

ATLANTIC CITY ELECTRIC COMPANY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Upon taking office, Governor Murphy put New Jersey on a path to achieve 100 percent clean energy by 2050, an objective reflected in the Energy Master Plan and further advanced by the Plug-In Vehicle Act ("PIV Act"). A key element of the Governor's clean energy vision is the electrification of the transportation sector, with the objective of having 330,000 plug-in electric vehicles ("PIVs") registered in New Jersey by 2025. This is a transformative goal that will require active participation from all sectors of the electric and transportation industries—including electric utilities. Atlantic City Electric Company ("ACE" or the "Company") has worked to support the State's goals for PIVs, first with its original request in this docket, and now with its expanded initiative set out in the Company's Amended Petition for Approval of a Plug-In Vehicle Program (the "Amended Petition"). ACE believes that electric utilities can, and should, play a key role in transportation electrification—including supporting efforts aimed at low-to-moderate income residents, and environmental justice communities. Without utility participation, New Jersey's ambitious goals will not be achieved.

For its part, the Division of Rate Counsel ("Rate Counsel") rejects most, but not all, of the Company's proposals[1] and argues the Board of Public Utilities (the "Board") lacks the power to grant the relief ACE requests. Put simply, Rate Counsel's Motion to Dismiss would limit the authority of the Board, deny the full Board the opportunity to consider ACE's proposals, and curtail the Board's statutory role to facilitate the electrification of New Jersey's transportation sector – all without permitting ACE to demonstrate the merit and viability of its Offerings.

To accomplish this, Rate Counsel relies primarily on the "used and useful" ratemaking principle as an absolute bar to much of the Company's Amended Petition (particularly Offerings

[1] Rate Counsel does not contest Offerings 1, 2, and 13. See RCM, at 1.

3 – 12). The "used and useful" principle, however, is merely one among several ratemaking concepts often used to determine which assets may be included in the "rate base" of a public utility. In general, utility rates are set to include a return of, and on, the rate base used to provide service to customers. In fact, a utility is constitutionally entitled to a fair opportunity to earn a reasonable rate of return on its rate base. Where it is appropriately applied, and Rate Counsel has not done that here, the "used and useful" principle typically requires that property included in rate base be utility owned and used to provide service to customers

Many of ACE's Offerings, however, involve rebates and incentives—two types of costs the Board has previously authorized—and not the acquisition of physical, utility property. Because the "used and useful" principle is generally applied to *physical utility assets*, Rate Counsel's application of the principle to the rebates and incentives proposed in the Company's Offerings is not appropriate. As for the Offerings that do involve capital investment, Rate Counsel simply dismisses those facilities as unnecessary without any support or evidence. This is mere opinion, and does not support the dismissal of ACE's Petition, as Rate Counsel contends.

Rate Counsel extends its application of the "used and useful" principle to cost recovery broadly, and argues that a public utility can *never* recover its costs for either: (1) non-utility property, or (2) property that is not used in the provision of utility service. Indeed, Rate Counsel claims the Board has no choice but to accept this bright-line interpretation because the "used and useful principle" cannot "be overridden by either legislation or regulatory or judicial decisions." See Rate Counsel's Memorandum of Law in Support of Motion to Dismiss ("RCM") at 14.

Yet, within the very same motion, Rate Counsel **disproves** its own argument by admitting that programs under the Regional Greenhouse Gas Initiative Act ("RGGI") permit public utilities "to recover through utility rates their investments in non-utility property[.]" RCM at 26. In this

way and others, Rate Counsel over-reaches, and urges the Board to adopt a position that is unsupported by the law, unsupported by Board precedent, unsupported by the practical realities of ratemaking, and conflicts directly with existing and emerging Board programs.

Rate Counsel also attempts to limit the Board's authority through novel interpretations of the language in the PIV Act. For example, Rate Counsel downplays the Board's role in the regulation of PIV infrastructure, even though the PIV Act expressly confers on the Board, among other things, the power to adopt policies and programs to accomplish the goals of the Act. In another instance, Rate Counsel cites a section of the PIV Act that plainly states providers of vehicle charging facilities will not be deemed "public utilities," and uses that to argue that the Legislature sought to prohibit utilities from establishing rate-supported PIV public charging programs. Further, Rate Counsel urges that the Board delve into the legislative history of the Act to engraft a purported prohibition on utility PIV filings that is absent from the legislation itself. In all of these examples, Rate Counsel seeks to limit the Board's power, ignores statutory language in the PIV Act conferring authority on the Board, and effectively, would inhibit the State from achieving the ambitious goals for the widespread adoption of PIVs, as set forth in the PIV Act and elsewhere.

Finally, Rate Counsel argues that the Board's Main Extension Rules prohibit aspects of the Company's PIV proposal. To make this argument, Rate Counsel speculates about the ultimate participants in Offering 9, their locations and facilities, and misstates the role of the Main Extension Rules in service extensions. These arguments are unavailing. Moreover, as Rate Counsel is aware, even if the Board were to decide the Main Extension Rules might be applicable, the Board is free to waive its rules in furtherance of an important public interest.

The Governor, the Legislature, and the various departments and agencies that contributed to the State's Energy Master Plan (including, most notably, the Board itself) have set ambitious

goals for the electrification of New Jersey's transportation sector. The Board has a critical role to play in achieving these goals. Granting Rate Counsel's motion would frustrate that process and would minimize the Board's contribution to the PIV development in the State. Further, dismissing part of ACE's Amended Petition, as Rate Counsel urges, would jeopardize the State's ability to achieve the goals of the PIV Act, because it would remove a key pathway towards electrifying the State's transportation sector, *i.e.*, through the electric utilities. For these reasons, ACE respectfully requests that Rate Counsel's motion be denied.

STATEMENT OF MATERIAL FACTS AND RELEVANT PROCEDURAL HISTORY

A. Background

ACE filed its initial Petition ("Original Petition") in this matter on February 22, 2018. The Original Petition sought the Board's approval for the initiation of an innovative PIV program. On December 17, 2019, ACE filed its Amended Petition, increasing the size and scope of the PIV program to better address the State's comprehensive clean energy and PIV goals. On January 17, 2020, Governor Murphy signed the PIV Act into law. Among other things, this forward-looking piece of legislation established, in law, ambitious goals concerning the proliferation of both PIVs and electric vehicle service equipment ("EVSE") throughout New Jersey. N.J.S.A. 48:25-1 to -11.

The PIV Act vested the Board with broad authority to regulate PIV and EVSE incentives. N.J.S.A. 48:25-11. Specifically, the Board was expressly empowered to establish rebate programs for the purchase of certain kinds of PIVs, as well as the purchase and installation of residential EVSE. N.J.S.A. 48:25-4 and -6. The PIV Act further empowered the Board to adopt additional "policies and programs to accomplish the goals established" by the PIV Act, including goals concerning the construction of EVSE for public use, at multi-family residential dwellings, at commercial locations, and many others. N.J.S.A. 48:25-3(a)(4)(a), (5), (6)(a), (7)(a), (9)(a); N.J.S.A. 48:25-3(b). The PIV Act further established a "Plug-In Electric Vehicle Incentive Fund"

under which the Board was authorized to deposit "each year, such additional amounts from the societal benefits charge, as the Board deems necessary" to fund incentive programs for the purchase of PIVs and residential EVSE. N.J.S.A. 48:25-7(b)(1) and (2).

Finally, the Legislature expressly referenced the Energy Master Plan and its "objectives" as being synonymous with the goals of the PIV Act. N.J.S.A. 48:25-1. Shortly after Governor Murphy signed the PIV Act into law, he presented the final 2019 New Jersey Energy Master Plan ("EMP"). The EMP set forth specific goals relating to the increased use of PIVs and EVSE, repeatedly invoked the Board's ability to facilitate this use, and specifically addressed the concept of public utility cost recovery for PIV investment, advocating for "**using both rate-based and non-rate based solutions**" to further transportation electrification goals. See EMP at 69 (emphasis provided).

B. Summary of ACE's Amended Petition

The Amended Petition proposes thirteen (13) separate Offerings involving electrification in the residential, public, and commercial spaces, as well as the establishment of an Innovation Fund and renewable energy initiative. See Amended Petition, at 1-3. These thirteen offerings have an estimated cost of about $42.1 million. Amended Petition, at 1, ¶ 1. The thirteen Offerings are each briefly summarized below:

(1) provide qualified residential customers with opportunities to save on their energy costs by shifting usage, including but not limited to PIV charging, to off-peak times through time-of-use ("TOU") rates (Offering 1);

(2) provide off-bill incentives to residential customers for off-peak PIV charging (Offering 2);

(3) provide qualified residential customers with rebates for the purchase and installation of smart Level 2 chargers, plus incentives for off-peak PIV charging (Offering 3);

(4) provide qualified customers who own or operate multi-family residential buildings with rebates for the purchase and installation of Level 2 chargers, plus a demand charge incentive (Offering 4);

(5) provide qualified customers who own or operate office buildings or garages with a rebate for the purchase of Level 2 chargers, plus a demand charge incentive (Offering 5);

(6) provide qualified customers who maintain vehicle fleets with a rebate for the purchase of Level 2 chargers, plus a demand charge incentive (Offering 6);

(7) expand the availability of public PIV charging infrastructure through ACE's installation and operation of up to 45 public Direct Current Fast Chargers ("DCFCs") (Offering 7);

(8) in connection with Offering 7, up to 200 public Level 2 chargers installed and operated by ACE (Offering 8);

(9) further promote the deployment of public PIV infrastructure by providing a rate incentive to private owners/operators of public DCFCs at up to 30 locations (up to a maximum of 120 chargers), plus a "make ready" work incentive (Offering 9);

(10) provide grants (of up to $2 million in total) to encourage innovative projects to further facilitate the electrification of the transportation sector, particularly in low-to-moderate ("LMI") and environmental justice ("EJ") communities (Offering 10);

(11) provide funding to encourage the deployment of electric school buses in ACE's service territory, with a focus on LMI and EJ communities (Offering 11);

(12) provide incentives to make electric charging infrastructure available for New Jersey Transit buses operating in ACE's service territory (Offering 12); and

(13) offer a voluntary "Green Adder" to customers participating in Offering 1, and a built-in Green Adder for Offerings 7 and 8, where the electricity provided would come from renewable sources (Offering 13).

See Amended Petition, at 1-2, ¶ 1. To be clear, Rate Counsel's motion does not challenge Offerings 1, 2, and 13. RCM, at 32.

With respect to cost recovery, ACE proposes that: (1) all capital related to the PIV Program will be added to rate base as it is placed in service, to be recovered in a future base rate proceeding,

and (2) a PIV Program Regulatory Asset would be established to capture ACE's non-capital costs associated with the Program's Offerings. Id. at ¶¶ 57-58. The specific costs to be included in the PIV Regulatory Asset include, but are not limited to: rebates on EVSE equipment and installation, rate-related incentives, disbursements under Offerings 10 through 12, implementation and administrative costs, and the costs of the Education and Outreach Plan. Id. at ¶ 58. The PIV Regulatory Asset would also capture incremental revenues to the Company from Offerings 7 and 8, off-setting costs to customers. Id. The PIV Regulatory Asset would accrue at the Company's full authorized rate of return from inception and would be amortized over five years. Id. at ¶ 59.

The Company sought approval of its proposed Offerings consistent with the Board's broad authority to regulate public utilities, N.J.S.A. 48:2-13, including the provision of service, N.J.S.A. 48:2-23, other "standards . . . regulations, [or] practices," N.J.S.A. 48:2-25(a), as well as the Board's expansive ratemaking authority, N.J.S.A. 48:2-21(b), (c), (d), and now the PIV Act. The table on the following page provides an overview of each Offering and the statutory provisions enabling the Board to approve it, which will be discussed throughout this brief.

Offering	Category	Statutory Authority
1 Time-of-Use Rates	Residential	N.J.S.A. 48:2-13; N.J.S.A. 48:2-21(b), (c), (d); N.J.S.A. 48:25-1; N.J.S.A. 48:25-3(b); N.J.S.A. 48:25-(a), (c)(3); N.J.S.A. 48:25-11; N.J.S.A. 48:3-60(a)(3); N.J.S.A. 48:3-98(a)(1).
2 Incentives for Off-Peak Charging		
3 EVSE Rebate & Off-Peak Incentive		
4 Multi-Family Dwelling EVSE Rebate & Demand Charge Incentive	Commercial	N.J.S.A. 48:2-13; N.J.S.A. 48:2-21(b), (c), (d); N.J.S.A. 48:25-1; N.J.S.A. 48:25-3(a)(6)(a)-(b); N.J.S.A. 48:25-3(b); N.J.S.A. 48:25-4; N.J.S.A. 48:25-11; N.J.S.A. 48:3-60(a)(3) ; N.J.S.A. 48:3-98(a)(1).
5 Office and Garage EVSE Rebate & Demand Charge Incentive		
6 PIV Fleet EVSE Rebate & Demand Charge Incentive		
7 ACE Installation & Ownership of Public DCFCs	Public	N.J.S.A. 48:2-13; N.J.S.A. 48:2-21(b), (c), (d); N.J.S.A. 48:25-1; N.J.S.A. 48:25-3(a)(4)(a)-(c), (a)(5); N.J.S.A. 48:25-3(b); N.J.S.A. 48:25-11; N.J.S.A. 48:3-60(a)(3) ; N.J.S.A. 48:3-98(a)(1).
8 ACE Installation & Ownership of Public Level 2 Chargers		
9 Rate and "Make Ready" Incentive to Public DCFC Owners & Operators		
10 Grants for Innovative Projects in Transportation Electrification	Community Planning & Transit	N.J.S.A. 48:2-13; N.J.S.A. 48:2-21(b), (c), (d); N.J.S.A. 48:25-1; N.J.S.A. 48:25-3(b).
11 Funding for Deployment of Electric School Buses		N.J.S.A. 48:2-13; N.J.S.A. 48:2-21(b), (c), (d); N.J.S.A. 48:25-1; N.J.S.A. 48:25-3(a)(8)(a)-(b), (9)(a)-(b); N.J.S.A. 48:25-3(b); N.J.S.A. 48:25-11; N.J.S.A. 48:3-60(a)(3).
12 Incentives for NJ Transit EVSE		
13 100% Renewable Energy	Green Adder	N.J.S.A. 48:2-13; N.J.S.A. 48:2-21(b), (c), (d); N.J.S.A. 48:25-1; N.J.S.A. 48:25-3; N.J.S.A. 48:25-11; N.J.S.A. 48:3-60(a)(3); N.J.S.A. 48:3-98.1(a)(2).

As set forth herein, the Offerings in the Amended Petition further the goals established in the PIV Act and the EMP, and – despite Rate Counsel's objections to the contrary – the Board has full power and authority to approve these offerings under the PIV Act and other existing statues.

LEGAL ARGUMENT

I. Standard of Review

A motion for summary decision is governed by N.J.A.C. 1:1-12.5. The motion may be granted where "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." N.J.A.C. 1:1-12.5(b). In short, "[t]he standard governing agency determinations under N.J.A.C. 1:1-12.5 is substantially the same as that governing a motion under *Rule* 4:46-2 for summary judgment in civil litigation." L.A. v. Bd. of Educ. of City of Trenton, Mercer County, 221 N.J. 192, 203-04 (2015) (internal citation and quotations omitted). Thus, the factfinder must view the evidentiary materials in the light most favorable to the *non-moving* party, and draw all reasonable inferences from the evidence in favor thereof. L.A., 221 N.J. at 204 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Just like the comparable civil litigation standard, a motion for summary decision should be denied when the factfinder would be required to decide the motion on a meager record – especially when the ruling sought on the motion would have a far-reaching social and legal effect. See Jackson v. Muhlenberg Hosp., 53 N.J. 138, 141-42 (1969); Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001) (motion should be denied where discovery on material issues is incomplete). Here, discovery has not yet commenced, making a summary decision premature.

II. Rate Counsel's Reliance on the Used and Useful Principle is Misplaced

Rate Counsel asserts that **as a matter of law** a utility can only recover costs associated with: (1) utility-owned *property*, (2) that is used and useful in the provision of utility service. However, a review of New Jersey statutes, applicable case law, prior Board decisions, and persuasive authorities from other jurisdictions demonstrates that Rate Counsel's rigid view of the "used and useful" principle lacks both factual and legal support and does not mandate the dismissal of ACE's Petition.

A. The Board is Not Bound by Rate Counsel's Incorrect and Inflexible Interpretation of the Used and Useful Principle.

Ratemaking and determining cost recovery are complex undertakings, informed by the application of a number of principles and concepts. One of these many concepts is the "used and useful principle," which was developed as a methodology to determine what *property* can be included in a utility's rate base. See, e.g., In re Petition of Jersey Cent. Power & Light Co., 85 N.J. 520, 529 (1981) (internal citation omitted). Put another way, "the rate base . . . 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[.]" In re N.J. Power & Light Co., 9 N.J. 498, 509 (1952) (emphasis supplied).

Thus, the used and useful principle stands for the proposition that, among other factors, assets included in rate base must be in-service and providing service to customers. Other concepts, such as prudence, also apply to rate base determinations. As discussed below, Rate Counsel misapplies the used and useful principle in its motion, and the principle does not bar ACE's Amended Petition or recovery of the costs related to its Offerings 3-12.

1. The "Constitutional" Framework Demonstrates that the "Used and Useful" Principle is Not a Bar to Utility Cost Recovery for Investment in Non-Utility Owned Property or Property that is Not "Used and Useful."

In an attempt to convince the Board that its hands are tied by "constitutional" principles and old case law, Rate Counsel argues that a utility cannot recover costs associated with investment in non-utility owned property and/or property that is not "used and useful." This oversimplified argument, however, rests upon a flawed foundation and a strained interpretation of a century-old (now overturned) legal doctrine.

Citing Smyth v. Ames, 169 U.S. 466 (1898), overruled by Fed. Power Comm'n v. National Gas Pipeline Co. of Am., 315 U.S. 575 (1942), as the basis for its argument that the "used and useful" principle absolutely prohibits utility investment in non-utility owned property *or* property that is not used and useful, Rate Counsel argues that "[w]hat the [public utility] company is entitled to ask for 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." See RCM at 13 (citing Ames, 169 U.S. at 547).

However, this principle (known as the "fair value" rule) "**suffered from practical difficulties which ultimately led to its abandonment as a constitutional requirement.**" Duquesne Light Co. v. Barasch, 488 U.S. 299, 309 (1989) (emphasis supplied). Indeed, the fair value rule was abrogated at least as early as 1942 by the Court in Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).[2] In Barasch, the Supreme Court reaffirmed that "it is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end." 488 U.S. at 309 (internal citation

[2] Rate Counsel suggests in a footnote that the "fair value" rule was "replaced" rather than overruled. See RCM at 13, n.8.

quotation omitted). Thus, the Supreme Court decisions cited by Rate Counsel demonstrate a preference for *flexible* and *pragmatic* ratemaking unconstrained by any rigid formulae or dogmatic processes. The clear emphasis is on the "end-result" and not on any individual cost recovery decision.

Consistent with these constitutionally permissible ratemaking practices, the Board has long engaged in flexible, pragmatic ratemaking unhindered by any bright-line restrictions such as the one Rate Counsel now asserts. Despite Rate Counsel's insistence to the contrary, "[t]here is no formula making for certainty in the exercise of [the Board's] authority." Atl. City Sewerage Co. v. Bd. of Public Util. Comm'rs, 128 N.J.L. 359, 365 (1942) (citing Simpson v. Shepherd, 230 U.S. 352 (1913).[3] Echoing the Supreme Court, New Jersey Courts have held that ratemaking "is not 'a matter of formulas,' but rather of 'a reasonable judgment' grounded 'in a proper consideration of all relevant facts." Atl. City Sewerage Co., 128 N.J.L. at 365 (internal citation omitted).

This flexibility is an inherent trait of regulatory law, which "'has [an] elasticity that permits it to adapt to changing circumstances and conditions[.]'" In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 347 (2011) (internal citation omitted). The Board has long utilized this flexibility to craft appropriate ratemaking solutions based on the facts before it – including facts involving non-utility owed property and circumstances where utility investments were not "used and useful."

[3] See also In re Public Serv. Coordinated Transp., 5 N.J. 196, 217 (1950) ("There are a number of formulae useful in the determination of fair value; depreciated original cost, depreciated prudent investment, reproduction cost of the property less depreciation, cost of reproducing the service as distinct from the property, and there are undoubtedly others. But the Board is not bound to and, indeed, should not use any single formula or combination of formulae in arriving at a proper rate base for the determination of fair value is not controlled by arbitrary rules or formulae, but **should reflect the reasonable judgment of the Board based upon all the relevant facts.**" (Emphasis supplied).

2. Cost Recovery for Investments in Non-Utility Owned Property or Property that was Not Used and Useful has been Previously Authorized by Both the Board and the Legislature.

As noted above, the Board has consistently utilized its broad discretion to formulate ratemaking solutions based on the facts and circumstances before it. Several examples illustrate that ACE's Petition should not be dismissed "as a matter of law," as Rate Counsel contends. These examples include: (1) the Regional Greenhouse Gas Initiative Act ("RGGI"); (2) the Atlantic Generating Station; and (3) the Rockland Electric Company AMI Order. Each of these will be briefly addressed below.

Plainly put, these examples demonstrate not only that Rate Counsel's bright-line application of the "used and useful" principle does not comport with its actual application, but also that each such scenario must be evaluated on its *facts*. Here, discovery is not complete and the factual record has not yet been developed, warranting denial of Rate Counsel's motion.

i. RGGI Disproves Rate Counsel's Argument that the "Used and Useful" Principle is an Absolute Bar to a Utility's Recovery of Investment in Non-Utility Owned Property or in Property that is Not "Used and Useful."

Rate Counsel asserts in its motion that "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." See RCM at 14. In light of this argument, it is especially ironic that Rate Counsel also raises, in the very same motion, the RGGI Act, N.J.S.A. 48:3-98.1 et seq. See RCM at 25-27. This is because RGGI is proof positive that Rate Counsel's application of the "used and useful" principle misses the mark. See e.g., N.J.S.A. 48:3-98.1(a) (permitting public utilities to invest in, among other things, customer-side energy efficiency ("EE") and conservation programs, and to recover the costs of those investments, plus a return, in rates).

Rate Counsel ultimately concedes that "[t]hrough the RGGI Act, the Legislature granted limited authority to allow public utilities to recover through utility rates their investments in non-utility property[.]" RCM at 26. This concession cannot be reconciled with Rate Counsel's constitutional argument that the "used and useful" principle "cannot be overridden by . . . legislation." Because RGGI indeed allows public utilities to recover for investments in non-utility property, Rate Counsel's assertion that the "used and useful" principle is an absolute bar to utility cost recovery for investment in non-utility owned property cannot stand.

If cost recovery by utilities for non-utility programs were in fact constitutionally prohibited, as Rate Counsel contends, existing, utility-administered EE programs, for example, would be frustrated. For instance, New Jersey Natural Gas's ("NJNG") existing "SAVEGREEN" program provides, among other things, rebates to customers for energy efficient products, home energy assessments, HVAC incentives, etc.—all property that the utility will not own. See, e.g., I/M/O Petition of New Jersey Natural Gas Company for Approval of Existing and New Energy Efficiency Programs and a Class I Renewable Energy Program and the Associated Cost Recovery Mechanism Pursuant to N.J.S.A. 48:3-98, BPU Docket No. GO18030355, Order dated 9/17/18 ("NJNG Order"), at 4, ¶ 13. NJNG recovers the cost of these measures (including the product rebates) and is permitted to earn a return on them. See id. at 6-7, ¶¶ 21-23.

Specifically, pursuant to the Stipulation adopted by the Board through the NJNG Order, NJNG was "authorized to defer and seek recovery of all reasonable and prudent SAVEGREEN 2018 program costs, including grant costs, *customer incentives*, [etc.]. NJNG Order, at 7, ¶ 22 (emphasis supplied). These costs were deemed "*subject to recovery through rates*. . ." and recoverable "through a per-therm EE charge relative *to all applicable jurisdictional throughput on the NJNG distribution system.*" Id. (emphasis supplied). Furthermore, the NJNG Order provided

that "the SAVEGREEN 2018 *program investments made in participating customer rebates and incentive payments* will be amortized over a seven (7) year period . . . with the return of the investment and return on the unamortized investments based upon a rate of 6.69 percent . . . ." Id. at 8, ¶ 24 (emphasis supplied). Simply put, none of the foregoing would be possible if the Board accepts Rate Counsel's argument that the "used and useful" principle bars recovery for rate-supported programs that involve non-utility property. Such a conclusion would deny customers the significant benefits of well-run and appropriately funded EE programs.

What's more, Rate Counsel's argument that the "used and useful" principle prohibits ratepayer-funded programs that work to fund non-utility property would also undermine forthcoming EE programs that the Board is currently contemplating to achieve the aggressive EE targets set forth in the Clean Energy Act. See N.J.S.A. 48:3-87.9(c). Indeed, pursuant to the most recent EE Straw Proposal issued by Board Staff, among a myriad of other provisions, it is contemplated that "[p]rograms for existing residential buildings will be comprised of a comprehensive [Home Performance with ENERGY STAR] program *administered by the utilities* through which customers will r*eceive energy efficiency rebates and incentives to implement energy efficient measures*."[4] It is envisioned that utilities will be permitted to recover for these investments, and earn on them.[5] Perhaps most notably, Rate Counsel's own comments on the Staff's Straw Proposal (dated April 15, 2020) *acknowledge* that utilities may earn on their energy

[4] Straw Proposal for New Jersey's Energy Efficiency and Peak Demand Reduction Programs (Spring 2020), at 64 (emphases added), available at https://www.nj.gov/bpu/pdf/3-20-20%20Final%20EE%20Straw%20Proposal.pdf.

[5] Within its Straw Proposal, Board Staff proposed that "[t]he carrying cost for these investments will utilize the capital structure established in each utility's most recent base rate case, incorporating both (a) the cost of debt and (b) the return on equity ("ROE") less 100 basis points." See id. at 39.

efficiency programs, and tellingly, Rate Counsel does *not* suggest that earnings on such programs would be somehow unconstitutional.[6]

In summary, Rate Counsel's claim that the "used and useful" principle serves as an absolute bar to approval of Offerings 3-12 is belied by other arguments in Rate Counsel's motion, would be contrary to Board precedent approving many existing programs, and could altogether derail emerging programs overseen by the Board, beyond PIVs. As such, a ruling in Rate Counsel's favor would have far wider implications, well beyond ACE's pending PIV petition that would jeopardize existing programs and hamper the Board's ability to further important public policy initiatives. Accordingly, the Board should reject Rate Counsel's rigid application of the "used and useful" principle, and permit ACE's Amended Petition to move forward.

ii. The Atlantic Generating Station Order Demonstrates that Utilities are Permitted to Recover Investment in Property that was Never Used and Useful.

As just one example, the Atlantic Generating Station ("AGS") was a planned floating nuclear power plant off the Atlantic City coast, and was a project ultimately abandoned by PSE&G. See **Exhibit A.**[7] The utility sought to recover costs associated with planning and designing its investment in the AGS. Id. The parties agreed that all legitimate costs were to be amortized over a 20-year period. Id. Although PSE&G did not earn a rate of return, the utility recovered costs for a project that was never built or put into service. Id. Thus, this decision demonstrates that a utility has been permitted to recover costs in rates for an investment that was not used and useful – a

[6] See generally Rate Counsel's Comments on the Board of Public Utilities' Straw Proposal for New Jersey's Energy Efficiency and Peak Demand Reduction Programs, available at https://www.state.nj.us/rpa/docs/NJDRC_Comments_Straw_Proposal_for_New_Jersey_Energy_Efficiency_and_Peak_Demand_Reduction_Programs_4-15-20.pdf. Importantly, while Rate Counsel's recent comments in response to the Straw Proposal addressed how much the utilities should earn on EE investments, they did not argue that a return was constitutionally prohibited. See id. at 5-13.

[7] An excerpted version of the Initial Decision is attached as the full document was over one hundred pages long.

completely contrary outcome to the one which Rate Counsel argues must apply under its application of the used and useful principle. See also N.J.S.A. 48:3-61, -64; In re Murphy, 426 N.J. Super. 423, 424 (App. Div. 2012) (observing "[Energy Discount and Energy Competition Act ("EDECA")] also authorizes the utility to recover from ratepayers certain costs that it was at risk of losing when the market opened to competition . . . called 'stranded costs[.]'").

iii. The RECO Order is Distinguishable and Rate Counsel's Interpretation of the Order is Unsupported by Its Plain Language.

Rate Counsel cites the Board's 2017 Order in 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 Order") as evidence that the used and useful principle prohibits utility cost recovery for investment in non-utility owned property. On closer examination, however, the RECO case does not provide the bright line authority that Rate Counsel suggests and is certainly not a barrier to approval of ACE's PIV Offerings.

The RECO case involved a request to recover Advanced Metering Infrastructure ("AMI") installation costs, including the costs of two types of work performed on the customer-side of the meter (*i.e.*, customer property), specifically: (1) work necessary to install the AMI meter; and (2) incidental work to correct irregularities (*e.g.*, faulty electrical cables) that were unrelated to the AMI installation. The Board ultimately concluded that the AMI meters would not be "used and useful" without certain customer-side work and permitted RECO to seek recovery of the costs necessary for AMI installation. See RECO Order, at 22. The Board also determined that any incidental, non-AMI-related work would continue to be the responsibility of the customer and was not eligible for cost recovery from ratepayers by the utility. Id.

While Rate Counsel argues that such a reading is not possible, it is the correct interpretation under the canon of construction known as the "last antecedent."[8] Applying that doctrine to the relevant provision in the RECO Order, and not just the truncated quotation included in Rate Counsel's motion, it becomes clear the Board permitted RECO to seek recovery of costs for work on customer-owned property needed to install AMI:

> Recognizing that AMI meters could not be operated as 'used' and 'useful' without this work, the Board **HEREBY WAIVES** General Information Section No. 22 of RECO's current tariff only with respect to work done related to the AMI Program roll out and done specifically for installation of an AMI meter at the customer's location. Any work not related to the AMI Program roll out will continue to be the responsibility of the customer. With 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.

RECO Order, at 22 (bold and underling in original, italics supplied).

In the excerpt above, "such" is the qualifying/referential word. It modifies "work." The reader must look to the last antecedent, *i.e.*, the last time the word "work" was used. Here, the last antecedent is "[a]ny *work* not related to the AMI Program roll out" which is separate and distinct from "work done related to the AMI Program roll out." Therefore, it is clear that "cost of such work" refers to the last antecedent, *i.e.* "[a]ny work **not related** to the AMI Program roll out." Stated plainly, the Board authorized recovery of costs on the customer side of the meter that were related to the AMI Program.

[8] Under the doctrine of the last antecedent, "unless a contrary intention otherwise appears, a qualifying phrase . . . refers to the last antecedent phrase." State v. Gelman, 195 N.J. 475, 484 (2008) (citing 2A *Sutherland Statutory Construction* § 47.33, at 487–88 (7th ed. 2007) ("**Referential** and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.") (Emphasis supplied). See also Mountain Hill, L.L.C. v. Zoning Bd. of Adjustment of Tp. of Middletown, 403 N.J. Super. 210, 237-38 (App. Div. 2008).

Rate Counsel's ability to arrive at an entirely different conclusion as to the meaning of the RECO Order illustrates that the RECO decision is not a clear-cut articulation of the application of the "used and useful" principle to non-utility property as Rate Counsel argues. Indeed, if the Company's Amended Petition is permitted to move forward, and it certainly should be, the Board will eventually have an opportunity to clarify its RECO Order, and to apply it to the facts adduced in this proceeding, as deemed appropriate by the Board. Until then, the RECO Order is not an impediment to the Company's request, and actually supports the approval of the Offerings described in the Amended Petition.

B. Other Jurisdictions have Permitted Utilities to Recover PIV Infrastructure Costs, Further Demonstrating that the Used and Useful Principle does Not Act as a *per se* Bar.

As additional persuasive evidence rebutting Rate Counsel's insistence that the used and useful principle acts as an absolute bar to cost recovery for utility cost support and investment in PIV charging infrastructure, the Board need only consider the actions taken by regulatory agencies and legislatures in other states to see that Rate Counsel's presumed bright-line rule is not a rule at all.

For example, in 2012 the Oregon Public Utilities Commission ("OPUC") determined that utilities can invest in and operate EVSE and that "**the used and useful test . . . does not preclude rate recovery for utilities providing plug-in EV charging services and . . . utilities may legally recover EVSE installation and operation costs in rates**" when the utility makes a compelling case that the EVSE would benefit its rate payers. See Oregon Public Utilities Commission Docket No. UM 1461, Order 12-13, at 10 (Jan. 19, 2012)[9] (emphasis supplied).

[9] A copy of this Order is available at: https://www.cobar.org/Portals/COBAR/TCL/2020/February/Feb_Features-Energy.pdf.

In another proceeding, the OPUC addressed an objection that the "used and useful" principle precluded a proposed customer rebate program and determined that "**customer rebates are not physical assets**" and, therefore, the "used and useful" principle was not applicable to rebates. See In re Portland General Elec. Co., Application for Transp. Elec. Programs, Docket No. UM-811, Order No. 18-054 (OPUC, Feb 16, 2018)[10] (permitting utility to recovery costs after prudency review) (emphasis provided). So too, here. The rebates proposed under ACE's Offerings are *not* physical assets and, therefore, the "used and useful" does not preclude their recovery in rates.

Other examples come from the California Public Utilities Commission ("CPUC")[11] and the Maryland Public Service Commission ("MPSC").[12] See, e.g., Alternate Proposed Decision Regarding Southern California Edison Company's Application for Charge Ready and Market Education Programs, CPUC, Docket No. A.14-10-014, at 20-21 (Jan. 16, 2016) (permitted utility to "treat the rebates as expenses, to be recovered from ratepayers in the year in which they are incurred.")[13]; In re Petition of the Electric Vehicle Work Group for Implementation of a Statewide Electric Vehicle Portfolio, Case No. 9478, Order No. 88997, at 77 (MPSC Jan. 14, 2019)

[10] A copy of this Order is available at: https://apps.puc.state.or.us/orders/2018ords/18-054.pdf.

[11] The CPUC's 2014 Order permitting utility investment in EV/PIV infrastructure **predated** any action by California's legislature by about a year. See Application of San Diego Gas & Elec. Co. for Approval of its Electric Vehicle-Grid Integration Program, Application 14-04-14, Decision No. 14-12-079 (CPUC Dec. 18, 2014); Ca. Senate Bill 350, *Clean Energy Pollution and Reduction Act of 2015*, Oct. 7, 2015; Cal. Health & Safety Code § 44258.5 (West). Thus, this timing negates any argument that *legislative* approval is required to "overcome" the "used and useful principle. Any such argument would be tantamount to "moving the goalposts," since Rate Counsel has argued that "the used and useful principle . . . , cannot be overridden by . . . legislation[.]" See RCM at 14.

[12] Maryland's EV/PIV programs have a statutory origin. See, e.g., 011 Md. Laws, Ch. 403, codified at PUA § 7-211(m). As noted in Footnote 6, however, this fact is of no moment since it also refutes Rate Counsel's bright-line rule.

[13] A copy of this decision is available at: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M157/K682/157682806.PDF.

(permitting utilities "to seek cost recovery through traditional ratemaking in a future rate case proceeding" of residential PIV program offering rebates).[14] Thus, the "used and useful" principle did not stand as an obstacle to a utility recovering its cost-support and/or investment in non-utility owned property that was not used and useful.

In sum, the above-referenced states have rejected a rigid application of the "used and useful" principle, allowing EVSE development to grow with utility support, which in turn, fosters the greater adoption of PIVs. As the EMP and the PIV Act make clear, New Jersey seeks to be a leader in PIV and EVSE deployment. Precluding utility PIV filings in the manner advocated by Rate Counsel would inhibit the State's ability to lead in encouraging the widespread adoption of PIVs, since it would prohibit critical utility support in developing EVSE. Because Rate Counsel's arguments run contrary to the State's goals, set through legislation, Rate Counsel's motion should be denied.

C. Offerings 3 through 12 do Not Violate the Used and Useful Principle.

Rate Counsel does not contest Offerings 1, 2, or 13. See RCM at 31. Thus, it is fair to say that Rate Counsel has conceded that the Board has the authority to approve these Offerings. However, Rate Counsel makes the sweeping assertion that Offerings 3 through 12 violate the "used and useful" principle because "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." RCM at 17. Rate Counsel, however, has misapplied the "used and useful" principle to the Company's Offerings, such that the "used and useful" principle is *not* a barrier to the cost recovery ACE has proposed in its Amended Petition.

[14] A copy of this Order is available at: https://www.psc.state.md.us/wp-content/uploads/Order-No.-88997-Case-No.-9478-EV-Portfolio-Order.pdf.

i. Offerings 3, 4, 5, and 6.

With respect to Offering 3 (rebates for residential chargers), rebates and incentives are a common practice for which the Board has permitted utilities to recover associated costs. See, e.g., N.J.S.A. 48:3-98.1(a). Rate Counsel asserts the same objection – that the equipment at issue would not be owned by ACE – against Offerings 4, 5, and 6 (rebates for chargers for multi-family, office buildings/garages, vehicle fleets, respectively). Again, Rate Counsel ignores the fact that ACE is providing *rebates*, which are not physical assets for purposes of the "used and useful" principle. See, supra In re Portland General Elec. Co., No. UM-811, Order No. 18-054.

ii. Offerings 7 and 8.

With respect to Offerings 7 and 8 (charging equipment owned and operated by ACE), Rate Counsel concedes that these chargers will be owned by the Company but asserts, without evidence, that utility-owned EVSE "is not needed to provide safe and reliable service utility service to ACE's ratepayers." RCM at 18. This conclusory argument is nothing more than Rate Counsel's unsupported opinion and presents a genuine issue of material fact (*e.g.* usage of the chargers by ACE's ratepayers who require PIV charging) that requires denial of Rate Counsel's motion.

iii. Offering 9.

Rate Counsel again argues that because ACE will not own the EVSE under Offering 9 (demand incentives and "make ready" work owned by ACE), this Offering is, at least in part, barred by the "used and useful" principle. However, while Rate Counsel focuses on whether or not the EVSE will be owned by ACE, that is not the issue. Under Offering 9, ACE would offer an off-bill demand charge incentive and perform make-ready work which ACE would own. See Amended Petition, at 18-19. As noted above, an incentive is not a physical asset. With respect to the make-ready work, these matters are addressed more fully in Section V, infra.

iv. Offerings 10, 11, and 12.

Concerning Offerings 10, 11, and 12 (innovation grants, incentives for electric school buses, incentives for electric NJ Transit buses, respectively), Rate Counsel argues that because the target of the funding under each Offering would not be owned by ACE or "used and useful" in providing public service, such funding is not recoverable through rates. Again, funding for PIV research is not a "physical asset." Further, the PIV Act (specifically, N.J.S.A. 48:25-3(b)) provides the Board with the authority to adopt *other* "policies and programs," in addition to those set forth in Sections 4 and 6 of the Act, to accomplish the Legislature's goals. These goals include "new bus purchases made by the New Jersey Transit Corporation", and the requirement to "address . . . medium-duty and heavy-duty on-road diesel vehicles and associated charging infrastructure (presumably including school buses), similar to the State goals for light-duty vehicles[.]" N.J.S.A. 48:25-3(a)(9)(a)-(b); N.J.S.A. 48:25-3(a)(10).

In sum, Rate Counsel seeks to convince the Board that the "used and useful" principle bars Offerings 3-12 by repeating, again and again, that ACE, in most cases, would not own the EVSE or the ultimate target of the requested funding. As set forth in Sections II(A)-(B), supra, Rate Counsel's arguments miss the forest for the trees in that they presume the used and useful principle applies in the first instance, and in the second instance serves as an unyielding bar. Rate Counsel's arguments in this regard miss the mark, and therefore, its pending motion should be denied.

III. The Board has the Requisite Statutory Authority to Approve ACE's Petition

Having presumed to instruct the Board as to the correct application of the "used and useful" principle, Rate Counsel also seeks to educate the Board as to what it cannot do. As with Rate Counsel's attempt to expand the "used and principle" beyond its logical limits, Rate Counsel's effort to foreclose the Board's authority also falls short for the simple reason that Rate Counsel

has failed to recognize what the Board *can* do pursuant to its plenary authority over public utilities and specifically under the PIV Act.

A. The Board had Authority to Approve ACE's Petition Before the PIV Act.

Even if the Legislature had not expressly granted the Board the authority to implement, regulate, and modify incentive programs for PIVs and EVSE, the Board would have had this authority under pre-existing statutes. Indeed, "[t]he New Jersey Legislature has vested the BPU with 'general supervision and regulation of and jurisdiction and control over all public utilities … and their property, property rights, equipment, facilities, and franchises so far as may be necessary for the purpose of carrying out the provisions of [Title 48] of the New Jersey Statutes.'" Matter of Valley Rd. Sewerage Co., 154 N.J. 224, 235 (1998) (quoting N.J.S.A. 48:2-13) (alteration in original). "This sweeping grant of power is 'intended to delegate the widest range of regulatory powers over utilities to the [BPU].'" Valley Rd. Sewerage Co., 154 N.J. at 235 (internal citation and quotation omitted).[15] Indeed, New Jersey's courts have "always construed these legislative grants to the **fullest and broadest extent**." In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 371 (1961) (internal citations omitted) (emphasis supplied).

"Furthermore, the BPU's authority over utilities, like that of regulatory agencies generally, extends beyond powers expressly granted by the statute to include incidental powers that the agency needs to fulfill its statutory mandate." Id. (internal citations omitted). Accordingly, the PIV Act's express grant of authority to the Board built upon the already adequate foundation provided by the Board's existing powers to regulate the rates and services of utilities, as well as their

[15] See also N.J.S.A. 48:2-23 (the Board has authority to "require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment[.]"); N.J.S.A. 48:2-25(a) (the Board may "[f]ix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed or observed and followed thereafter by any public utility[.]"); N.J.S.A. 48:2-21(b), (c), (d) (providing broad ratemaking authority to the Board).

participation in EE and conservation initiatives, among other important public benefit programs. See e.g., N.J.S.A. 48:3-98.1(a) (authorizing electric utilities to "provide and invest in" energy efficiency and conservation programs on a regulated basis, including on the customer side of the point of interconnection).[16]

B. The PIV Act does Not Inhibit ACE's Petition but, Instead, Supports It.

Rate Counsel asserts that the PIV Act somehow works to effectively prohibit public utility involvement in the deployment of PIV infrastructure. However, this reading is only possible if the Board engrafts new terms into the Act. Rate Counsel further argues that the legislative history of the PIV Act demonstrates that utility filings are prohibited. See RCM at 23-25. However, neither the plain language of the PIV Act nor its legislative history can reasonably be read to lead to such an "absurd result." See, Perez v. Zagami, LLC, 218 N.J. 202, 209-11 (2014) (stating that statutes should not be read in a way that would lead to an absurd result).

Rate Counsel first points to N.J.S.A. 48:25-10 to suggest that this provision of the PIV Act must be read to prohibit utility filings. In pertinent part, the provision provides:

> . . . [A]n 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.)."

This language does not have the effect Rate Counsel suggests. *Nothing* within the above-quoted language prohibits utility filings. The language was included within the statute for an entirely

[16] The RGGI Act defines "energy efficiency and energy conservation programs" to include both programs that conserve energy and programs for making the use of electricity "more efficient"—which ACE's offering are clearly designed to achieve. See N.J.S.A. 48:3-98.1(d).

different purpose, a fact readily confirmed by examining the title of that section of the PIV Act: "48:25-10 Not Deemed Electric Public Utility[.]"

Indeed, without the foregoing clarification within the law, a private, non-utility owner/manager of "electric vehicle service equipment" (*i.e.*, a provider of charging services) would be vulnerable to an argument that it was a public utility since, by virtue of providing charging services, it owned facilities for the distribution of electricity for public use. See N.J.S.A. 48:2-13. This is a common hurdle that private providers of EV charging services have had to address, and the PIV Act resolves.[17]

To this point, the New Jersey Vehicle Infrastructure Stakeholder Group, formed at the direction of the Board to solicit input from stakeholders to develop PIV infrastructure policies, posed this very question: "Should owners and operators of EVSE that provide electric vehicle charging service be regulated as public utilities?"[18] Rather than inhibiting utility filings, the above-quoted provision of the PIV Act quite plainly is intended to relieve non-utility providers of public charging services from regulation as a public utility, and to minimize the need to engage in creative "workarounds" (where a non-utility would, for example, provide electricity for charging to a PIV driver for free, but charge the PIV driver "rent" for the time the driver occupies the space during charging). The above-quoted language was intended to dispense with this issue, and nothing more.

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[17] See, e.g., ChargeEVC, *Response to Question Posed by New Jersey Board of Public Utilities: Should Owners and Operators of EVSE that provide electric vehicle charging service be regulated as electric utilities?* (Oct. 16, 2017), available at https://www.bpu.state.nj.us/bpu/pdf/publicnotice/stakeholder/CHARGEVC_BPU_Comments_101617_FINAL.pdf

[18] See ACE Original Petition, n.7 (quoting New Jersey Electric Vehicle Infrastructure Stakeholder Group Kickoff Meeting, dated Sept. 15, 2017, at 17, available at https://www.njcleanenergy.com/files/file/EV%20Stakeholder%20Meeting%20%20%20Sept%2015%20%202017a.pdf).

Had the Legislature sought to foreclose utility filings within the PIV Act, it could have affirmatively done so. Tellingly, however, the Legislature did not take this step. In arguing that the PIV Act precludes rate-supported, utility filings, Rate Counsel relies on an earlier draft of the bill that included the submittal of utility filings to provide PIV infrastructure, but importantly, also established a multi-step process and timeline to precede those filings.[19] While those provisions expressly concerning utility filings were not ultimately adopted in the version of the bill that became law, they are relevant insofar as they demonstrate that the Legislature was at least *aware* of the potential for utility filings during its consideration of the PIV Act.[20] Particularly against this backdrop, the PIV Act cannot reasonably be read to preclude utility filings.[21]

While there is no need to delve more deeply into the Legislature's intent in removing the language concerning utility filings, engaging in such an inquiry would require examining the removed language and its context. To be sure, the removed language was not simply an authorization for utilities to develop EV infrastructure through rates. Instead, the language would

[19] See Rate Counsel's Br. at 25, n.13 (citing Assembly Bill No. 4819, § 10, at 17, available at https://www.njleg.state.nj.us/2018/Bills/A5000/4819_I1.HTM (hereinafter "A4189")); see also A4189, §§ 4, 8-10.

[20] Indeed, the earlier version of the PIV legislation further contained a provision that permitted the Board to rule upon utility EV filings filed anytime eighteen (18) months prior to the date of enactment of the bill. See A4189, § 10(b) ("The board may determine any electric public utility proposed charging network plan submitted within 18 months prior to the effective date of [this act] . . . fulfills the requirements of subsection a. of this section if the board determines the proposed charging network plan is consistent with the goals and requirements of [this act]." This provision further demonstrates that utility filings were within the contemplation of the Legislature when it ultimately passed the PIV Act.

[21] The Legislature could have (and indeed should have) used express language to that effect if it sought to prohibit filings like ACE's pending Amended Petition. State in Interest of K.O., 217 N.J. 83, 91-91 (2014) (court cannot "presume that the Legislature intended something other than that expressed by way of the plain language [of the statute].") (internal citation and quotation omitted). Here, the Board cannot presume that the Legislature intended what Rate Counsel suggests. The Legislature did not use language that would support such a conclusion.

have established a multi-step process to precede[22] utility filings, including but not limited to: (1) establishing a nineteen-member "Electric Vehicle Working Group"; (2) the designation of "travel corridors" by that Working Group; (3) the establishment of "the essential public charging network" by the Board, in consultation with other departments; and finally (4) the submission of utility filings to conform to the essential public charging network, to be resolved within 180 days of those submissions. A4189, §§ 4, 8-10.

Had this language been adopted by the Legislature, utility filings would not even have been due for a year following the date of enactment (*i.e.*, January 2021). Id., §10(a). Fulfilling all these conditions precedent would have taken considerable time and would have been incongruous with the Legislature's desire to achieve specific milestones concerning EV registrations and charger deployments. See N.J.S.A. 48:25-3 (establishing, *e.g.*, goals of 330,000 EV registrations, 400 DCFCs and 1,000 Level 2 chargers in the State by December 31, 2025); see also A4189, § 3 (which would have established the same goals for EV registrations, but even more aggressive goals for charger deployment—600 DCFCs and 1,000 Level 2 chargers by December 31, *2021*).

Furthermore, as the PIV Act's legislative findings make clear, the Legislature was mindful of the State's then-ongoing efforts in developing the EMP. See N.J.S.A. 48:25-1. At the time of enactment of the PIV Act, the Final EMP (which ultimately contained the above-cited, express references to utility involvement through, *inter alia*, "rate-based solutions") was still under

[22] See *supra*, n. 19 (quoting A4189, § 10(b)). Inasmuch as the prior iteration of the PIV Act would have allowed the Board to consider utility filings that were made at the time of enactment of the legislation, it is unclear how these filings would conform to the "Statewide" "essential charging network" the Board was to develop, "in cooperation with the electric public utilities in the State, the Department of Transportation, the New Jersey Turnpike Authority, and the South Jersey Transportation Authority" at a later point in time. See A4819, § 9(a). Moreover, since only two of the State's electric public utilities had EV filings pending with the board at the time the PIV Act was being debated, those filings could not, on their own, comprise a "Statewide" approach.

development. See supra at 69. Nonetheless, the Draft EMP, issued well before final passage of the PIV Act in June 2019, was a milestone event in and of itself.[23]

Among other things, the Draft EMP provided that: (1) "[t]he EV industry to date has been largely described as a market failure," (2) "New Jersey is *committed* to leveraging a *combination of funds* from the Volkswagen Settlement Fund, the NJ Clean Energy Program, *utility programs*, and public private partnerships to build out initial charging infrastructure". Draft EMP, at 30 (emphases supplied). In light of the legislative findings in the PIV Act, it is reasonable to presume that the Legislature was mindful of the State's intentions—and "commitment"—as expressed in the Draft EMP, including those relating to the development of "charging infrastructure" through "utility programs." In light of these statements within the Draft EMP, if the Legislature nevertheless wanted to prohibit "utility programs" for charging infrastructure, it would have done so expressly. Further, the final EMP is consistent with the PIV Act and echoes the policy positions outlined in the Draft EMP.

Finally, Rate Counsel posits that since the PIV Act allocates money collected pursuant to the societal benefits charge ("SBC") to incentivize the purchase of EVs and EVSE, that such allocation precludes utility filings. Nothing within the text of the statute (nor its legislative history) suggests that the Legislature sought to preclude utilities from establishing programs, funded through rates. Indeed, as ACE intends to demonstrate in this proceeding, utility-run programs, funded through rates, will be critical in achieving the ambitious goals of the EMP and the PIV Act. Granting Rate Counsel's motion, particularly at this early stage of the proceedings, would strip the Board of a critical avenue towards achieving the goals of the Act. Given the various sections of the PIV Act conferring broad authority on the Board to pursue the goals of the legislation, it is

[23] Draft 2019 New Jersey Energy Master Plan ("Draft EMP") available at https://nj.gov/emp/pdf/Draft%202019%20EMP%20Final.pdf.

unreasonable to conclude that the Legislature, through the PIV Act, sought to foreclose the Board's authority in this regard by mere implication.

C. EVSE and PIV Incentives *are* Regulated by the Board and, Therefore, are *Not* Competitive Services Under N.J.S.A. 48:3-51.

The PIV Act demonstrates that the Board **does** regulate PIV and EVSE incentives. Indeed, the PIV Act's very purpose is to encourage the "the use of plug-in electric vehicles and the development of plug-in electric vehicle charging infrastructure[.]" N.J.S.A. 48:25-3. The statute provides that the Board may adopt "policies and programs" to accomplish PIV Act's goals. N.J.S.A. 48:25-3(b). Further, "[t]the board may, in consultation with the department, adopt, pursuant to the 'Administrative Procedure Act," . . . rules and regulations necessary for the implementation of [the foregoing sections of the PIV Act.]." N.J.S.A. 48:25-11. Finally, the PIV Act also amended EDECA to specifically include PIVs and PIV charging infrastructure programs among the enumerated costs public utilities can recover via the societal benefits charge. See N.J.S.A. 48:25-7; N.J.S.A. 48:3-60(a)(3).[24]

With this background, basic statutory interpretation principles confirm the conclusion that the PIV Act vested the Board with the authority to regulate incentives for PIV infrastructure and programs. As an initial matter, "[t]he Legislature 'may commit a subject to the judgment of an administrative agency with a statement of the goal to be reached rather than the path to be followed to reach it.'" Matter of Farmers' Mut. Fire Assur. Ass'n of N.J., 256 N.J. Super. 607, 620 (App. Div. 1992) (internal citation omitted).

[24] The term "demand side management" is defined at N.J.S.A. 48:3-51, and means "the management of customer demand for energy service, through the implementation of cost effective energy efficiency technologies, including, but not limited to installed conservation, load management, and energy efficiency measures on and in the residential, commercial, industrial, institutional and governmental premises and facilities in this state." The PIV Act amended EDECA to include "plug-in vehicles and plug-in electric vehicle charging infrastructure" programs as demand side management programs eligible for funding through the Societal Benefits Charge. Id. *Demand management* is an integral component of ACE's Petition. See ACE's Petition, at Offerings 1-6, 9.

Considering the Legislature's plainly stated goals, the PIV Act must "be read as a whole and consideration [ ] given to all related sections[,]" Aragon v. Estate of Snyder, 314 N.J. Super. 635, 639 (Ch. Div. 1998), and the Legislature's intent "is to be derived from a view of the whole and every part of the statute, taken and compared together." Republican Committee of Garwood v. Mayor and Council of Borough of Garwood, 140 N.J. Super 593, 599 (Law Div. 1976).[25]

Using these well-settled principles, the PIV Act provides the Board with the **express** authority to "adopt . . . rules and regulations necessary for the implementation of[,]" the foregoing provisions of the PIV Act. N.J.S.A. 48:25-11, includes the authority to "establish and implement a program to provide incentives for the purchase and installation of in-home" EVSE, N.J.S.A. 48:25-6, and the authority to "adopt policies and programs to accomplish the goals established pursuant to" N.J.S.A. 48:25-3. See N.J.S.A. 48:25-3(b). These provisions clearly provide the Board with the power to regulate important aspects of the deployment of PIVs and PIV infrastructure, most notably, through incentives.[26]

In the face of statutory evidence to the contrary, Rate Counsel argues that the Board has no authority concerning PIVs or PIV charging infrastructure because PIV charging is a "competitive service" as that term is defined under EDECA, N.J.S.A. 48:3-49 et seq. See RCM at 22. A "competitive service" is defined as "any service offered by an electric public utility or a gas public utility that the board determines to be competitive pursuant to [N.J.S.A. 48:3-56 or N.J.S.A.

[25] See also Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 218 (App. Div. 2000) (a court must "effectuate the legislative intent in light of the language used **and the objects sought to be achieved**" by the statute) (emphasis supplied); Longo v. Market Transition Facility of N.J., 326 N.J. Super. 316, 323 (App. Div. 1999) (a court must consider "policy behind" statute "and the legislative scheme of which it is a part" in interpreting statute). Here, the relevant policy behind the PIV Act is fully enunciated in the EMP.

[26] To be clear, ACE's Petition does not seek to displace non-utility providers of public PIV charging infrastructure. Among other things, Offering 9 provides direct support for non-utility providers, and moreover, ACE's Petition targets low- and moderate-income and environmental justice communities, areas that could be underserved without utility involvement. See id. at 2.

48:3-58] **or that is not regulated by the board**." N.J.S.A. 48:3-51 (emphasis supplied). Implicit in this definition is the fact that a service that ***is*** regulated by the Board is ***not*** a competitive service.

Coincidentally, Rate Counsel notes that "[t]he 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." See RCM at 21. The PIV Act, of course, is found in Title 48 – where the statutes codifying the Board's authority are found. See, e.g., N.J.S.A. 48:25-1 to -11. Title 48 also codifies the rights and responsibilities of public utilities. Inclusion of the PIV Act in Title 48 indicates a role for both the Board and the utilities in the expansion of EVSE and does not support Rate Counsel's reading of the PIV Act to prohibit public utilities from involvement with PIV infrastructure. Such a reading is inconsistent with the plain language and purpose of the Act and would frustrate its purpose.

Perhaps the most basic principle of statutory interpretation is that a court cannot construe a statute in such a way that would achieve an absurd result. See, e.g., Perez, 218 N.J. at 209-11. To that end, Rate Counsel's interpretation – which prevents public utility involvement in PIV charging infrastructure, see RCM at 23-24, – is unsupported by the plain language of the statute, and would require the Board to engraft a new term into the statute that would specifically prohibit public utility involvement. However, this is something that neither the Board nor a court can do.[27] Accordingly, Rate Counsel's arguments concerning the PIV Act's supposed limitation on the Board's authority are unsupported by a plain reading of the Act. The PIV statute dictates what the Board can and cannot do – not Rate Counsel.

[27] See DiProspero v. Penn, 183 N.J. 477, 492 (2005) ("It is not the function of the Court to rewrite a plainly-written enactment of the Legislature [ ] or presume that the Legislature intended something other than expressed by way of the plain language.") (internal citation and quotation omitted); Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230 (1952) (a court cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment[.]").

IV. The Board Need Not Extend Its Authority to Approve ACE's Petition

As set forth in Section III, *supra*, the Board has full authority to approve ACE's Petition under the PIV Act. See N.J.S.A. 48:25-11. Nonetheless, Rate Counsel once again proposes to constrain the Board's authority by citing In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009), to support its argument that the Board's authority regarding EVSE is closely circumscribed. However, Rate Counsel's interpretation of Centex goes beyond its useful, rational limits.

Rate Counsel cites Centex for the proposition that "the Board cannot implement state policy through the Board's ratemaking powers without an explicit grant of authority from the Legislature." RCM at 27 (citing Centex, 411 N.J. Super. 244). Centex, however, has no applicability to this proceeding because it addressed a situation where the Board was found to have exceeded its authority where a statute *circumscribed* that authority and there was no other grant of authority that justified the Board's actions. 411 N.J. Super. at 260-61 ("BPU's power to act in the area of extensions of service is circumscribed by the language of [statute][.]"). Centex is inapposite to this matter, where the PIV Act *specifically provides* the Board's authority to act.

Indeed, as noted above in Section IV(A), the PIV Act provides the Board with express authority to regulate incentives for PIVs and PIV infrastructure. See N.J.S.A. 48:25-6(a); N.J.S.A. 48:25-6(d)(2); N.J.S.A. 48:25-11. The PIV Act also sets forth several of the Legislature's "goals" concerning "the use of plug-in electric vehicles and the development of plug-in electric vehicle charging infrastructure in the State" outside the residential setting. N.J.S.A. 48:25-3(a)(4)(a), (5), N.J.S.A. 48:25-3(a)(6)(a) N.J.S.A. 48:25-3(a)(7)(a).

Further, in enacting the PIV Act, the Legislature declared that "increased use of plug-in vehicles" can "contribute significantly" to attaining the "objectives of . . . the State's Energy Master Plan[.]" N.J.S.A. 48:25-1. As mentioned above, the EMP specifically addresses utility cost

recovery for PIV infrastructure, noting that the Board should use "**both rate-based and non-rate based solutions"** to ensure that "**utility providers** and other stakeholders can offer a significant opportunity for widespread charging deployment across multiple transportation modes and sectors." EMP, at 69 (emphasis supplied).

The PIV Act provides the Board with ample authority to pursue and accomplish the PIV goals established by the Legislature. This is not a case where the Board would be forced to rely solely upon broad policy goals or a State Plan as the bases for its actions. Instead, the Board draws its power from an express legislative grant of authority regarding PIVs and EVSE. Accordingly, Rate Counsel's arguments that Centex demonstrates that any action by the Board to approve ACE's Petition would be *ultra vires* are inapposite. The authority to implement, regulate, and oversee PIV and EVSE incentive programs is comfortably within the authority that the Legislature delegated to the Board in the PIV Act.

V. The Main Extension Rules are Not a Bar to Offering 9

Throughout its motion, Rate Counsel asserts that the Company's Offerings violate the "used and useful" principle because the facilities in question will not be owned and operated by ACE. Within its argument concerning main extensions (Point IV), Rate Counsel conversely asserts that, rather than having an insufficient interest in facilities to justify cost recovery, ACE is attempting to own too much of the facilities used in providing electric service. According to Rate Counsel, this is inconsistent with the Main Extension Rules, N.J.A.C. 14:3-8.1 et seq. and must be rejected. As set forth below, this argument is flawed in a number of ways.

Before turning to the substance of Rate Counsel's argument, however, it is necessary to understand what ACE has proposed in Offering 9. Offering 9 is intended to remove barriers to commercial property owners installing DCFCs on their property, with particular emphasis on commercial locations in underserved areas of the ACE service territory. To be eligible for this

Offering, the commercial property owner must commit to making the charging facilities available for public use at all times. Offering 9 is comprised of two components: (1) a rate incentive to offset a portion of the demand charge the customer would incur, and (2) an offer by ACE to perform "make ready" work. Specifically, the Company proposes to install and own the infrastructure required to install a DCFC up to the point of the charger connection, at no cost to the commercial customer. It is this latter element of Offering 9 to which Rate Counsel apparently takes exception. Thus, Rate Counsel argues Offering 9 should be dismissed to the extent it "permits 'make-ready' work on customer-owned property" because the Main Extension Rules would preclude such activity. RCM at 31.

As an initial matter, Rate Counsel correctly acknowledges that the Main Extension Rules apply to the "extension of new utility service to a property **currently unserved by that utility**." RCM at 30 (emphasis supplied). The corollary to this statement is that the Main Extension Rules do not apply where electric service is already present at the premises. At this time, none of the commercial locations to be served under Offering 9 have been conclusively identified.

Thus, it is pure speculation by Rate Counsel to argue that electric service is not present at the location and therefore the Main Extension Rules are implicated. Indep. Realty Co. v. Tp. of North Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005) (an issue is not ripe for adjudication if the facts illustrate that the rights of the parties are "future, contingent, and uncertain."); Texas v. United States, 523 U.S. 296, 300 (1998) (claim not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal citations and quotations omitted). In the absence of requests by individual commercial property owners for service at specific commercial locations, the potential applicability of the

Main Extension Rules cannot be known. This fact alone would justify dismissal of Rate Counsel's motion since it evinces a dispute as to facts at issue in this matter.

Second, Rate Counsel argues that the Main Extension Rules prohibit utility "make-ready" work on customer-owned property. See e.g., RCM at 31. This argument is also problematic. To start, it is unclear what precisely Rate Counsel means when it refers to "customer-owned property." If Rate Counsel is referring to the physical property location, utilities routinely install facilities on customer-owned property. Indeed, the Main Extension Rules specifically protect utilities from being required to install facilities on property that is not utility owned "unless the regulated entity is legally authorized to do so, for example through an easement or right of way." See N.J.A.C. 14:3-8.3(c). If Rate Counsel is referring to the facilities needed to serve the DCFCs, it is ACE's intention to own those facilities and they would not be customer-owned property. Thus, it is unclear how precisely Rate Counsel believes Offering 9 would run afoul of the Main Extension Rules, if they applied.

Third, Rate Counsel misstates the role the Main Extension Rules play in making service extensions: they are not the immutable requirements Rate Counsel suggests. Instead, the plain language of the regulations contemplates that the utility and the customer will work collaboratively pursuant to approved tariff provisions to complete the service extension. See e.g., N.J.A.C. 14:3-8.1(d). If an agreement cannot be reached, the Main Extension Rules suggest cost allocation formulae, N.J.A.C. 14:3-8.10(a), and provide for when the utility may request a deposit from a customer seeking a service extension. See N.J.A.C. 14:3-8.1(d).

The Main Extension Rules also enable a utility to decline to extend service where conditions on the customer's premises warrant such refusal. See N.J.A.C. 14:3-8.3(g) and (h). Nowhere in the plain language of the Main Extension Rules, however, is there language

containing the prohibitions that Rate Counsel would have the Board now read into the regulations. Indeed, the failure of Rate Counsel to cite to any such express language is telling in its absence.

Finally, Rate Counsel cites, again, to Centex to support its argument that a waiver of the Main Extension Rules would be an impermissible *ultra vires* action by the Board. RCM at 31. As explained in Section IV, *supra*, Centex is distinguishable based on the facts of this proceeding. In truth, far from supporting Rate Counsel's arguments, Centex actually supports the ACE requests. First, the PIV Act expressly delegates a role to the Board in the development of charging infrastructure in the State. See, e.g., Section III, *supra*. Thus, unlike in Centex, here the Board has an express legislative mandate to implement policies that will further the development and deployment of EV charging facilities, and actions consistent with that authority are clearly not *ultra vires*.

Second, the Court in Centex held that the Board's authority to **require** a utility to complete a service extension pursuant to N.J.S.A. 48:2-27 (and its Main Extension Rules) is non-discretionary and therefore must be narrowly construed. See Centex, 411 N.J. Super. at 262. Thus, the Centex Court concluded that N.J.S.A. 48:2-27 conferred upon the Board the power to **require** a public utility to pay for an extension upon certain findings of fact, but that delegation of power did not include the ability to **prevent** the utility from voluntarily paying for an extension. See Centex, 411 N.J. Super. at 262.

Third, in making this argument, Rate Counsel is attempting to blunt what it knows to be the Company's response to the entirety of its Main Extension argument, which is simply this: Should the Board conclude the Main Extension Rules apply to Offering 9, the Board may elect to waive the application of those rules to further the express legislative policy set out in the PIV

Act.[28] See N.J.A.C. 14:1-1.2. If a waiver is necessary, and ACE believes it is not, granting such waiver would clearly be in the public interest as it would facilitate the development and deployment of DCFCs in underserved portions of the State, in furtherance of the Legislature's stated policy of encouraging the electrification of the transportation sector in New Jersey.

CONCLUSION

For the foregoing reasons, the Board should deny Rate Counsel's motion.

Respectfully submitted,
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[28] See N.J.A.C. 14:1-1.2(b)(1) which provides: "The Board shall, in accordance with the general purposes and intent of its rules, waive section(s) of its rules if full compliance with the rule(s) would adversely affect the ratepayers of a utility or other regulated entity, the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public[.]"

Exhibit A

In re Petition of Public Service Electric and Gas Company for Approval of an Increase in Electric and Gas Rates and for Changes to the Tariffs for Electric and Gas Services, P.U.C. N.J. No. 6 Gas, Pursuant to R.S. 48:2-21,

BPU Docket No. 794-310

OAL Docket No. PUC 877-79

Initial Decision Revenue Requirements, February 5, 1980

Excerpted to include discussion concerning Atlantic Generating Station ratemaking.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE PETITION OF **PUBLIC SERVICE ELECTRIC AND GAS COMPANY** FOR APPROVAL OF AN INCREASE IN ELECTRIC AND GAS RATE AND FOR CHANGES IN THE TARIFFS FOR ELECTRIC AND GAS SERVICES, P.U.C. N.J. NO. 7 ELECTRIC, AND P.U.C. N.J. NO. 6 GAS, PURSUANT TO R.S. 48:2-21	))))))))	INITIAL DECISION REVENUE REQUIREMENTS **O.A.L. DKT. NO. PUC 877-79** BPU DKT. NO. 794-310

(APPEARANCES ATTACHED)

BEFORE THE HONORABLE **DAVID J. McGEE**, A.L.J.:

On April 20, 1979 Public Service Electric and Gas Company (hereinafter referred to as petitioner, company or Public Service) filed a petition for authority to increase its electric and gas rates and change its tariffs for electric and gas service pursuant to N.J.S.A. 48:2-21. The proposed overall increase was designed to produce $374,511,000 in additional annual operating revenues. $289,602,000 of this increase is attributable to electric service, (a 17.84% increase) and $84,909,000 of this increase is attributable to gas service (an 11.36% increase).

It was not necessary for the Board to suspend Petitioner's requested rate increase as the stipulation in Petioner's last rate case (Docket No. 711-1107) provided that petitioner would not increase its rates until March 1, 1980. In April 1979 the Board found this matter to be a contested case and transmitted this matter to the Office of Administrative Law for determination. An initial hearing was held in Newark, New Jersey on May 15, 1979 after proper notice. Further hearings were held in the field to solicit public comment in Trenton, Camden, New Brunswick and Hackensack, New Jersey after proper notice.

The question then is whether Board policy treats political advertising as below the line. Rate Counsel neglected to point out in their brief that the Board has already dealt with this entire issue. The Board held generic hearings on the subject of advertising which resulted in a decision by the Board broadly treating many forms of advertising as below the line. It is not clear but the Board apparently granted reconsideration of the issue to consider a narrower scope to the decision. No action was ever taken on reconsideration. By operation of BPU regulations if no action on reconsideration is taken within sixty (60) days the reconsideration is denied. It was generally understood, however, that the Board would not take any action on advertising until the entire issue was resolved. Technically, however, there is a valid, outstanding Board order treating advertising as below the line.

The issue as to political advertising is not unresolved however. At no time in the board's consideration of the issue did it question whether political advertising was not to be treated as below the line. Political advertising always fell within the narrowest scope of the proposed treatment of advertising. I, therefore, conclude that at least as to political advertising it is Board policy to treat such advertising expenses as a below the line expense.

ATLANTIC GENERATING STATION ABANDONMENT LOSS

In December 1978 the Company officially abandoned the Atlantic Generating Station project, which was a project aimed at siting floating nuclear power plants off the coast of New Jersey. Rate Counsel stipulated with the Company in the last rate case that the proper treatment of this loss was to amortize the loss over 20 years with no rate of return being earned on the unamortized portion.

The treatment of the loss was stipulated to, but the appropriate amount of the loss was the subject of extensive litigation in this case. Rate Counsel undertook a thorough review of the entire history of the project. As a result of their review, Rate Counsel recommended the following adjustments:

OAL DKT NO. PUC 877-79

Atlantic Generating Station

	(000 omitted)
Joint Ownership	($45,380)
Renegotiationn of AGS Contract	(11,567)
AFDC	(10,139)
Termination Costs:	
Salvage	($10,000)
Unabsorbed Overheads	(29,800)
Valves	(900)
Sales Assessment	(1,400)
Corporate Managed Costs	(600)
Marketing Expenses	(2,800)
Wind down expenses	(1,200)
	113,786

Joint Ownership

Rate Counsel would make an adjustment due to the joint ownership provisions of the Atlantic Generating Station (AGS) contract. The Company gave a 20% share of the AGS Facilities to Atlantic City Electric Company (ACE) and Jersey Central Power and Light Company (JCP & L) in return ACE's and JCP & L's responsibility in the event of termination was limited to $6 million. The 20% share of the facilities and the cost responsibility were disproportionate. In other words ACE's and JCP + L's share of the cost upon termination should have been greater if based on their 20% share of the generating capacity.

Reasonableness and prudence, the standards used in this proceeding, contemplate varying levels of risk in decision making. If one is in a high risk situation, it may be prudent to elect a high risk alternative. The AGS project has not been viewed by the Company as high risk. They have sought to minimize the risks. Rate Counsel has commented on the difficulties of the project, but they seek to compare AGS to the normal situation of a land-based nuclear facility.

Rate Counsel therefore perceives the risks of AGS as no different than a land-based facility. I will, therefore, assume AGS has attached to it a normal level of risk in terms of ultimately bringing the facility on line.

Rate Counsel's argument is that the disproportionate joint cost arrangements of AGS was imprudent because it is contrary to the industry standard which is a proportionate sharing of costs. In order to demonstrate this standard, Rate Counsel looks to other Public Service facilities which the Company has undertaken jointly with other utilities. Rate Counsel shows that with these other facilities there is a proportionate sharing of costs and thus creates a standard. The Company shows that each joint facility has its own peculiarities and there can be no standard generalized from an analysis of these facilities. Further, the peculiarity making disproportionate cost arrangments necessary for AGS was the need for extensive transmission facilities in ACE's and JCP & L's service territories. Evidence has not been produced from other jurisdictions presumably because of the limited expertise of Rate Counsel's witness.

The Company grants that the other jointly owned facilities, Salem and Hope Creek, are located out of the Company's service territory, are served by extra territorial transmission lines, and the costs were shared proportionately. The Company shows, however, that the reason for this proportionate sharing was because both of these facilities were originally planned to be located within the Company's service territory at Burlington and Newbold Island. The agreements for the cost sharing were originally executed without the parties contemplating the need for extra territorial transmision lines.

I find the Company's position to be persuasive and conclude that Rate Counsel has not established a standard by which the Company can be judged. I will, therefore, not allow this adjustment.

Renegotiation of the OPS Contract

In 1974 the Company renegotiated the OPS contract. The contract originally entered into was in the nature of a joint venture. Both the Company and Offshore Power Systems (OPS) stood to gain from the success of the project. OPS

sought to mass pruduce floating nuclear generating stations. Obviously the more units they could sell the greater their profit would be. The Public Service Company had a fixed price contract, but the price would be reduced as OPS was able to sell additional units. In accepting a fixed price contract Public Service gave up control over the management of the projects costs.

By 1974 OPS had sold no units to anyone other than Publiic Service. The load forecasts of Public Service showed decreasing growth in projected load ever since 1969. One must assume Public Service's experience was typical of the industry along the Eastern Seaboard. OPS therefore probably knew of these trends and negotiated the contract in 1974 with an eye to the down side, or what their protection was in case of termination. The Company on the other hand while they had experienced a decrease in load growth, had also experienced the abandonment of other projects due to environmental problems. The net result was that the Company had an increased need for generating capacity and was viewing the upside of the contract or what would be their costs for completing the project. Not surprisingly, the Company was able to negotiate very reasonable terms for the extension of the service dates of the offshore nuclear units because the Company was looking to the upside and OPS to the downside. Each party got what they wanted. The terms of the renegotiated contract retained the fixed price nature of the contract giving Public Service little control over the management of the project's costs.

Rate Counsel argues that the lack of control of the project's costs resulted in $11,567,000 in costs that need not have been incurred. Rate Counsel maintains the Company had the incentive to ignore the long range downside costs of termination because they wanted the short run benefits of improved cash flow. Rate Counsel demonstrates that the Company was in the throes of a serious financial crisis in 1974 which gave rise to a need for improved cash flow. Rate Counsel further argues that not only did the Company have the incentive, but it in fact acted imprudently because there were many indications in 1974 that the offshore nuclear facilities would never be needed.

From the testimony I conclude, that on the basis of the information available to the Company, that a reasonable projection of the future showed a need for the offshore facilities. However, all projections carry with them uncertainty. The Company was aware of this uncertainty as was demonstrated by the fact that some consideration was given to a 2.5% growth rate which would have rendered all the offshore facilities unnecesary.

When confronted with uncertainty a prudent man hedges his decision. This is what the Company failed to do. The Company placed a ll of its eggs in the upside basket of the renegotiated contract.

The remaining question is whether the lack of control the Company had over the management of the project's costs resulted in unnecessary expense. Rate Counsel maintains that the work on the construction of the OPS manufacturing plant could have been delayed four to five years. The Company argues in rebuttal that there were wind-down and start up costs associated with a delay in the construction of the manufacturing plant unaccounted for by Rate Counsel's $ll,567,000 cost. The Company also wishes the costs viewed in context. The Company was able to realize a reduction in progress payments of over $425 million during the same period as result of the renegotiation.

I find that Company's arguments with regard to the wind-down and start up costs noteworthy, but these costs are unquantified. I also find that there are benefits from the renegotiation of the contract, although unquantified, which would offset the $ll,567,000 cost proposed by Rate Counsel. I must resolve the doubts concerning these unquantified adjustments against the Company, however, because it has the burden of proof in this regard. I will, therefore, deduct the entire amount or $ll, 567,000.

AFDC

Rate Counsel argues that the Company should have stopped accruing AFDC on the offshore nuclear project at the point in time when it first began to enter exploratory discussions contemplating termination, which was October 1977.

The Company maintains the appropriate date for calculating AFDC is December 1978, the date of legal termination under the terms of the contract.

In October 1977 the Company first entered into discussion with OPS looking toward termination. It was agreed that February 22, 1978 would be the deadline for reaching agreement on termination costs and those termination costs would be calculated according to the level of just and reasonable expenditures made before December 29, 1977. The project, however, continued until its official termination date of December 1978.

The question is at what point should AFDC no longer be accrued: When a project is almost dead but has a feint pulse or when the project is officially pronounced dead? Rate Counsel argues that even if the project has a feint pulse, the appropriate date is December 29, 1977 because that is the date on which the Company's liability was fixed retroactively by the contract and that should also be the date on which the ratepayers' liability is fixed. Rate Counsel's logic is convincing and I concur with Rate Counsel's position.

Termination - Unabsorbed Overheads

When termination costs under the contract between Public Service and OPS were finally negotiated in February 1977 unabsorbed overheads were a major item in the negotiations. Unabsorbed overheads are explained by the Company as follows:

> "The concept of unabsorbed overheads is widley recognized and accepted as a legitimate termination cost. The basic idea of unabsorbed overheads is that when an order for a major piece of equipment is placed, facilties and personnel are reserved for that order and preliminary engineering work is done. If that order is later cancelled, and if those facilities and personnel and preliminary engineering work cannot be otherwise utilized, a cost of termination is recognized as an unabsorbed overhead."

The Company also cited Apex Metal Stamping Co. v. Alexander and Sawyer Inc., 48 N.J. Super 476 (App. Div. 1958) as proof that unabsorbed overheads are considered by the courts as a legitimate termination cost. I conclude from the Company's explanation of these costs that they are legitimate, real costs of termination. The remaining question is how much of these costs are legitimate.

The Company sought to prove $29.7 million was the appropriate level of this expense by showing that the negotiation process was fair and favorable to the Company. The Company argues that OPS' original claim for unabsorbed overheads was for $142.4 million and as result of the negotiations that figure was reduced to $30.1 million and possibly as low as $21.9 million if the redction in OPS' overall claim is attributed to unabsorbed overheads. The difficulty with this argument is that the Company had no idea what level was appropriate because they were not allowed to see Westinghouse's books. Westinghouse is the parent corporation of OPS and the entity that incurred the unabsorbed overhead costs. I must, therefore reject the Company's justification of this expense as the costs have no basis in concrete fact. This does not mean that a utility is precluded from ever entering into a settlement negotiation. It means that a utility must be mindful of its regulatory responsibilities and be able to produce some basis to support its settlements.

Having rejected the Company's estimate of the level of costs, the result is a legitimate cost exists without quantification. Rate Counsel maintains that this cost be quantified as zero. If it is a legitimate cost, it cannot be quantified as zero. To resolve this issue I will allow one-half of the $29.7 million estimated by the Company or $14.85 million.

As an addendum, I note that the Company attempted to resusitate its position in its reply brief by showing that actual payments pursuant to a contract were made by OPS to Westinghouse for unobsorbed overheads in the amount of $25 million. These payments were later audited by Price Waterhouse. All this evidence proves is OPS made payments to Westinghouse. These payments could have been fair and reasonable because an attempt was made to accurately reflect

the costs of the subsidiary to judge its performance or these payments may have been a vehicle to plow profits into the parent company. I can draw no conclusion from the fact that payments were made.

Salvage

The Company settled the contract with OPS on the basis that $18 million was the cost of salvage which would offset Public Service's total responsibility. Rate Counsel maintains a higher salvage value is appropriate. Their salvage estimate is $28 million.

Rate Counsel attacks the Company's figure on the basis that they had limited opportunity to inspect the property, that they should have hired an appraiser, and that the figure is suspect because it agrees with OPS' estimate.

I find that the Company had an adequate basis on which to estimate the salvage value. The Company had a least a dozen engineers at the construction site throughout the life of the project. These engineers periodically made estimates of termination costs. The Company's General Manager of Real Estate, who is the current president of the Chapter of the American Institute of Real Estate Appraisers, inspected the property at the construction site and had available to him the same information on which Rate Counsel based its estimate. The company has also demonstrated substantial weaknesses in Rate Counsel's estimate. Considering the foregoing, I will allow $18 million as the value of salvage.

Marketing Costs

Rate Counsel would reduce marketing costs by $2.8 million from $4.2 million, arguing that OPS should have shared in these costs because it stood to benefit from its marketing effort through the sale of additional units. The Company relies on the contract, arguing they were obligated to pay these expenses and further arguing that the marketing effort would have benefited Public Service.

As I have already held that the Company renegotiated the contract on the upside when they should have hedged their decision, I find that Company's reliance on the contract unjustified. I therefore, will allow Rate Counsel's adjustment, as OPS stood to benefit substantially from the marketing effort. However, I will only allow-one half of the adjustment as the Company has demonstrated that Rate Counsel has incorrectly calculated this adjustment.

Valve

The Company has adequately demonstrated on the record that the value of the valves was included in the $18 million salvage value. I will, therefore, make no deduction for this item. Rate Counsel argued this item was not included in the $18 million salvage value.

Maintenance and Security

The Company claims the appropriate level of maintenance and security costs to protect the construction facility for two to three years while it was being salvaged is $2.1 million. The only proof in this regard is Mr. Mallard's statement that " such a facility clearly could not be salvaged all at once, and hence this is a legitimate cost." I find the Compnay has not met its burden of proof and will, therefore, allow Rate Counsel's adjustment of $1.2 million which is based on a one year salvage period.

Field Sales Assessments and Managed Corporate Costs

The Company originally conceded that these two items, field Sales Assessments, $1.4 milliion, and Managed Corporate Costs, $0.6 million, were inappropriate. In its reply brief the Company does not concede these items, arguing that these items were in effect bargaining chips. The Company argues that some recognition should be given to their ability to negotiate a settlement figure lower than their original estimate of their liability.

The Company's position is a sensible one since Rate Counsel used the Company's estimate of its liability as a starting place for its adjustments. I will therefore, deduct $2 million for Field Sales Assesments and Managed Corporate costs, but will offfset that amount by the $8 million the Company was able to save through its negotiation efforts.

Summary of Adjustments - Atlantic

Company Proposed Amount		$319.9 million
Less Termination Adjustments		
Sales Assesment	1.4	
Unabsorbed overheads	14.85	
Group Costs	0.6	
Marketing Expenses	1.4	
Maintenance & Security	1.2	
Negotiations Gains	(8)	
	11.45	
Deduct termination adjustment		(11.45)
Less Renegotiation Adjustment		(11.6)
Less AFDC Adjustment		(7.37)
Plus $6 million paid by other utilities		6
		295.48

OAL DKT NO. PUC 877-79

Tax computation:		
Before Tax Loss	295.48	
Non-Taxable (13.9%)	41.07	
Taxable Base	254.41	
Tax at 48%	122.12	
After Tax Loss	132.29	
Total Net Loss	173.36	
ALJ Net Abondonment Los		173,360
Divide by 20 years		
Adjustment to Income		8,668

RATE OF RETURN

The Company's witness Dr. Phillips recommended a 14.5% rate of return on equity using a comparable earnings approach. Dr. Phillips' method was to demonstrate that utilities were either riskier or had risks comparable to the Standard & Poor's 400 Industrials. He then used the average rate of return on equity of the 400 industrials, 14.5%, as the rate of return for the petitioner.

The Company employed a second rate of return witness Mr. Meyer, who's method was characterized as not being a classic rate of return method. Mr. Meyer testified that the equity investor would require a dividend yield on book value at least equal to the bond rate of the same company which in the then current market was 9.75%. To produce the 9.75% dividend yield on book value, the Company would have to earn a 15% rate of return on book common equity assuming a 65% payout ratio. As a proof that his position is correct, Mr. Meyer calculated the actual return to the investor in terms of yield and growth and found that the actual return fell within a range of 12.75% - 14.75%, a range considered reasonable by Mr. Meyer.

Both Dr. Phillips and Mr. Meyer put forward positions on rate of return as witnesses for the Company. Dr. Phillips recommendd 14.5% and Mr. Meyer 15%. A rate of return on equity of 14.25%, however, represents the Company's position.

Rate Counsel presented the testimony of Dr. Marcus who principly used a Discounted Cash Flow approach (DCF) but also a comparable earnings and a spread method approach. Dr. Marcus's recommended position was a 13.1% rate of return on equity.

The Federal Government Agencies, an intervenor in the case, presented the testimony of Dr. Belmont who also used the DCF method. Dr. Belmont determined a range of reasonableness for the equity rate of return. A return between 12.03% and 12.75% was recommended as reasonable by Dr. Belmont with a single most probable value of 12.53%.

Beginning with the Federal Government Agencies position of 12.53% rate of return on equity, I note that a past Board decisions have allowed a 13% rate of return, a return higher than recommended by the Federal Government, and the Company's stock has never sold at or near book value at that 13% rate of return. I also note that since the 13% rate of return was first awarded by the Board, market conditions have changed considerably, necessitating a higher return. I, therefore, reject the position of the Federal Government.

In the concluding weeks of the testimony in this case, the Company produced evidenced updating Rate Counsel's position as proposed by Dr. Marcus. The update was necessitated by the change in market conditions occurring in the fall of 1979. That evidence is summarized as follows:

	RATE COUNSEL'S POSITION	COMPANY UPDATE	
Divident Yield	9.6%	10.05%	10.05
Expected Growth	3.0%	3.0	3.25
Cost of Equity	12.60%	13.05	13.30

Dividend Yield Adjusted for Selling Costs and Pressure	(1) 10.1%	10.58	10.58
	(2)	10.86	10.86
Fair and Reasonable Return	(1) 13.10%	13.58	13.83
	(2)	13.86	14.11

(1) 5.0% pressure and selling cost adjustment
(2) 7.5% pressure and selling cost adjustment

Dr. Marcus in petitioner's last rate proceeding used a 3.25% growth facctor and a 7.5% pressure and selling cost factor. Dr. Marcus' testimony as to why he down graded these factors in this case was unpersuasive. I will, therefore, use the higher factors, in assessing Rate Counsel's position.

The company recalculated Dr. Marcus' dividend yield figure using both an eighteen month average, which dilutes the high dividend yield months in 1979, and a twelve month average through October 1979, which is reflected in the above schedule. The Company pointed out that even using the more conservative eighteen month figure, which is 9.93%, with a 3.25% growth factor and a 7.5% pressure and selling cost factor, the result is a 13.99% rate of return on equity. Using a twelve month average, as can be seen from the above table, the rate of return is 14.11%.

Another approach is to look back in time to when the Company stock last sold near book value. In 1977 the Company's stock sold at 93% of book value after a rate decision by the Board in 1976 which allowed the Company a 13% rate of return. Assuming the Board made the correct decision as evidenced by the market place assessment (93% of book), it is possible to update the 1976 decision by applying Marcus' spread method.

Dr. Marcus' spread method divides the rate of return on equity into two components; the utility bond rate and an increment of return representing the higher risk of equities above the bond rate. The equity risk component remains constant, therefore, it is possible to measure the change in market conditions by observing the change in the bond rate. Subtracting the 1977 bond rate from the 1979 bond rate, an increment of 1.66% is determined. Today's rate of return on equity would, therefore, be 1.66% higher than the 13% allowed by the Board in 1976 or 14.66%. The 1979 bond rate was determined in mid 1979. Market conditions have changed considerably since then. If that bond rate was determined today it would be in the neighborhood of 100 basic points higher or 15.66%.

The company demonstrated that the testimony of its witness, Mr. Meyer should also be updated. Mr. Meyer's recommendation would no longer be 15%, but rather in the 15-17% range.

Using the 13.99% rate of return of Dr. Marcus as recalculated by the Company and giving minimum effect to the 14.5% rate recommended by Dr. Phillips, the updated 15-17% rate of Mr. Meyer, and the 14.66 to 15.66% rate as developed by applying Dr. Marcus' spread method, the 14.25% rate of return on equity requested by the Company is reasonable.

Capitalization

The Company's proposed capitalization at December 31, 1979 according to schedules submitted with the second stipulation is summarized as follows:

	(Thousands of Dollars)			
	Amount	Percent	Cost	Weighted Cost
Long-Term Debt	$2,256,919	44.15	7.48	3.30
Preferred Stock	589,994	11.54	7.67	.89
Dividend Preference	29,568	.58	6.28	.04
Short-Term Debt	119,074	2.33	13.00	.30

IN THE MATTER OF THE PETITION OF ATLANTIC CITY ELECTRIC COMPANY FOR APPROVAL OF A VOLUNTARY PROGRAM FOR PLUG-IN ELECTRIC VEHICLE CHARGING	**STATE OF NEW JERSEY** **BOARD OF PUBLIC UTILITIES** **BPU DOCKET NO. EO18020190**

CERTIFICATION OF SERVICE

ANDREW J. MCNALLY, of full age, certifies as follows:

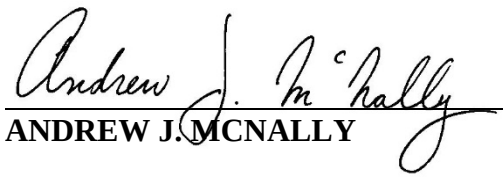
1. I am an attorney at law of the State of New Jersey and I am Assistant General Counsel to Atlantic City Electric Company ("ACE"), the Petitioner in the within matter, with which I am familiar.

2. I hereby certify that, on May 4, 2020, I caused ACE's Opposition to the Division of Rate Counsel's Motion to Dismiss ("ACE's Opposition") to be filed, electronically, with the New Jersey Board of Public Utilities through the Board Secretary's office (board.secretary@bpu.state.nj.us). Consistent with the Order issued by the Board in connection with *In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, Order dated March 19, 2020 ("COVID-19 Order"), I caused this document to be filed via electronic means only, and no paper copies will follow.

3. I further certify that, on May 4, 2020, I caused ACE's Opposition to be sent by electronic mail to each of the parties listed in the attached Service List, including to personnel at the Division of Rate Counsel. Consistent with the aforementioned COVID-19 Order, no paper copies will be served on the parties listed in the attached Service List.

5. I further and finally certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: May 4, 2020



ANDREW J. MCNALLY

I/M/O Petition of Atlantic City Electric Company for Approval of a
Voluntary Program for Plug-In Vehicle Charging
BPU Docket No. EO18020190

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