State of New Jersey
DIVISION OF RATE COUNSEL
140 EAST FRONT STREET, 4TH FL
P.O. BOX 003
TRENTON, NEW JERSEY 08625

PHIL MURPHY
*Governor*

SHEILA OLIVER
*Lt. Governor*

STEFANIE A. BRAND
*Director*

May 18, 2020

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

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

Dear Secretary Camacho-Welch:

Please accept for filing this Reply Brief by the New Jersey Division of Rate Counsel ("Rate Counsel"), in the above-referenced matter. Copies of this brief are being provided to all parties on the service list by electronic mail only.

**Please acknowledge receipt of this Reply Brief.**

Thank you for your consideration and attention to this matter.

Respectfully submitted,

STEFANIE A. BRAND
Director, Division of Rate Counsel

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

BW
Enclosure
cc: Service List

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

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

Stefanie A. Brand, Esq., Director
Division of the Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625

Brian O. Lipman, Esq.
Litigation Manager
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625

Felicia Thomas-Friel, Esq.
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625

Kurt S. Lewandowski, Esq.
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625

Brian Weeks, Esq.
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625

Ami Morita, Esq.
Division of Rate Counsel
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625

Pamela Owen, DAG
Division of Law
Public Utilities Section
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Alex Moreau, DAG
Division of Law
Public Utilities Section
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Paul Flanagan, Executive Director
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Sherri Jones
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Grace Strom Power
Chief of Staff
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Michael Hornsby
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Stacy Peterson, Executive Director
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Jackie O'Grady
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Kelly Mooji
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625

Cathleen Lewis
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625

Andrea Hart
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625

Clark M. Stalker, Esq.
Atlantic City Electric Company
92DC42
500 N. Wakefield Drive,
P.O. Box 6066
Newark, DE 19714-6066

Philip J. Passanante, Esq.
Atlantic City Electric
92DC42
500 N. Wakefield Drive
P.O. Box 6066
Newark, DE 19714-6066

Peter R. Blazunas
Pepco Holdings LLC – EP9020
701 Ninth Street, NW
Washington, DC 20068-0001

Lauren M. Lepkoski, Esq.
FirstEnergy Service Company
Legal Department
2800 Pottsville Pike
Reading, PA 19612-6001

Robert S. Stewart
Manager, Smart/Grid/Technology
Pepco Holdings LLC – EP8022
701 Ninth Street, NW
Washington, DC 20068-0001

Michele Falcao
PSE&G Services Corporation
80 Park Plaza – T5
P.O. Box 570
Newark, NJ 07102

Justin B. Incardone, Esq.
Associate General Regulatory Counsel
PSEG Services Corporation
80 Park Plaza, T5G
Newark, NJ 07102-4194

Joseph F. Janocha
Pepco Holdings LLC – 92DC56
500 N. Wakefield Drive
P.O. Box 6066
Newark, DE 19714-6066

Kenneth Sheehan, Esq.
NJ Board of Public Utilities
44 South Clinton Avenue
Suite 314
P.O. Box 350
Trenton, NJ 08625-0350

Daren Eppley, DAG
Division of Law
Public Utilities Section
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Bernard Smalls
PSE&G Services Corporation
80 Park Plaza – T5
P.O. Box 570
Newark, NJ 07102

Michael Beck, DAG
Division of Law
Public Utilities Section
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Murray E. Bevan, Esq.
Bevan, Mosca & Giuditta, P.C.
222 Mount Airy Road
Suite 200
Basking Ridge, NJ 07920-2335

Brandon Simmons, DAG
Division of Law
Public Utilities Section
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Jennifer McCave, Esq.
Bevan, Mosca & Giuditta, P.C.
222 Mount Airy Road
Suite 200
Basking Ridge, NJ 07920-2335

Katherine M. Dailey, Paralegal
Bevan, Mosca & Giuditta, P.C.
222 Mount Airy Road
Suite 200
Basking Ridge, NJ 07920-2335

William K. Mosca, Jr., Esq.
Bevan, Mosca & Giuditta, P.C.
222 Mount Airy Road
Suite 200
Basking Ridge, NJ 07920-2335

Courtney L. Schultz, Esq.
Saul Ewing LLP
Centre Square West, 38 Floor
1500 Market Street
Philadelphia, PA 19102

Colleen A. Foley, Esq.
Saul Ewing, LLP
One Riverfront Plaza
Suite 1520
Newark, NJ 07102

Aaron Kleinbaum, Esq.
Raghu Murthy
Eastern Environmental Law Center
50 Park Place, Suite 1025
Newark, NJ 07102

Ezra D. Hausman, Ph.D.
77 Kaposia Street
Newton, MA 02466

Joshua J. Cohen
Director, Policy
Greenlots
1910 Towne Centre Blvd., Ste. 250
Annapolis, MD 21401

Guillermo C. Artiles
McCarter & English
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102-4056

Kevin Auerbacher, Esq.
Managing Counsel
Tesla, Inc.
1333 H Street, NW, Floor 11
Washington, DC 20005

Patrick Bean
Global Charging Policy Lead
Tesla, Inc.
1333 H Street, NW, Floor 11
Washington, DC 20005

Bill Ehrlich
Senior Policy Advisor
Tesla, Inc.
3500 Deer Creek
Palo Alto, CA 94304

William Bittinger, Esq.
Eastern Environmental Law Center
50 Park Place, Suite 1025
Newark, NJ 07102

Martin C. Rothfelder, Esq.
Rothfelder Stern, L.L.C.
407 Greenwood Ave., #301
Trenton, NJ 08609

Nathan Howe, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102-4056

Andrew J. McNally, Esq.
500 N. Wakefield Drive
P.O. Box 6066
Newark DE 19714-6066

Jennifer Grisham
Pepco Holdings LLC- EP3624
701 Ninth Street, NW
Washington DC 20068-0001

Heather Hall, Manager
500 N. Wakefield Drive
P.O. Box 6066
Newark DE 19714-6066

Thomas Ashley
Vice President, Policy
Greenlots
925 N. La Brea Avenue, 6th Floor
Los Angeles, CA 90038

Raghu Murthy, Esq.
Eastern Environmental Law Center
50 Park Place, Suite 1025
Newark, NJ 07102

Christopher Oprysk
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Abe Silverman, Esq.
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Ilene Lampitt, Esq.
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Scott Sumliner
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Christopher Oprysk
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

**STATE OF NEW JERSEY**
**BOARD OF PUBLIC UTILITIES**

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

---

# REPLY BRIEF ON BEHALF OF THE DIVISION OF RATE COUNSEL

---


STEFANIE A. BRAND, ESQ.
DIRECTOR, DIVISION OF RATE COUNSEL

DIVISION OF RATE COUNSEL
140 East Front Street-4th Floor
P. O. Box 003
Trenton, New Jersey 08625
Phone: 609-984-1460
Email: njratepayer@rpa.nj.gov

Of Counsel:
Brian O. Lipman, Esq.
Felicia Thomas-Friel, Esq.
Brian Weeks, Esq.
Kurt S. Lewandowki, Esq.


Dated: May 18, 2020

## TABLE OF CONTENTS

# TABLE OF AUTHORITY

**PAGE**

**Cases**

**Statutes**

## PRELIMINARY STATEMENT

Reducing emissions from the transportation sector is certainly an issue of great importance in New Jersey's efforts to combat the effects of climate change. To facilitate the reduction of emissions from cars and trucks, the Legislature and the Governor have called for increasing the use of electric vehicles in New Jersey. The Legislature passed the "PIV Act," which provides the means by which the Board of Public Utilities ("Board" or "BPU") may promote the use of electric vehicles. While original versions of the PIV Act contained broad provisions allowing utilities to invest in electric vehicle infrastructure and charge ratepayers for the costs and profits involved in doing so, the Legislature pared down those provisions of the Act. The version of the bill that was ultimately passed and signed by the Governor included certain specified incentives that the BPU could provide to promote the adoption of electric vehicles. Specifically, the Act permitted rebates up to $5,000 to customers purchasing electric vehicles, and rebates up to $500 to customers purchasing in home chargers. N.J.S.A. 48:25-4, -6.

The source of the funds to be utilized to pay for these programs was also specified in the PIV Act. N.J.S.A. 48:25-7 states that both of the authorized programs are to be paid for via the "Plug-in Electric Vehicle Incentive Fund," ("PIV Fund") to be administered by the BPU. The sources of funding for the PIV Fund are also specified in N.J.S.A. 48:25-7, and include funds collected via the Societal Benefits Charge ("SBC") and Regional Greenhouse Gas Initiative ("RGGI") for the vehicle rebates and SBC funds for the in-home charger rebates. Other than those sources, the only other funds to be deposited in the PIV Fund are further appropriations by the Legislature and the investment income of the Fund itself.

Despite this clear and unambiguous statutory language, the Petitioner and two intervenors[1] argue that the funding sources specified by the Legislature are insufficient. Citing to general language regarding BPU authority, they are therefore advocating that the Board ignore the statute's plain language and authorize a series of programs to be paid for via direct charges on customer bills. The Board lacks authority to do this. Its role is to execute the law as written, which the Legislature deemed sufficient to meet its statutory goals. Any Order allowing funding beyond what was permitted by the Legislature would be ultra vires as a matter of law.

Not only is the Petitioner seeking approval that goes beyond the clear statutory language, it is seeking approval to earn a profit on *other people's property*. This is also something the Board may not allow as it goes against decades of established law allowing utilities to earn only on "used and useful utility property." Although the Legislature has in one circumstance allowed the inclusion of energy efficiency and renewable energy investments in a utility's rate base, it chose not to do so here. There is simply no legal authority for the Board to grant approval of most of the Offerings proposed by Atlantic City Electric Company ("ACE") in this petition.

In its defense, ACE and intervenors cite to general policy concerns about the need to encourage transportation electrification. While these policy issues are no doubt important, they are not relevant to this motion. The Legislature, balancing environmental concerns, the desire of utilities to foster the increased sales that will come with EV adoption, and the economic concerns of customers who will be forced to pay for EV programs whether they can afford an EV or not, settled on authorizing certain programs and certain funding sources for those programs. The balance struck by the Legislature is even more important now, as many New Jersey families struggle with unemployment and the need to continue paying for these essential services.

[1] Natural Resources Defense Council and Zeco Systems, Inc. d/b/a Greenlots.

Whether the Legislature struck the right balance or should have authorized more is also not relevant to this motion. The issues here are legal.

No disputed factual issues preclude the issuance of the legal relief sought by Rate Counsel. Rate Counsel has taken the description of the Offerings as they were stated in ACE's petition. While several intervenors and ACE have called for further proceedings to flesh out the policy issues surrounding electric vehicle adoption, such proceedings would waste the resources of both the Board and the litigants if the requested programs cannot be approved as a matter of law. The Board should, and must, consider the legal issues raised herein so that the issues in this case can be reduced to those the BPU has the legal authority to grant. For these reasons, Rate Counsel's motion should be granted.

## ARGUMENT

## POINT I

### THERE IS NO LEGAL AUTHORITY TO ALLOW UTILITIES TO EARN ON PROPERTY OWNED BY OTHERS IN THIS CASE

While acknowledging the long standing legal doctrine that utilities may only recover in rate base property that is "used and useful utility property," ACE urges the BPU to dispense with this principle in order to pursue general goals related to transportation electrification. Doing so would allow the utilities to earn a profit on property they do not own. Yet ACE has provided the BPU no legal authority or basis to depart from this long standing legal precedent. These precedents exist to maintain the balance between what is fair for a utility seeking to earn a reasonable return on its investments and what is fair for customers who are entitled to be charged only rates that are just and reasonable. They are constitutionally derived, based on principles of property rights and may not be cast aside so easily. As ACE has provided no legal justification to deviate from well-established law, the Board should uphold these basic principles of law and fairness.

ACE's brief expresses doubt about the constitutional basis of rate regulation. AB p. 10-12.[2] Fortunately, the United States Supreme Court put those doubts to bed long ago. In its 1989 Duquesne Light Co. v. Barasch decision, the Court explained that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." 488 U.S. 299, 307. The Court further explained that, "[i]f the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and

[2] ACE's opposition brief is cited as AB; Rate Counsel's brief is cited as RCB.

Fourteenth Amendments." 488 U.S. at 307. ACE may have been confused by the change over time in the accepted method of fixing constitutionally permissible, i.e., non-confiscatory, utility rates. The Duquesne Light Court also explained that change in ratemaking method: "Forty-five years ago in the landmark case of FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), this Court abandoned the rule of Smyth v. Ames, 169 U.S. 466, 522 (1898) , and held that the 'fair value' rule is not the only constitutionally acceptable method of fixing utility rates. In Hope we ruled that historical cost was a valid basis on which to calculate utility compensation." 488 U.S. at 310. The New Jersey Supreme Court has also made it clear that the Constitutional concerns work both ways, *i.e.*, if the rate is too high it is confiscatory for the ratepayers, but if it is too low, it confiscates utility property. In re Proposed Increased Intrastate Indus. Sand Rates, 66 N.J. 12, 23-24 (1974). Thus, there is no doubt that utility rates may not be set at a level that is confiscatory of the property of either the utility or the ratepayer.

In addition to our courts, the Board has for decades followed the used and useful principle. See, e.g., I/M/O Petition of Suez Water Arlington Hills Inc. For Approval of an Increase in Rates, BPU Docket No. WR16060510, Order dated Nov. 13, 2017 (adopting recommendation of ALJ's Initial Decision to disallow rate recovery for a pump that had been removed from service, on the basis that it was no longer used and useful); I/M/O Parkway Water Co. For an Increase in Rates & Charges For Water Service, BPU Docket No. WR05070634, 2006 N.J. PUC LEXIS 165 (adopting ALJ's recommendation to disallow from rates all costs associated with seven wells that had been contaminated by radionuclides, on the basis that such property was no longer used and useful); In re Electric Utility Nuclear Performance Standards, 120 P.U.R. 4th 620 (1990) ("Generally, utilities include the value of property used and useful in

the provision of utility service in rate base.") These are just a few of the many Board decisions that have followed the used and useful principle, the entirety of which are too numerous to list.

In Offerings 3 through 12 of its Amended Petition, ACE seeks a return on and recovery of investments that will not be owned by the Company. Much of the investment proposed in this proceeding is for EVs and EVSE that will not be owned by ACE, but rather by customers of the Company. The customer-owned charging infrastructure ACE proposes also is not dedicated to the public service, and therefore ratepayers cannot be required to pay a return on and of such costs by law. See, e.g., Atlantic City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365-66 (Sup. Ct. 1942), aff'd 129 N.J.L. 401 (E. & A. 1943). The individuals or parties owning the equipment will benefit from its use; however, all of the Company's ratepayers will pay for it. This infrastructure will never be employed for the public's convenience, and will not enhance or even encompass the facilities used by ACE in providing safe, adequate, and proper service. The public simply will never be granted an interest in the use of this privately owned infrastructure, which is a prerequisite for being used and useful utility property. Munn v. Illinois, 94 U.S. 113, 125-26 (1877). Not only will ratepayers be paying for equipment to be owned by private individuals, ratepayers will also pay for ACE to earn a return on the property it will never own. As our courts have said, "[t]he public is entitled to demand that no more money be extracted from it than the services rendered by the utility are reasonably worth." In re Valley Rd. Sewerage Co., 285 N.J. Super. 202, 210 (1995).

ACE argues that its Offerings do not run afoul of the used and useful principle because ACE's contribution comes in the form of a rebate, rather than the actual purchase of property. This argument, however, ignores the fact that ACE has proposed that its capital spending be placed into rate base as soon as the equipment goes into service, and that the remainder be

designated as a "regulatory asset" and go into rate base when the Company comes in for its next rate case. Petition pp. 25-27. Thus, the Company is clearly proposing to earn on these investments and place them into rate base even though they are not the utility's property. The Company's argument that calling them "rebates" somehow changes the application of long-standing law regarding the property on which they may earn, is simply a ruse and should be rejected.[3] If an investment is to be included in rate base, whether contemporaneously or as a regulatory asset, it must be used and useful utility property.

ACE's brief also cites N.J.S.A. 48:3-98.1, often referred to as Section 13 of the Regional Greenhouse Gas Initiative ("RGGI") Act, as evidence that the constitutional principles underlying the "used and useful" principle do not prohibit its Offerings 3 through 12. AB pp. 13-16.[4] In that statute, the Legislature granted a limited exception to the used and useful principle, allowing utilities to earn on energy efficiency and Class I renewable energy investments even if they are on customer property. The Legislature did so explicitly in N.J.S.A. 48:3-98.1(b).

In that limited circumstance, the Legislature presumably believed that these investments could be made and paid for without rendering the resulting rates confiscatory. While no party challenged the constitutionality of the RGGI Act, its enactment has not led – until now – to an argument that the "used and useful" principle has no further effect. Indeed, the Board itself has upheld the used and useful principle in a number of cases that arose after the passage of the

[3] These "rebates" also exceed the amount allowed by the PIV Act and should be rejected on that basis as well. See, N.J.S.A. 48:25-6.

[4] Citing, e.g., I/M/O Petition of New Jersey Natural Gas Co. 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 Sept. 17, 2018.

RGGI Act.[5] See, e.g., Petition of Suez Water Arlington Hills, supra (Board Order adopting recommendation of ALJ's Initial Decision to disallow rate recovery for a pump that had been removed from service, on the basis that it was no longer used and useful in the rendition of service); 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 Aug. 23, 2017, ("RECO AMI Order") at 19[6] ("A determination as to the prudency of the program as well as the prudency of the program costs will be made in a subsequent base rate case after the AMI Program has been fully deployed and is used and useful.")

But most importantly, even if the Legislature may provide for limited exceptions to the "used and useful" principle, it has not chosen to do so here. If Section 13 of the RGGI Act is instructive at all, it shows that the Legislature is capable of expressing its determination to create an exception when it deems one to be constitutional, prudent and necessary. In the PIV Act, however, it included no such language. The Legislature in the PIV Act did not provide that

[5] ACE cites a number of out of state cases for the proposition that EV and EVSE are permitted despite the used and useful doctrine. AB pp. 19-20. Those cases are not precedential in this case and their applicability is unclear since the details of the offerings, the governing statutes and the rate base treatment of the assets is not fully known. It should be noted, however, that in at least one of the cases cited by ACE, Southern California Edison was apparently not permitted to rate base its EV investments. Alternate Proposed Decision Regarding Southern California Edison Company's Application for Charge Ready and Market Education Programs, California Public Utility Commission, Docket No. A.14-10-014 (Jan. 16, 2016), at 19-21. In the 2018 Oregon case cited by ACE, the Commission was reviewing a stipulation agreed to by the parties and noted that the term "used and useful," which was included in Oregon's statute, referred to "a required prerequisite for rate recovery of a utility's capital investments." In re Portland General Elec. Co., Application for Transp. Elec. Programs, Oregon Public Utility Commission, Docket No. UM-811, Order No. 18-054 (Feb. 16, 2018), at 9. That Oregon Order specifically states that the question of recovery of invested capital would be made in a future Order and that its decision approving the stipulation and the pilot programs at issue was not intended to be precedential in any other proceeding. Id. at 12. The Maryland decision, as acknowledged by ACE, was based on the Maryland Commission's interpretation of the Maryland statute, and thus provides little guidance to any decision regarding New Jersey's statutes.

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

public utilities may recover through utility rates their investments in non-utility property related to the purchase, installation or use of EVs or EVSE.[7]

The 1980 Atlantic Generating Station Board Order relied on by ACE is also inapplicable to this case. In that Order, the Board authorized a utility to recover its costs for an abandoned floating nuclear power plant. AB pp. 16-17. That matter involved expenditures on utility property (although not used and useful), not customer-owned property, and the Board authorized recovery only of actual costs, prohibiting the utility from earning a return on the unused property. I/M/O Petition of Pub. Serv. Elec. & Gas Co. for Approval of an Increase in Elec. & Gas Rate & for Changes in the Tariffs for Elect. & Gas Servs., P.U.C. N.J. No. 7 Elec., & P.U.C. N.J. No. 6 Gas, Pursuant to R.S. 48:2-21, BPU Docket No. 794-310, Initial Decision dated Feb. 9, 1980.[8]

Similarly, the Board Order in the RECO AMI matter, which barred any form of cost recovery for work performed on customer-owned property, does not undermine the used and useful principle or allow ACE to recovery and profit on investments in customer property. In that 2017 Order, the Board decided a fully litigated matter and decided that a utility cannot recover in rates investment in customer-owned property. RECO AMI Order, supra. ACE's brief claims that Rate Counsel's reliance on the RECO AMI Order

[7] Through selective editing of Rate Counsel's brief, ACE mischaracterizes Rate Counsel's position in order to knock it down. While Rate Counsel does maintain that the Legislature could not constitutionally override the requirement that rates be just and reasonable, and that the used and useful requirement is an integral part of ensuring rates are just and reasonable, Rate Counsel recognizes that not all Legislative enactments run afoul of that constitutional requirement. However, as set forth below, the Legislature did not authorize utilizing rates to pay for programs such as those proposed here, and thus the issue of whether they could have is of no moment.

[8] This 1980 Board Order was not, of course, decided on constitutional principles. Other courts have disallowed recovery of costs for abandoned nuclear power plants, based on their state laws See Duquesne Light, supra, 488 U.S. at 301 (Pennsylvania law requiring fixing of electricity rates without consideration of a utility's expenditures for nuclear electrical generating facilities which were planned but never built, and thus were not "used and useful in service to the public," even though the expenditures were prudent and reasonable when made, did not take the utility's property in violation of the Fifth Amendment to the United States Constitution).

is misplaced. AB pp. 17-19. Through a convoluted interpretation of the RECO AMI Order, ACE concludes that the Board in fact permitted RECO to recover costs associated with work performed on customer-owned property. Id. However, ACE's interpretation of the RECO AMI Order is entirely incorrect.

In the RECO matter, Rockland Electric Company requested pre-approval to install advanced meters throughout its entire service territory. As part of its installation plan, Rockland proposed to perform work on the customer side of the electric meter in order to facilitate installation of the new meters. Similar to customer-owned EV servicing equipment ("EVSE"), because the property was located on the customer's side of the meter, the property was customer-owned. Rockland proposed to capitalize such costs in rate base. Similar to ACE's Offerings 3 through 6 and 9 through 12, Rockland proposed to earn a return on customer-owned property.

The Board found Rockland's proposal to be contrary to New Jersey law. Even though the Board believed such work was necessary for the safe installation of AMI,[9] the Board agreed with Rate Counsel that the Company's proposal "violates settled New Jersey case law." Rockland AMI Order at 22. The Board specifically found that:

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

It is noteworthy that the Board did not deny cost recovery of the customer-owned property to Rockland solely on the basis that Rockland proposed to "rate base" the investment.

[9] In order to allow RECO to perform work on the customer side of the meter, the Board waived General Information Section No. 22 of RECO's filed tariff, which states that the customer is responsible to provide and maintain such equipment. RECO 8/23/17 Order, at 22; https://www.oru.com/en/nj-rates-tariffs, General Information Section No. 22.

Instead, in holding that "[c]osts related to this work shall not be recovered from the Company's ratepayers," the Board denied cost recovery in any form. ACE's attempt to invoke rules of statutory construction to alter the Board's unambiguous ruling is to no avail. The plain language of the Board Order clearly states its meaning.

ACE's proposal to use ratepayer money for infrastructure to be owned by others, and earn a return of and on its investment in the process, is contrary to law. To the extent ACE seeks to earn on property that it does not own or that is not used and useful for the provision of electric service, its proposal is not legally permitted. Rate Counsel's motion to dismiss those aspects of ACE's petition should be granted.

## POINT II

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

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

In an effort to argue that statutory authority exists for the programs proposed by ACE, the Company includes in its brief a "chart" purportedly establishing a myriad of statutory authority for its proposals. AB p. 8. It would be easy to skim past this "chart" and conclude that there are many statutes that support ACE's petition. However, a review of the actual provisions cited demonstrates a very telling omission. Nowhere on this chart are the operative provisions of the PIV Act cited. The only provisions of the PIV Act that are cited are N.J.S.A. 48:25-1 (Findings, Declarations), N.J.S.A. 48:25-3 (establishing State Goals), and N.J.S.A. 48:25-11 (allowing the Board to issue rules and regulations). The provisions establishing how the Legislature has authorized the state to achieve the Act's goals are missing.[10]

ACE undoubtedly wishes that the Board will not look at the operative sections of the PIV Act because those sections are plainly contrary to the approvals sought in this case. N.J.S.A.

[10] We note that ACE filed its Amended Petition on December 17, 2019, a month before the Governor signed the PIV Act into law on January 17, 2020. However, the Board's approval must still be consistent with the Act.

48:25-4 establishes the Light Duty Plug-in Vehicle Incentive Program. That provision directs the Board to establish a program to provide one-time payments of up to $5,000 to customers buying light duty plug-in vehicles. The next section, N.J.S.A. 48:25-5, establishes how the sellers and lessors of plug-in vehicles shall administer the Light Duty Plug-in Vehicle Incentive Program. N.J.S.A. 48:25-6 provides that the Board "may establish and implement a program to provide incentives for the purchase and installation of in-home electric vehicle service equipment." If the Board does establish such a program, N.J.S.A. 48:25-6(c) provides that the incentive shall be a one-time payment no more than $500 per person.[11] N.J.S.A. 48:25-7 establishes the Plug-in Vehicle Incentive Fund (PIV Incentive Fund), and provides that "moneys in the fund shall be used by the board solely for the purpose of disbursing the incentives established pursuant to sections 4 and 6" of the Act. The sources of funding for the PIV Incentive Fund and their uses are specifically enumerated in subsection (b) of this section. For the Light Duty Plug-in Vehicle Incentive Program, they include $30 million of money collected from the Societal Benefits Charge ("SBC"), moneys made available to the Board from the Regional Greenhouse Gas Initiative, and "other funding as determined by the Board." For the incentive program for the purchase and installation of in-home vehicle chargers, N.J.S.A. 48:25-7(b) limits the funding source to "additional amounts from the societal benefits charge." All funding sources must be deposited into the fund, along with other funds that may be appropriated by the Legislature and the return on investments earned by the Fund. Nowhere does this section of the statute authorize additional funding through customer rates.[12]

[11] Although the statute clearly limits incentives for in-home chargers to $500, ACE, without justification or discussion, proposes higher incentives here. Its proposals should be rejected on that basis as well.

[12] The remaining sections of the statute include provisions requiring the development of a website, N.J.S.A. 48:25-8, public education, N.J.S.A. 48:25-9, and the provision discussed in Rate Counsel's initial brief providing that an

Outside of those specifically enumerated sources, the PIV Act does not authorize the Board to allow utilities to invest any ratepayer funds in its implementation. In fact, the PIV Act does not provide any role for public utilities in subsidizing purchases or other activity related to EVs or EVSE. The PIV Act delegated to the Board the responsibility to adopt policies, programs and rules to develop a comprehensive approach to the expansion of EVs in New Jersey. However, while the Legislature authorized the Board to allocate $300 million of SBC funds to promptly begin subsidizing the purchase and installation of EVs and EVSE, the PIV Act did not authorize the Board to allow subsidies of EV-related activities through electric utility rates.

The plain language of these statutory provisions is virtually ignored by ACE. N.J.S.A. 48:25-7 is cited only twice in its brief, selectively edited to obscure its plain meaning. AB pp. 5, 30. Instead, ACE attempts to employ various principles of statutory construction to weave authority that was not provided by the Legislature. These tools of statutory construction cannot overrule the Legislature's plain language. See, State v. Hudson, 209 N.J. 513, 529 (2012) ("extrinsic aids may **not** be used to create ambiguity when the plain language of the statute itself answers the interpretative question"). The PIV Act is clear and the Legislative language does not change no matter what tools of distraction and obfuscation ACE attempts to employ. ACE also attempts to argue that if there is no explicit prohibition in the statute for BPU to allow utilities to pay for and earn on PIV programs through regulated rates, then BPU is free to do so. This is absolutely not the state of the law, which limits executive agencies to the powers granted to them by the Legislature. General Assembly of New Jersey v. Byrne, 90 N.J. 376, 393 (1982). Moreover, the implications of adopting such an argument are vast, as it would allow the BPU to

---

entity owning charging equipment shall not be deemed a public utility and that charging shall be considered a "service" and not the sale of electricity. N.J.S.A. 48:25-10.

authorize just about anything to be placed on the bills of captive ratepayers. No statute could reasonably list everything the Legislature does not want an agency to do. This tortured legal argument clearly has no merit and cannot possibly form the basis of an agency decision that is counter to the plain language of the statute.

As ACE must acknowledge, AB pp. 27-29, language allowing the utilities to construct and operate charging infrastructure through regulated rates was included in the original version of the bill that ultimately became the PIV Act, but that authority was specifically deleted by the Legislature before enactment.[13] ACE also must acknowledge that the removal of that authority indicates the Legislature was "aware" of the option of funding EV-related projects with utility investments when it decided not to authorize the Board to allow such investments. AB p. 27. Supported by nothing but speculation, ACE somehow construes the Legislature's decision not to authorize utility investment in EV-related projects as some sort of implicit approval of such investment. It is simply illogical to claim that the Legislature intended to include a provision in a bill that it in fact removed from the bill. The removal of this language does not provide the Board with the authority to allow utility investments in EVs or EVSE.

Further evidence that the PIV Act does not authorize utility investments in EVs or EVSE is revealed by comparing its express language with section 13 of the RGGI Act. As noted above, although the PIV Act lists specific sources of funds that the Board may use to provide incentives for EV and EVSE development, regulated rates, however, are not among them. N.J.S.A. 48:25-7. In contrast, in section 13 of the RGGI Act the Legislature expressly authorized the Board to allow utility investments, along with SBC funds, in regulated energy conservation and efficiency

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

and Class I renewable energy projects regardless of whether they involve facilities on the utility side or customer side of the meter. N.J.S.A. 48:3-98.1(a). Clearly, the Legislature knows how to authorize such utility investments in specific types of energy projects when it decides to do so. The Legislature decided to authorize utility investments in regulated energy conservation and efficiency and Class I renewable energy projects in section 13 of the RGGI Act. The Legislature decided not to authorize utility investments in EVs or EVSE in the PIV Act.

ACE's attempt to ignore the plain language of EDECA must also be rejected. The Board's authorizing statute gives it general regulatory supervision over public utilities with certain enumerated exceptions. N.J.S.A. 48:3-50 et seq. ACE's brief ignores the express limits on the Board's powers by suggesting it has always had the authority to approve Offerings 3 through 12 of its Amended Petition. AB pp. 24-25. In its opposition brief, AB p. 12, ACE confuses the central legal principle that an administrative agency may act only within the scope of its statutorily granted authority, with the procedural flexibility that courts accord administrative agencies. "An agency's regulation 'may not under the guise of interpretation … give the statute any greater effect than its language allows.'" Centex Homes, supra, 411 N.J. Super. at 252 (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004) and Valley Road, supra, 154 N.J. at 242 (Garibaldi, J., dissenting) (internal quotations deleted)). Administrative agencies, of course, have discretion to select the *procedures* by which they exercise their statutory authority. In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008, 205 N.J. 339, 347 (2011). But an agency's procedural flexibility does not expand its statutory enabling authority. ACE's confusion of agency *flexibility* with agency *authority* is clear from its misleadingly incomplete quotation of In re BGS Service. AB p. 15. While the Court in that decision noted the elasticity and flexibility of administrative law, it went on to

reiterate that such flexibility "allows agencies 'the ability to select those procedures most appropriate to enable the agency to implement legislative policy.'" 205 N.J. at 347 (internal citations deleted).

In 1999, EDECA introduced competition to New Jersey's retail electricity generation market. The Legislature drafted EDECA to foster the role of competition "to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service." N.J.S.A. 48:3-50(a)(2). EDECA specifically maintained BPU jurisdiction over transmit

ssion and distribution, but carved out "competitive services" from the bundled utility services subject to BPU supervision. While retaining the Board's broad jurisdiction to regulate public utilities, N.J.S.A. 48:2-13(d), EDECA limited the Board's authority over "competitive services." EDECA defines a "competitive service" as "any service offered by an electric public utility or a gas public utility that the [B]oard determines to be competitive pursuant to [N.J.S.A. 48:3-56 or N.J.S.A. 48:3-58] or that is not regulated by the [B]oard." N.J.S.A. 48:3-51. EDECA specifically prohibited the Board from regulating competitive services except, as noted above, to ensure reliability. As stated in N.J.S.A 48:3-56, "the board shall not regulate, fix, or prescribe the rates, tolls, charges, rate structures, rate base, or cost of service of competitive services." EDECA does allow electric and gas utilities to provide certain competitive services, but only with Board approval and only under limited and specifically enumerated circumstances. N.J.S.A. 48:3-58. The Board must make certain findings before a utility may provide competitive services, including a finding that the provision of the competitive service shall not interfere with the provision of regulated non-competitive services and that the rate charged for the competitive service does not require subsidization through regulated rates. N.J.S.A. 48:3-58.

In fact, one of the specific purposes of EDECA was to "ensure that rates for non-competitive public utility services do not subsidize the provision of competitive services by public utilities." N.J.S.A. 48:3-50.

Pursuant to these statutory provisions, electric vehicle charging is clearly a "competitive service." First, the purchase and installation of EVSE and the charging of EVs are not among the functions of a public utility in New Jersey that are regulated by the Board. ACE attempts to argue that they are, but its arguments fall flat. AB pp. 30-33. In the same breath, ACE argues that statutes must be read as a whole, but then ignores the overall structure of EDECA. Certainly, BPU does not regulate the cost of electric vehicles or EVSE. It does not set the rates that charging stations may collect for those who use their services. Indeed, N.J.S.A. 48:25-10 specifically states that an entity owning or controlling an EV charging station is not considered a public utility based on that activity. The very list of intervenors in this case shows that there are competitors vying to serve EV and EVSE customers. The fact that the Legislature continued the BPU's oversight of how the SBC funds would be spent under the PIV Act does not mean that these services are regulated by the Board as contemplated for non-competitive services under EDECA. Thus, under the definition in N.J.S.A. 48:3-51, they are competitive services.

Second, EVSE installation and EV charging are not the type of competitive services that a regulated utility may provide subject to Board approval under N.J.S.A. 48:3-55. Those services include metering, billing, safety and reliability services, and similar services that the utility had offered prior to January 1, 1993 when their services were "unbundled." N.J.S.A. 48:3-55(f). EDECA expressly prohibits an electric public utility from providing any competitive service that was not approved or pending as of July 1, 1998. N.J.S.A. 48:3-55(i). That date passed over 20 years ago. The EDCs did not provide any of these services at the time of

EDECA, and the Board has never authorized any regulated utility to provide them. Therefore, EV-related services are not among the competitive services that EDECA authorizes the Board to allow a public utility to provide.

Finding no help in the express language of either statute, ACE attempts to expand the Board's authority utilizing general language in various statutes and general policies expressed in the EMP.[14] ACE cites to the general goals set forth in N.J.S.A. 48:25-3 and the general mandate in the statute that the BPU implement the Act consistent with those goals. ACE also cites the general provision at the end of the PIV Act allowing the BPU to issue rules and regulations as it implements the Act. However, these provisions cannot trump the plain language setting forth the BPU's powers under the Act. If the Legislature wanted to grant additional authority to achieve the purposes of the statute it would have done so, but it removed that language before passage of the bill. The language that remains provides ample support via specific programs and funding sources for the BPU to implement the statute. Adding additional powers beyond what the statutory language can support is beyond the authority of the BPU.

ACE's brief suggests, AB p. 15, that the Clean Energy Act (CEA) supports utility investment in EVs and EVSE. Nothing in the CEA supports that proposition. The CEA only sets forth how EV load will be factored into the energy savings and demand reduction calculations. It did not otherwise direct or authorize EDC involvement in funding EV purchasing, charging or infrastructure.

ACE also claims that N.J.S.A. 48:3-98.1 supports Offerings 3 through 12 despite the fact that adoption of EVs will increase the use of electricity, rather than conserve it. ACE bases this argument on its claim that its Offerings would encourage "more efficient" use of electricity. AB

[14] ACE's reliance on the EMP will be discussed in Point III below.

pp. 24-25 & 25, n. 16. EV charging is not energy efficiency, energy conservation or Class I renewable energy as defined in N.J.S.A. 48:3-98.1(d). In that statute, the Legislature defined an "energy efficiency and energy conservation program" as a regulated program for the purpose of conserving energy or making the use of electricity or natural gas more efficient by New Jersey consumers. N.J.S.A. 48:3-98.1(d). However, as explained in the 2019 Energy Master Plan, the use of EVs will not conserve electricity, it will substantially *increase* electricity consumption.[15]

ACE offers no support for its interpretation that such an increase constitutes "energy efficiency." Its argument is an absurd reading of the statute and is not a fair assessment of the Legislature's intent to allow utility investments in energy conservation and energy efficiency programs as defined in N.J.S.A. 48:3-98.1(d). Since the plain language of N.J.S.A. 48:3-98.1 does not apply to EV charging, that statutory provision is not sufficient to bestow authority on the BPU to allow ACE to participate in the proposed competitive services on a regulated basis.

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

[15] The 2019 EMP anticipates that fully electrifying the transportation and building industries in New Jersey will increase the use of electricity by as much as 2.3 times by 2050. 2019 EMP at p. 176.

## POINT III

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

The Board may not utilize general policy goals or documents to provide authority where the Legislature has not. The Board, like any administrative agency, may only expand its expressly enumerated powers to "'incidental powers [as] are reasonably necessary or appropriate to effectuate' those expressly granted powers." N.J. Guild of Hearing Aid Dispensers, supra, 75 N.J. at 562. Thus, the 2019 Energy Master Plan, general concerns regarding environmental goals and general statutory goals are insufficient to grant the necessary authority for the Board to approve ACE's Amended Petition.

Nevertheless, ACE claims support for its Offerings 3 through 12 in the State's 2019 Energy Master Plan ("2019 EMP"),[16] AB p. 33-34, citing 2019 EMP at 68. First, the cited section of the 2019 EMP does not call for the type of program proposed by ACE. Instead, it discusses the need for collaborative and strategic planning for the increased adoption of EVs in New Jersey. 2019 EMP at 68. Indeed, the 2019 EMP suggests an important role for utilities in upgrading their distribution systems to accommodate the huge increase in electric load anticipated with widespread adoption of EVs.[17] The EDCs are to work with the Board to develop Integrated Distribution Plans, within a year, to plan for, finance and implement those upgrades. Id. at 14, 176 & 194. Prudent utility investment in their distribution systems to provide safe, adequate and proper service is a well-recognized utility function. Investing in EVs and EVSE is not.

[16] State of New Jersey, "2019 New Jersey Energy Master Plan, Pathway to 2050," available at https://nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf

[17] The 2019 EMP anticipates that fully electrifying the transportation and building industries in New Jersey will increase the use of electricity enormously, by as much as 2.3 times by 2050. Id. at p. 176.

Second, and most significant for purposes of this motion, is that the 2019 EMP is a policy document that has no regulatory effect, i.e., it does not authorize the Board to do anything. See N.J.S.A. 52:27F-14, -15. As noted above, it is well established that the Board cannot implement state policy through the Board's ratemaking powers without an explicit grant of authority from the Legislature. See Centex Homes, supra, 411 N.J. Super. 244. In Centex Homes, the Court reviewed the Board's amendments to its Main Extension regulations that sought to implement the goals of another policy document, the State's Development and Redevelopment Plan ("State Plan"), to foster "smart growth." The Court recognized that the State Plan carries no regulatory effect and, therefore, "a state agency may only make modifications to its regulations to reflect the State Plan 'if such modifications are within the scope of the agency's authority. If the necessary modifications would exceed the agency's authority, it should seek to obtain the authority through normal legislative . . . processes.'" Id., citing In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 357 (App. Div. 2002).

The Court acknowledged that "the BPU's powers extend beyond those expressly granted by the statute 'to include incidental powers that the agency needs to fulfill its statutory mandate,'" however, "we cannot say that the language of N.J.S.A. 48:2-23 demonstrates a legislative intent to integrate an environmental factor into the [main extension] analysis in such a way as to drastically change the function of the statute from a regulation of public utilities to the regulation of urban and suburban sprawl." 411 N.J. Super. at 264-5. "While the BPU was 'intended by the Legislature to have the widest range of regulatory powers over public utilities,' that power has never been cast in environmental terms." Id. at 265-66, quoting A.A. Mastrangelo, Inc. v. Comm'r of the Dep't of Envtl. Prot., 90 N.J. 666, 685 (1982).

Similarly, the PIV Act does not have the purpose of authorizing the Board to subsidize the adoption of EVs through utility rates. It does not authorize the Board to charge utility ratepayers to buy school buses or provide grants for "innovation." Instead, it specifies specific programs and specific funding sources. ACE's Offerings 3 through 12 do not address the tasks that the PIV Act envisions for utilities, but instead propose non-utility projects that the Board has no authority to approve.

Thus, in the absence of enumerated authority, BPU cannot use general policy goals or environmental concerns to grant itself authority the Legislature did not bestow upon it. Since the 2019 EMP, like the State Plan, has no regulatory effect, see N.J.S.A. 52:27F-14, -15, the Board can only enforce it to the extent such enforcement is within the scope of the Board's statutory and legal authority. The Board may certainly utilize the 2019 EMP as guidance in exercising the authority that has been granted to it by the Legislature, but it cannot be used to expand BPU's authority beyond that. Accordingly, the 2019 EMP provides no authority to the Board to approve Offerings 3-12 of ACE's Amended Petition.

## POINT IV

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

ACE alleges that application of the Board's Main Extension Rules, N.J.A.C. 14:3-8.1 to-8.14, would preclude Offering 9. AB p. 34-37. In fact, ACE seeks Board approval of Offering 9 without application of the Main Extension Rules. The distinction is significant. Without the Main Extension Rules, Offering 9 would place the risk on ratepayers if ACE's investment in a new EV-related service extension should generate insufficient revenue.

The Board may direct a public utility service extension to a new customer if "the extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same." N.J.S.A. 48:2-27. The Main Extension Rules essentially serve as a proxy for determining whether extending service to a new facility is worth the investment. Under those Rules, the customer pays the utility a deposit to cover the cost of the extension, which the utility refunds to the customer as the utility receives revenue from the service extension. Thus, some risk is placed on a customer that its requested service extension may not produce "sufficient business" to fund a complete refund of its extension. See Van Holten Group v. Elizabethtown Water Co., 121 N.J. 48, 52 (1990). The utility also bears the risk that its investment in unproductive service extensions may be found imprudent and the costs disallowed when it seeks recovery of and on those costs. ACE's Offering 9 would shift this risk to ratepayers, who would subsidize the "make ready" portion of EVSE installation costs.

Application of the Main Extension Rules to Offering 9 of ACE's Amended Petition is necessary to protect ratepayers from the risk of imprudent investments in EVSE that will not generate sufficient business. ACE's brief entirely ignores the financial risks it would impose on

ratepayers, offering no reason to deviate from the Main Extension Rules or to guarantee a certain payment to the owner of the EVSE. In fact, ACE has cited no authority for the Board to waive its own Main Extension Rules to allow EV-related subsidies. Such action would be an ultra vires act by the Board. See Centex Homes, supra, 411 N.J. Super. 244. Make-ready work on utility property may only be authorized consistent with the Board's Main Extension Rules. Accordingly, to the extent Offering 9 would permit ACE to invest in "make-ready" work on customer-owned property, it should be dismissed because it does not comport with the Main Extension Rules.

## CONCLUSION

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

Respectfully submitted,

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: */s/ Stefanie Brand*
Stefanie A. Brand, Esq.