State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. PUC 07138-19

AGENCY DKT. NO. W019030381

IN THE MATTER OF THE PETITION OF SUEZ WATER NEW JERSEY, INC., FOR APPROVAL OF A PILOT PROGRAM TO FACILITATE THE REPLACEMENT OF LEAD SERVICE LINES AND A RELATED COST RECOVERY MECHANISM.

Stephen B. Genzer, Esq., for petitioners (Saul Ewing Arnstein & Lehr, LLP, attorneys)

Geoffrey Gersten and **Alex Moreau,** Deputy Attorneys General, for Staff of the Board of Public Utilities (Gurbir S. Grewal, Attorney General of New Jersey, attorneys)

Debra Robinson and **Christine Juarez,** Assistant Deputies Rate Counsel, for Division of Rate Counsel (Stefanie A. Brand, Director)

Record Closed: May 15, 2020 Decided: June 15, 2020

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

STATEMENT OF THE CASE

Petitioner Suez Water New Jersey (Suez or Company) filed a petition with the Board of Public Utilities (Board) seeking the approval of a pilot program to facilitate the replacement of

lead service lines (LSL) and a related cost recovery mechanism pursuant to N.J.S.A. 48:2-21 and 48:2-23, N.J.A.C. 14:5-1.2 and 14:1 et seq. The Division of Rate Counsel (Rate Counsel) opposes the petition and has filed a motion for Summary Decision contending that Suez cannot recover costs associated with replacing such customer-owned lines from ratepayers, and therefore the petition should be denied as a matter of law. Petitioner opposes the motion contending that material facts remain in dispute, and the Company can be permitted to amortize the costs of performing non-company owned LSL replacements through a pilot program that addresses a public health concern.

PROCEDURAL HISTORY

The petition was filed with the Board on March 22, 2019, and transmitted to the Office of Administrative Law (OAL) on May 24, 2019, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to the undersigned, who conducted the initial case management conference on July 8, 2019.

Duly-noticed public hearings were held on January 21, 2020, in Hackensack, New Jersey. Several members of the public attended the hearings and expressed their general opposition to the Company's petition.

Rate Counsel filed its motion for summary decision on January 10, 2020, Suez filed its response on February 3, 2020, and Rate Counsel filed its reply on February 10, 2020. Staff of the Board of Public Utilities (Staff) notified the undersigned on February 10, 2020, that it would not be filing a response to Rate Counsel's motion.

Oral argument was held on February 25, 2020.[1] As such, the motion is now ripe for determination.

[1] On a May 15, 2020, telephone status conference, and memorialized by letter dated May 18, 2020, Suez requested that the undersigned take Official Notice of two matters currently before the Board where Rate Counsel makes the same argument as in the instant matter. While there was no objection from the other parties, I have determined not to do so as the matters have yet to be decided by the Board. The parties are free to advise the undersigned if the Board makes a ruling germane to this matter prior to its resolution at the OAL.

FACTUAL DISCUSSION AND FINDINGS

Rate Counsel, Suez and Board Staff, have agreed that the following is not in dispute, [Brief in support of Motion for Summary Decision of Assistant Deputy Rate Counsel Christine M. Juarez (Juarez Brief at 3-6)] [Brief in opposition to Motion for Summary Stephen B. Genzer, Esq. (Genzer Brief Exhibit B)], and having considered the parties' submissions comprising the record in this matter, I **FIND** as **FACT:**

1. Suez is a public utility providing water service to approximately 258,000 customers throughout the State of New Jersey, including a large portion of Bergen and Hudson Counties.

2. Among numerous other statutes and regulations, Suez is required to comply with the Federal Lead and Copper Rule, 40 C.F.R. Chapter 1, Subchapter D, Part 141, Subpart I.

3. New Jersey has adopted the Federal Lead and Copper Rule (L & C) by reference at N.J.A.C. 7:0-5.1.

4. Suez is also subject to the Water Quality Accountability Act, N.J.S.A. 58:31-1 et seq.

5. In accordance with the Lead and Copper Rule sampling requirements, Suez has been sampling 100 or more customer taps every six months.

6. Using approved DEP/EPA testing protocols, during the July to December 2018 sampling period, 15 out of 108 samples exceeded the 15 parts per billion (ppb) Lead Action Level resulting in a 90^{th} percentile of 18.4 ppb, and during the January to June 2019 sampling period resulting in a 90^{th} percentile of 15.6 ppb, 14 samples out of 106 exceeded the 15 ppb Lead Action Level.

7. The original fifteen samples were located in residential properties in eleven towns in Bergen and Hudson Counties.

8. Per the currently in place L & C, the Lead Action level is exceeded if the 90th percentile exceeds 15 ppb utilizing the NJDEP approved interpolation method. 40 C.F.R. 141.80(c)(1). As a regulation, the L & C can change over time. All references in this Statement of Material Facts Not in Dispute refer to the L & C in place as of March 22, 2019.

9. Due to the current Lead Action Level exceedances for the July 2018-December 2018 and January 2019 periods, the L & C requires Suez to replace seven percent of the LSL in its distribution system on an annual basis. 40 C.F.R. 141.84(b)(1).

10. Sometimes a residential building is customer-owned and sometimes it is owned by someone else. Suez considers its "customer" to be the person or entity on record with Suez as being responsible for paying its regular water or wastewater utility bills to the Company.

11. For purposes of the statement of material facts not in dispute, "service lines" are defined as those pipes or connecting segments of pipes or "lines" connecting the water mains in the street to customer premises. Usually, but not always, that service line is made up of two segments: a company-owned segment connecting the main in the street to a connecting "curb box" or "meter barrel" (usually located at or near the residential building's property line at the curb—a part of which is sometimes called a "gooseneck"), and a non-company owned segment connecting the "curb box" to the meter in or next to the residential building. Sometimes this non-company owned portion of the service line is referred to as the "customer" side. The "service line" is referred to as an LSL if the material or any part of the portion of that entire service line is, in whole or in part, made up of the mineral "lead."

12. During these particular exceedance periods of July through December 2018 and January through June 2019, the L & C requires Suez to replace "that portion of the lead service line that it owns." 40 C.F.R. 141.84(d).

13. The current L & C requires Suez to notify the customer or owner of the property, that Suez is planning to replace the company owned portion of the LSL and/or gooseneck

and must at the same time offer to replace the non-company owned portion of the line at the owner's or customer's cost. 40 C.F.R. 141.84(d). Suez reports that it has been complying with this provision by coordinating and facilitating the non-company side replacements with the contractor and customer/owner.

14. If Suez is going to replace the company owned portion of an LSL, the Company must offer to replace the non-company owned or customer-side portion of an LSL, under the L & C, but Suez "is not required to bear the cost of replacing the privately-owned portion of the line, nor is it required to replace the privately-owned portion where the owner chooses not to pay the cost of replacing the privately-owned portion of the line . . . " 40 C.F.R. 141.84(d).

15. Following its initial Lead Action Level Exceedance for the July through December 2018 period, Suez filed the petition in the current matter on March 22, 2019.

16. The petition proposes a "pilot program" involving replacement of non-company owned, or customer-side, LSL.

17. Under the proposed pilot program, when Suez is performing replacement work on company-owned LSL or goosenecks, the Company will investigate whether the customer-owned portion of the line also contains lead, by testing in an easily available and reasonable manner either the end of the non-company owned LSL near the curb box or the other end of the non-company owned portion of the service line, near the meter, if accessible, to determine whether the service line contains lead at that location.

18. Within this proposed pilot program, when a non-company side LSL is identified, the Company proposes to offer to replace the non-company side portion of the LSL when Suez is performing work on adjacent company-owned LSL or goosenecks.

19. In replacing the non-company side portion of the LSL, Suez proposes to charge the individual customer (or owner of the residential building) $1,000.00 of the total replacement cost. The proposed pilot program would allow the customer

to pay this surcharge as a monthly charge of approximately $83.33 per month for twelve months.

20. The Company proposes that the total difference between the full cost of LSL replacement and that $1,000.00 from each affected customer/owner be recovered from all Suez's water customers by accumulating those dollars into a separately tracked account, and that account would be recovered from all of the Company's water customers.

21. Suez proposes these costs (plus administrative and carrying costs on the unamortized balance) would be amortized and recovered from rate payers over a period of seven years. The Company proposes to identify and recover the dollars within that account as an identified surcharge on customers' bills.

22. Suez proposes to recover carrying costs at its authorized overall rate of return on the unamortized balance of the separately tracked account. The regulatory mechanism the Company proposes in order to obtain rate recovery on this account is that it would establish a regulatory asset for the unamortized costs to be recovered over time from all of Suez's water customers.

23. As of August 16, 2019, the average cost to replace customer-owned service lines has been approximately $3,000.00 per service.

24. In addition to recovering the costs of replacing non-company owned LSL through the pilot program surcharge, Suez proposed to include the recovery of the company-owned portion of LSL through the surcharge. The Company agreed in discovery from Rate Counsel to include the company-owned portion of LSL replacement through the Distribution System Improvement Charge (DSIC) surcharge, so is no longer requesting that regulatory treatment through this proposed pilot program mechanism. The issues in dispute in this matter are limited to whether a pilot program should be adopted by the Board ordering other Suez water customers to pay for replacement of noncompany side LSL through a surcharge mechanism.

25. Suez and Rate Counsel acknowledge that Suez does not own nor is it in control of the non-company owned portion of the service line. This will not change under the proposed Pilot Program.

26. The Company has replaced certain non-company owned LSL, at shareholder expense, in certain instances where sampling has indicated a Lead Action Level exceedance.

27. The American Water Works Association and The American National Standards Institute have adopted ANSI/AWWA C810-17, titled Replacement and Flushing of Lead Service Lines.

28. Among other things, ANSI/AWWA C810-17 includes a sampling and flushing procedure which a customer should follow if a customer declines to replace the non-company owned side of an LSL (Sections 4.2 through 4.4 and Section 5.2) and partial replacement is done. Suez is currently advising customers of this procedure.

29. The total actual number of a non-company side LSL is currently unknown, but is in the process of being ascertained.

LEGAL ANALYSIS AND CONCLUSION

The parties have agreed that "[t]he issues in dispute in this matter are limited to whether a pilot program should be adopted by the Board ordering other Suez water customers to pay for replacement of noncompany side LSL through a surcharge mechanism." (Findings of Fact at ¶24.)

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995):

> a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'
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> [Brill, 142 N.J. at 540; quoting Anderson v. Liberty Lobby, 477 U.S. 242 (1986).]

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

Suez contends that genuine issues of material fact remain in dispute necessitating the denial of the motion. "[R]ate Counsel has misunderstood the Company's proposal and appears to confuse "rates" with "rate base." Rather, the petition

> proposed that the regulatory asset be treated as a deferred expense that would be amortized over seven years and that the Company's authorized rate of return would be applied to the unamortized balance. The Company's proposed ratemaking method is wholly within accepted utility practices, and was intended to both encourage and facilitate the removal of LSL.
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> [Emphasis in original (Genzer Brief at 2-3).]

Rate Counsel disputes Suez's characterization of its position. "The flaw in Suez's argument is that the brief accompanying its Motion, Rate Counsel never once claimed that Suez was seeking cost recovery through its rate base. The issue here is that Suez

is attempting to earn a return on property it does not own." [Reply Brief of Assistant Deputy Rate Counsel Christine M. Juarez (Juarez Reply Brief at 3).] Rate Counsel adds that "[a]s set forth in the Statement of Material facts not in Dispute, Rate Counsel, Suez and Board staff are in agreement on the specifics of Suez's proposed rate recovery. In its brief, Suez attempts to create a factual dispute where none exists." Ibid.

The plain language of the agreed upon statement of material facts not in dispute includes a lengthy discussion of the underlying issue, fully outlines the company's proposal and, as noted above, agrees upon the issue in dispute in this matter. (Juarez Brief at 3-6; Genzer Brief, Exhibit B.) Based on the foregoing, Suez's argument that Rate Counsel simply "misunderstood" the relief being sought is unpersuasive and not supported by the record. Therefore, I **CONCLUDE** that there are no disputed material facts in this matter.

Accordingly, the undisputed facts and the arguments of both parties will be evaluated utilizing the Brill standard.

In support of its motion for Summary Decision, Rate Counsel argues that: ratepayers cannot be required to pay a return on and a return of customer-owned property in rates; ratepayers are only required to pay for utility property that is used and useful in the public service; and the undisputed facts show that Suez's proposal to recover an investment in customer-owned service line in rates is contrary to law. (Juarez Brief at 7, 13.)

Suez opposes the motion contending that: the Company can be permitted to amortize the costs of performing non-company owned LSL replacements through a pilot program that addresses a public health concern; Rate Counsel seeks an advisory opinion not at issue in this petition; Rate Counsel's reliance on the used an useful principle for an asset's eligibility in rate base is inapplicable here as the Company is not seeking rate base treatment for the costs associated with non-company side lead service line replacements; the Board is not bound by a rigid and inflexible formula in setting rates; persuasive authority demonstrate that the proposal is constitutional; and there is no prohibition against expensing costs associated with non-company owned property and amortizing the costs over time with appropriate review. (Genzer Brief at ¶¶ 10, 12, 13,

15, 19, 22.)

Staff declined to file a brief in support of or in opposition to the motion or take any position in this matter.

It is well established in both federal and state law that investment recoverable in utility rates is limited to "the fair value of the property used and useful in the public service." Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365 (Sup. Ct. 1942)[2] accord I/M/O Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 217 (1950); In re N.J. Power & Light Co., 9 N.J. 498, 509 (1952); Verizon Communications v. Fed. Communications Comm'n, 535 U.S. 467,484 (2002); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). Further, our Supreme Court has held that this mandate requires that the property in question must consist of assets of the public utility. In re N.J. Power & Light., 9 N.J. at 209 ("It is established that the rate base in a proceeding of this nature is the fair value of the property of the public utility that is used and useful in the public service . . .") (emphasis added).

The Supreme Court has additionally held that "[p]roperty affected with a public interest, such as the assets of a public utility, fulfill a societal need while providing an investment opportunity. In general, investors may expect a utility to earn a reasonable rate of return on its assets." In re Valley Rd. Sewerage Co., 154 N.J. 224, 240 (1998); accord Duquesne Light Co., 488 U.S. at 307 ("the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.")

Further, the Board has a long history of following the "used and useful principle." See, e.g., I/M/O Suez Water Arlington Hills Inc. for Approval of an Increase in Rates, BPU Docket No. WR16060510, Order Dated 11/13/17 (adopting recommendation of ALJ's Initial Decision to disallow rate recovery for a pump that had been removed from service, on the basis that it was no longer used and useful.); I/M/O Parkway Water Co. For an Increase in Rates & Charges For Water Service, BPU Docket No. WR05070634, 2006 N.J. PUC LEXIS 165 (adopting ALJ's recommendation to disallow from rates all costs associated with seven wells that had been contaminated by radionuclides, on the basis that such property was no longer used and useful); In

[2] The court reaffirmed this language in 1950 in I/M/O Petition of Public Service Coordinated Transport, 5 N.J. at 217, and again in 1974 in In re Proposed Increased Intrastate Industrial Sand Rates, 66 N.J. 12, 22 (1974).

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 provisions of utility service in rate base.").

Most recently, the Board, in 2017, was presented with an issue substantially similar to the instant matter, whether a utility can recover in rates an investment in customer owned property. (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 (Rockland Order). The Board's complete discussion and findings on the issue of "Work on The Customer Side Meter" in that matter stated:

> The Board has several concerns regarding RECO's [Rockland Electric Company] proposal to perform work on the customer's side of the meter and capitalize such costs in rates. While the Board believes the make-ready work is necessary for the safe installation of the AMI meter to avoid unnecessary delays in the AMI Program's implementation, the Board agrees with Rate Counsel that the proposal, as requested, violates settled New Jersey case law. Per the Company's current tariff, the customer is responsible for maintenance of such equipment. The Board notes that RECO has not requested a modification to, or waiver of, this provision in their tariff. RECO has budgeted approximately $242,000 plus a ten percent contingency to perform this work, which according to RECO, is de minimis to the overall meter installation. 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 rollout and done specifically for installation of an AMI meter at the customer's location. Any work not related to the AMI Program rollout 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.
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> Rockland Order at 22.

Here, the relevant facts are not in dispute. The petition proposes a "pilot program" involving replacement of non-company owned or customer-side, LSL. Suez does not own, nor is it in control of, the non-company owned portion of the service line. This will not change under the proposed Pilot Program. The costs (plus administrative and carrying costs on the unamortized balance)

would be amortized and recovered from rate payers over a period of seven years. The Company proposes to identify and recover the dollars within that account as an identified surcharge on customers' bills. The proposal seeks to recover carrying costs at its authorized overall rate of return on the unamortized balance of the separately tracked account. The regulatory mechanism proposed in order to obtain rate recovery on this account is the establishment of a regulatory asset for the unamortized costs to be recovered over time from all of Suez's water customers. (Findings of fact at ¶¶ 16, 21, 22, 25.)

The long-settled case law is clear that rate recovery is limited to fair value of the property owned by the utility and used and useful in the public service. In re N.J. Power & Light Co., 9 N.J. at 209. It is not in dispute that the customer-owned LSL in the pilot program are not an asset of the Company nor will they be in the future. Further, the LSL, as they are owned by the customers, are not dedicated to the public service.

In Rockland, as in the instant matter, the utility sought to perform work on property that was customer owned. Additionally, the cost recovery mechanism proposed here by Suez is substantially similar to that proposed by Rockland. The Board found that Rockland's proposal was "contrary to settled New Jersey case law" and denied the company's request to capitalize such costs. Rockland order at 22. Accordingly, the Company's argument that it "can be permitted to amortize the costs of performing non-company owned LSL replacements through a pilot program that addresses a public health concern" (Genzer Brief at 10) fails as this remedy is in direct conflict with the Board's Rockland order.

In opposition to the motion for summary decision, Suez argues:

> For its parts, Rate Counsel has consistently refused to provide any remedy within the bounds of public utility law and practice to help solve this public health issue. Instead, their response is 'No.' 'No' to any proposed Company program to deal with the non-company owned LSLs. 'No' to recovery of any dollars spent on non-company owned property, and 'No' to any suggestion as to how this public health concern should be addressed or alleviated. This Motion is yet another data point continuing Rate Counsel's adamant refusal to address this public health concern.

> Lead in drinking water is a complex problem that requires Rate Counsel, Suez and the Board to work together to resolve. There is an urgent need to incentivize the public and customers to replace their lead service lines. This need challenges Rate Counsel, Suez and the Board to be courageous and innovative in doing what is necessary to effectuate positive change that gets us beyond 'No'. Suez's experience in 2019 demonstrates that the public and customers are reluctant to replace their lead services lines because of the cost involved. Granting Rate Counsel's Motion effectively places the public back at status quo on a public health issue that all can agree is unacceptable.
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> (Genzer Brief at 6.)

The Company should be commended for its efforts to address a significant public health issue by seeking to replace LSL in its service territory. However, the inability of the parties to come to an agreement on the means to achieve that worthy goal is not germane to these proceedings. The proper role for this tribunal in the instant matter is solely to determine whether pilot program proposed by Suez is permissible by law. Upon review of the record, and applying the facts to the law, it is clear that it does not.

Accordingly, following the Brill standard, and having reviewed the parties' submissions and argument in support of, and opposition to, the within motion for summary decision, I **CONCLUDE** that the Company's proposed pilot program is contrary to settled New Jersey case law.

ORDER

It is hereby **ORDERED** that Rate Counsel's motion for summary decision be and hereby is **GRANTED.**

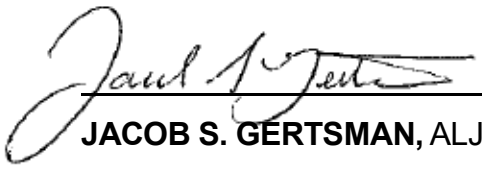
It is **FURTHER ORDERED** that the Company's petition be and hereby is **DENIED.**

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES,** which by law is authorized to make a final decision in this matter. If the

Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 15, 2020 

DATE **JACOB S. GERTSMAN,** ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

JSG/nd