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February 14, 2020

***via Overnight Delivery***
Honorable Jacob S. Gertsman, ALJ
Office of Administrative Law
3444 Quakerbridge Road
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Mercerville, New Jersey 08619

**Re: I/M/O the Joint Petition For Approval 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**
**OAL Docket No. PUC 07138-2019S**
**BPU Docket No. WO19030381**

**Reply - Motion for Summary Decision**

Dear ALJ Gertsman:

Please accept for filing this original and one copy of a letter brief and accompanying exhibit on behalf of the New Jersey Division of Rate Counsel ("Rate Counsel") as its Reply to the opposition brief filed on February 3, 2020 by Suez Water New Jersey ("Suez" or "Company") in the above-referenced Petition ("Petition"). Please date stamp the additional copy as "filed" and return it in the enclosed, self-addressed, stamped envelope. Thank you for your consideration and attention to this matter.



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## Preliminary Statement

Rate Counsel's motion addresses a fundamental tenet of utility regulation – that public utilities can only charge ratepayers in rates for investments in utility property that is used and useful in the public service. Used and useful investments must be owned by and have been dedicated to the public service by the public utility. The customer-owned portions of the service lines Suez seeks approval to replace in its Petition, earning a return of and on its investment in the process, meet none of these requirements. Nothing argued by Suez in its brief changes the relevant facts that are undisputed by the parties – that the lines are not and never will be utility property, that they have never been dedicated to the public service, and nonetheless Suez is seeking to earn a return on their replacement. Suez cannot recover costs associated with replacing such customer-owned lines from ratepayers, whether that recovery is in rate base or cloaked as the "regulatory asset" Suez proposes. Contrary to Suez's assertions; there is no "confusion" as to the details of Suez's proposal or the relief Suez seeks. Rate Counsel is fully aware of the specifics of Suez's proposal, including that such a proposal is contrary to both Federal and State case law that has existed for more than a century. Accordingly, Suez's Petition should be denied as a matter of law.

## Argument

### A. Contrary to Suez's Claim, There Are No Disputed Issues of Material Fact That Preclude The Granting of This Motion.

Suez's brief repeatedly claims that Rate Counsel's Motion asserted that Suez seeks to recover the costs associated with the pilot program through its rate base. SB[1], at 3, 4, 12. According to Suez, Rate Counsel's representation creates disputed issues of fact that defeat its

[1] Suez's opposition brief is cited as SB; Rate Counsel's brief is cited as RCB.

motion for summary decision. SB at 9. The flaw in Suez's argument is that in 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. The "conflict" between rate base and regulatory assets is a red herring meant to distract from the true issue before Your Honor.

In fact, the Statement of Material Facts Not in Dispute, which was agreed to by all parties to this proceeding, sets forth the regulatory treatment sought by Suez in this case:

> 21. SWNJ proposes that these costs (plus administrative costs and carrying costs on the unamortized balance) would be amortized and recovered from ratepayers over a period of seven years. SWNJ proposes to identify and recover the dollars within that account as an identified surcharge on customers' bills.
>
> 22. SWNJ proposes to recover carrying costs at its authorized overall rate of return on the unamortized balance of the separately tracked account. The regulatory mechanism SWNJ proposes in order to obtain rate recovery on this account is that SWNJ would establish a regulatory asset for the unamortized costs to be recovered over time from all SWNJ water customers.
>
> RCB at 5.

As 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. It is a flawed attempt that Your Honor should reject.

All facts relevant to consideration of Rate Counsel's Motion have been stipulated to by the parties. Rate Counsel's Motion addresses the threshold issue of whether Suez can recover in rates the costs of replacing property that it does not own, including earning a return on such costs in the process. The relevant material facts are as follows:

16. SWNJ's Petition proposes a "pilot program" involving replacement of non-company owned, or customer-side, Lead Service Lines.

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

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

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25. SWNJ and Rate Counsel acknowledge that SWNJ 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.

These are the only facts that are relevant to deciding Rate Counsel's Motion, and they are all undisputed.

Suez next argues that there are "remaining factual issues still underlying SWNJ's proposal." SB at 9. Suez then goes on to identify certain issues such as the proper priority for customer-owned replacements, whether customers who have already replaced their lines are entitled to compensation, and whether the customer or property owner has to pay the $1,000 contribution. Id. However, all of the factual issues raised by Suez involve policy issues that are relevant only after a determination has been made on whether Suez's Petition is legally viable. Rate Counsel's Motion addresses this threshold issue of whether such a Pilot Program can be implemented by law. Disputed policy issues such as those raised by Suez are simply not relevant to the threshold legal issue that is the subject of Rate Counsel's Motion.

**B. Suez's Brief Misinterprets the RECO AMI Order, In Which The Board Barred Cost Recovery in Any Form For Work Performed on Customer-owned Property.**

In 2017, the Board decided a fully litigated matter that presented the exact same issue raised in Rate Counsel's Motion - whether a utility can recover in rates an investment in customer-owned property. The Board definitively decided that such recovery is not allowed. I/M/O Petition of Rockland Electric Co. For Approval of an Advanced Metering Program; and For Other Relief, BPU Docket No. ER16060524, Order dated 8/23/17 ("RECO AMI Order"). Suez's brief claims that Rate Counsel's reliance on the RECO AMI Order is misplaced. SB at 23. Through a convoluted interpretation of the RECO AMI Order, Suez concludes that the Board in fact permitted RECO to recover costs associated with work performed on customer-owned property. Id. at 24. However, Suez'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 lead service lines, 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, where similar to Suez's Petition, Rockland would earn a return of and a return on customer-owned property.

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

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

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

This interpretation of the Board's Order is supported by Rockland itself. In a recent base rate case filing, in which Rockland sought cost recovery for all costs associated with implementing its AMI program, Rockland specifically excluded the costs associated with work performed on customer-owned property from its filing. I/M/O Petition of Rockland Electric Co. for Approval of Changes in its Electric Rates, Its Tariff For Electric Service, & Its Depreciation Rates; and for Other Relief, BPU Docket No. ER19050552, Order dated (1/22/20). In the pre-filed testimony (attached) accompanying its Petition in that matter, the Accounting Panel testified that:

> Adjustment No. 10 eliminates the cost of AMI expenses included in the test year in the amount of $94,000....The second adjustment of $19,000 eliminates the costs incurred through March 31, 2019, as a result of replacing old meter pans that could not be reused when the Company replaces old meters with new AMI hardware. The AMI Order required the Company to absorb these costs. (emphasis added)

The old meter pans referenced in this testimony are customer-owned property, and Rockland properly acknowledged that the 2017 AMI Order prohibited cost-recovery associated with replacing such customer-owned property. Suez's contrary interpretation is simply incorrect and should be disregarded. Instead, Your Honor should follow the Board's determination in the 2017

AMI Order that denied any form of cost recovery for work performed on customer-owned property.

### C. Suez Fails to Cite to a Single Case or Board Order to Support Its Position That It Is Entitled to Earn a Return of and Return On Investment in Customer-owned Property.

Suez's brief boils down to a singular argument that the relief it seeks is permitted by law because Suez is not proposing to place such costs into rate base. Yet Suez's argument ignores both that it is seeking to recover costs for investing in property it will not own and that, as with a rate base investment, it is seeking to earn a return on that investment at its authorized rate of return. Moreover, Suez's brief fails to cite to any case law or Board order that approved what Suez seeks to do.

Indeed, the Board orders relied on by Suez are inapplicable to this case. Suez cites to the cost recovery authorized by the Board in the 1980's pertaining to abandoned floating nuclear power plants. SB at 13. This situation was entirely inapposite to what Suez proposes here, as that matter involved expenditures on utility property (albeit never used and useful), not customer-owned property, and the Board authorized recovery of actual costs with no rate of return. 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 (2/9/80).

Suez also attempts to draw an analogy between its proposal and recovery of storm costs associated with Superstorm Sandy by Jersey Central Power & Light Company ("JCP&L"). SB at 13. According to Suez, this matter offers an example where a utility was permitted to

amortize certain costs along with a rate of return.[2] Yet this analogy also fails. The JCP&L matter involved costs associated with repairing and/or replacing utility property that was damaged as a result of Superstorm Sandy. Rate Counsel and Suez are already in agreement that ratepayers are responsible for the prudently-incurred costs associated with replacing utility-owned lead service lines. The crux of the dispute between Rate Counsel and Suez is whether ratepayers can be made to pay for replacing privately-owned lead service lines, including allowing Suez to earn a return on these costs. Because the JCP&L Order involved replacement of utility property, it is not instructive on the issues that are disputed between the parties in this case.

Suez also attempts to argue that because restoration of non-utility property is recoverable in rates, replacement of customer-owned lead lines is also recoverable. The work to restore is clearly different. There, in furtherance of service to all utility customers, Suez damages others' property (i.e. tearing up roads). To complete the project, Suez must restore that property. Here, there is no overall benefit to ratepayers from replacing customer-owned lead lines. The only one to benefit is the individual homeowner.

**D. Case Law and Board Orders Limit Rate Recovery to Utility-owned Assets that are Used and Useful in the Public Service.**

Suez argues repeatedly that its proposal survives a legal inquiry because it does not involve rate base recovery. SB, *passim*. However, Suez's argument is a red herring that advances an irrelevant distinction between rate base recovery and what it proposes in its Petition. It is undisputed that Suez seeks to earn a return of and a return on investment in property that it does not own now, nor ever will. In applying the case law, this is the only fact that matters – not

[2] The rate of return granted to JCP&L was the rate for seven-year constant maturity Treasury securities plus sixty basis points, not the full authorized rate of return sought by Suez.

whether Suez seeks to earn such a return through its rate base or through the separate regulatory asset it proposes. *As with rate base recovery, Suez proposes to earn a return on and of its investment in customer-owned property.* Requiring ratepayers to pay a return on and of investment in non-utility property, as Suez proposes, is clearly prohibited by the case law and Board orders.

As Rate Counsel's Motion noted, some of the earliest cases on utility regulation discussed when property becomes "clothed with a public interest." Munn v. Illinois, 94 U.S. 113, 125-26 (1877). A public utility is required to submit to government regulation only because it "devotes [its] property to a use in which the public has an interest." Id. Because of this public interest, the utility must "submit to be controlled by the public for the common good." Id. In return, the utility is entitled to just compensation for the use of its property under the Fifth and Fourteenth Amendments. St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 51 (1936).

While a utility is entitled to compensation for its property devoted to the public use, the captive ratepaying public can likewise only be asked to pay a rate based on the value of utility property that is used and useful in the public service. Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). In other words, "[w]hat the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it...than the services rendered by it are reasonably worth." Smyth v. Ames, supra, 169 U.S. 466, 547 (1898).

None of these early cases use the term "rate base." They simply prohibit a utility from earning a "return" on anything other than utility property that is used and useful in the public service. The same is true of later New Jersey state cases. Our State Supreme Court held that

"[a] rate based upon an excessive valuation or upon property not used or useful in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied." Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365-66 (1942). New Jersey has long recognized that utilities can only recover a return on investment in utility assets, noting that "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). Rate Counsel's Motion likewise cites to numerous Board orders that affirm this principle. The most recent of these cases is the RECO AMI Order discussed above, in which the Board denied any rate recovery for work performed by Rockland Electric on customer-owned property. All of these cases and orders are consistent in holding that a utility may only earn a return on and of its investment in utility-owned property that is serving the public interest.

It is undisputed that customer-owned lead service lines are not and never will be owned by Suez. Nor does a customer-owned service line affect the public interest. The only party with an interest in the line is the particular customer who owns it; the fact that Suez's water passes through the line does not endow the line with an interest applicable to the entire ratepaying public. The customer, and not Suez, is responsible for maintaining the privately-owned line, and this will continue to be true following replacement. The undisputed facts show that these privately-owned lines are not utility property and have never been employed for the public convenience. The case law and body of Board orders make it clear that ratepayers cannot be required to replace these privately owned lines. Suez's Petition should therefore be denied as a matter of law.

## Conclusion

For all of the reasons stated above, the arguments set forth in Suez's brief should be rejected. Suez's Petition should be denied as a matter of law for the reasons set forth in Rate Counsel's Motion.

Respectfully submitted,

STEFANIE A. BRAND
Director, Division of Rate Counsel

By: _____
Christine M. Juarez
Assistant Deputy Rate Counsel

c: OAL Service List (*via overnight mail*)
BPU Service List (*via e-mail & regular mail*)

# Exhibit A

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

Rockland Electric Company
Docket No. _____

Direct Testimony

Volume I

ROCKLAND ELECTRIC COMPANY
DIRECT TESTIMONY OF
ACCOUNTING PANEL

NJBPU Docket No. _____

Q. Would each member of the Accounting Panel ("Panel") please state his name and business address.

A. John de la Bastide, One Blue Hill Plaza, Pearl River, New York 10965.
Kyle Ryan, 4 Irving Place, New York, NY 10003.
Wenqi Wang, 4 Irving Place, New York, NY 10003.

Q. By whom are you employed and in what capacity?

A. (de la Bastide) I am employed by Orange and Rockland Utilities, Inc. ("Orange and Rockland" or "O&R"), the parent company of Rockland Electric Company ("RECO" or the "Company"), where I hold the position of Director – Financial Services.
(Ryan) I am employed by Consolidated Edison Company of New York, Inc. ("Con Edison" or "CECONY"), a utility affiliate of O&R and RECO, where I hold the position of Department Manager of Regulatory Filings.
(Wang) I am employed by CECONY, where I hold the position of Department Manager of Regulatory Accounting and Revenue Requirements.

Q. Please briefly outline your educational and business experience.

A. (de la Bastide) I graduated from Hofstra University in 1985 with a Bachelor of Business Administration in Accounting. I was employed by Con Edison for 30 years. Between 1986 and 1996, I was promoted to various supervisory positions in Corporate Accounting. In 1998, I was promoted to the position of Section Manager, Employee Benefits. In 2001, I was promoted to Department Manager, Financial Forecasting, in Corporate Accounting and have held various positions as Department Manager in Corporate Accounting and Electric Operations. I became Department Manager, Benefits and

A. This adjustment to O&M Expenses reflects the recovery of costs associated with this proceeding. RECO has estimated $600,000, including legal and consulting fees and other costs, as the amount necessary to establish RECO's new base rates. In addition, RECO proposes to recover an under-recovered balance of $6,250 from BPU Docket No. ER16050428, as authorized in the February 2017 Rate Order (p. 5). RECO proposes to recover these costs over a three-year period resulting in an increase in O&M Expenses of $180,000.

Q. What is the rationale for a three-year amortization period?

A. This period reflects the Company's anticipation that it may need to refile for new rates within three years. The period is reasonable in view of the time frame between recent Company base rate cases.

Q. Please explain adjustment No. 10.

A. Adjustment No. 10 eliminates the cost of AMI expenses included in the test year in the amount of $94,000. The adjustment has two components. The first relates to planned reductions in the number of meter readers required by the Company with the implementation of AMI metering. Since October 1, 2018, the Company has reduced its meter reading staff by five positions through March 31, 2019. The Company anticipates that it will be able to eliminate approximately one meter reading position each month through September 30, 2019. The actual staffing reductions achieved will be reflected in updates. The adjustment calculates the annual salary savings applicable to the Company for the Test Year of approximately $145,000 and reflects the amount not included in the Test Year of $76,000. Corresponding adjustments to employee benefits and payroll taxes are included in Schedules 5 and 20. The second adjustment of $19,000 eliminates the costs incurred through

March 31, 2019, as a result of replacing old meter pans that could not be reused when the Company replaces old meters with new AMI hardware. The AMI Order required the Company to absorb these costs. The Company will update this adjustment for any additional cost incurred during April through September 2019.

Q. Please address adjustment No. 11.

A. Adjustment No. 11 represents RECO's actual customer uncollectible write-off experience. It was calculated as the historic three-year average of bad debt write-offs as a percentage of revenues for the five-year period ended March 31, 2019. The resultant factor of 0.178% is then applied to the forecasted revenues for the Test Year. The result of $296,000 is compared to the bad debt expense for the Test Year of $368,000, for a decrease of $72,000 from the level contained in the Test Year forecast.

Q. Please describe adjustment No. 12

A. Adjustment 12 consists of two adjustments. The first contains an increase to RECO's danger tree program to address emerald ash borer and other dead and deceased trouble spots. This adjustment is supported by the Capital Budget Panel. Their funding request reflects the fact that there are approximately 17,000 ash trees in RECO's service territory and the emerald ash borer has almost a 100% mortality rate. The Capital Budget Panel indicates that the average cost to remove an ash tree is approximately $700. As a result, the potential exposure to remove every ash tree could approach $12 million (*i.e.*, 17,000 trees x $700 per tree). To initiate the Danger Tree program, the Company is requesting initial funding of $500,000 per year. The second adjustment calculates the increase necessary to fund the Company's

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

**SERVICE LIST**
**BPU DOCKET NO.: WO19030381**
**OAL DOCKET NO.: PUC07138-2919S**

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