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	**STATE OF NEW JERSEY** **BOARD OF PUBLIC UTILITIES** **OAL Docket No. PUC 07138-2019S** **BPU Docket No. WO19030381**

SUEZ WATER NEW JERSEY'S EXCEPTIONS TO THE INITIAL DECISION GRANTING RATE COUNSEL'S MOTION FOR SUMMARY DISPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

This firm represents Suez Water New Jersey Inc. ("SWNJ" or the "Company") in the above-captioned matter and submits this Brief on Exceptions to the New Jersey Board of Public Utilities ("BPU" or "Board") in response to the Initial Decision of Administrative Law Judge ("ALJ") Jacob S. Gertsman in the above referenced matter. In that Initial Decision, as a matter of law, the ALJ GRANTED the Motion for Summary Decision made by the Division of Rate Counsel, ("Rate Counsel"). The Initial Decision is contrary to law and must be REVERSED and either RETAINED by the Board for future proceedings, or, in the alternative, REMANDED with specific instructions for a full exploration of the substantive issues consistent with standard utility practice and law as determined by the Board.

PRELIMINARY STATEMENT

Lead in drinking water is a complex problem that requires SWNJ and the Board to work together and act in the public interest. Indeed, this past January the Legislature declared that "[l]ead service lines are the primary source of lead in drinking water" and that "[l]ead in drinking water poses a serious health and safety risk to the public[.]" N.J.S.A. 58:12A-38(a), (c). SWNJ believes there is an undisputed need to incentivize the public to replace their (non-company side) lead service lines ("LSL") and remains willing to work with our customers and the Board to accomplish that goal, especially in the current economic climate.

This need should challenge SWNJ, Rate Counsel, and the Board to be courageous and innovative in effectuating positive change consistent with law and the needs of customers. Unfortunately, rather than stepping up to meet this challenge, Rate Counsel has instead worked to block any and all progress on a critical public health issue recognized by the Legislature. In short, Rate Counsel's response has been to simply say "No."

This stonewall approach has now been adopted by the Initial Decision. "No" to any proposed Company program to deal with the non-company owned LSLs. "No" to recovery of any expenditures spent on non-company owned property, and "No" to any suggestion as to how this public health concern should be addressed or alleviated. "No" is neither an appropriate response in the public interest, nor contrary to the Initial Decision, the response required by public utility law.

The facts show that owners of residential buildings are reluctant to replace their non-company owned LSLs in no small measure because of the costs involved. If the Board were to join in and simply affirm the Initial Decision, New Jersey residents would be back at the March, 2020 *status quo*[1]. An affirmance of the Initial Decision states unequivocally that "doing nothing" is an acceptable response when confronted by a public health issue within the Board's authority to address. There is much work left to be done on this critical issue.

As set forth herein, and even more importantly, the Initial Decision misinterpreted the applicable law and applied the wrong standard in evaluating the Company's proposal. There is simply no bright line, as Rate Counsel suggested to the ALJ, that utilities may not recover legitimate and prudent expenditures on non-company owned property. It is that simple. The result of the acceptance of this theory by the ALJ is a flawed, extreme, and dangerous interpretation of public utility law that will undermine numerous Board and Legislative programs already in place and inhibit the Board's ability to implement future programs. At Rate Counsel's invitation, the ALJ has interpreted the "used and useful" principle to create new law. Rate

[1] Ownership of and responsibility for the non-Company owned portion of service lines are the property owners'/customers' and not the water utility. Absent the need to address the non-company side LSL issue, there would normally be no need for the Board to address non-company side plumbing.

Counsel will now wield the Initial Decision in this matter as a sword in an attempt to restrict the appropriate use of the Board's broad regulatory authority.

However, the fact that the Initial Decision bought into Rate Counsel's plainly incorrect theories does not compel this Board to follow. The Board must take action now before the Initial Decision can be leveraged as false precedent in this and other pending matters dealing with substantially similar legal questions. Prompt and decisive Board action will not only foreclose the false precedent problem, but demonstrate to New Jersey citizens that the Board is committed to addressing the serious problem of lead in drinking water while maintaining its statutory authority.

The false precedent problem noted above is predicated upon the Initial Decision's incorrect application of the "used and useful" standard (which is traditionally and properly applied only to rate base questions) in a matter which never requested rate base treatment in the first place. Not every utility expenditure has been, is, or should be, judged on the "used and useful standard." The "used and useful" standard is applicable to "rate base." It is, however, *inapplicable* to expenses. It is inapplicable to revenues. It is *inapplicable* to tariff design, and it is *inapplicable* to rate of return. Regulatory policy and pilot programs instituting those policies can involve any or all of those aspects of ratemaking, not just the one on which the ALJ ruled – and that one was never requested by any party in this proceeding. Further, the Initial Decision incorrectly applied the "used and useful" standard when the "just and reasonable" standard or "end result" test should have been applied in its stead.

The Company is now forced to request that the Board REVERSE the Initial Decision and either retain jurisdiction to fully evaluate the merits of the proposed pilot program and other viable options, develop a factual record, and explore the multiple ratemaking options available to

accomplish the goal of reducing lead in tap water, or, in the alternative, remand this matter to the same ALJ who wrote the instant Initial Decision with sufficient clarifying instructions to permit a record to develop on the critical issue of lead service line replacement.[2]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Beginning in 2018, SWNJ experienced water test results indicating that some residences in the SWNJ system had lead levels in tap water in excess of the maximum contaminant level of 15 ppb set in Department of Environmental Protection ("DEP") and Environmental Protection Agency ("EPA") guidelines.[3] To determine the source, the Company examined, and has continued to examine, water quality from its treatment plant to customer taps.

It is undisputed that the water in the Company's mains is free of lead.

SWNJ filed its Petition with the New Jersey Board of Public Utilities ("BPU" or "Board") in this matter on March 22, 2019. Thereafter, the Company filed a clarifying letter on April 8, 2019. Rate Counsel filed a letter on April 12, 2019 objecting to the Company's request for deferred accounting. SWNJ responded to Rate Counsel's objection the same day. The Company subsequently filed a letter with the BPU Secretary providing additional clarification as to its position and requesting action at the next BPU agenda meeting. The Board transmitted the matter as a contested case to the Office of Administrative Law on May 21, 2019. Thereafter, SWNJ filed the Direct Testimonies of James C. Cagle and Mark McKoy in support of the original request. Rate Counsel filed the Direct Testimony of Howard Woods concerning the

[2] In granting Rate Counsel's motion, the Initial Decision foreclosed the possibility thus far of *any* record whatsoever being made concerning the Company's proposal for LSL replacement.

[3] The Company experienced lead level exceedances in "2H 2018" (the period July 1 – December 31, 2018), and "1H 2019" (the period January 1 – June 30, 2019). The results from 2H 2019 have not yet been placed in the record of this matter due to Rate Counsel's Motion, now granted, but we now ask the Board to take official notice that those results indicate that the 2H 2019 results indicate that SWNJ is no longer in exceedance of DEP lead contamination levels. We would intend to introduce those data, as well as data from 1H 2020, when available, into the record of a remanded proceeding. *See* Point III, *infra*.

original request on October 18, 2019, and the Company filed the Rebuttal Testimony of James C. Cagle on December 10, 2019.

In relevant part, under the Company's Petition, the costs of replacing the non-company side of an LSL would be shared between individual customers/owners, and all other water customers. Specifically, the Company offered to arrange for non-company owned LSL to be replaced at a cost of $1,000 to the building owner (which may or may not be its customer), with the difference in the total cost being treated as a regulatory asset by the Company that would be recovered through a surcharge to all customers. The Company proposed that the regulatory asset be treated as a deferred expense that would be amortized over seven (7) years, and that the Company be afforded carrying costs on that regulatory asset as it is being amortized to $0 (the Company suggested the carrying cost rate as the overall rate of return last set by the BPU).

Rate Counsel filed a Motion for Summary Decision on January 10, 2020, thus foreclosing further action on an evidentiary record. SWNJ filed its opposition on February 3, 2020, and Rate Counsel filed a reply on February 14, 2020. The parties had earlier agreed upon a Statement of Material Facts not in Dispute ("Statement of Material Facts"). See Exhibit "B" to SWNJ'S Opposition Papers.[4] The Statement of Material Facts identified the possible sources of lead in residential buildings to include one or more of the following: (a) the Company's side of the lead service lines, (b) the non-company or "customer" side of the LSLs, and/or (c) plumbing or fixtures in individual residential buildings. See Exhibit "B" to SWNJ'S Opposition Papers, at ¶ 24.

Of these three possible sources, two have been addressed by the parties. First, the parties agreed that costs associated with replacing *company* side LSLs could be included in a

[4] Along with these exceptions, for the Board's convenience, the Company provides: (1) Rate Counsel's Motion for Summary Disposition and exhibits, (2) SWNJ's Opposition and exhibit, and (3) Rate Counsel's Reply and exhibits.

Distribution System Improvement Charge ("DSIC") and ultimately rate base). Second, the parties agreed that plumbing in individual residences is beyond the ability of the Company to address. Id. Thus, the remaining substantive issue to be determined is how to deal with the non-company side, or customer side, LSLs. This was the subject of the Company's proposal and Rate Counsel's motion.

Oral argument was held on Rate Counsel's motion on February 25, 2020 before Hon. Jacob S. Gertsman, ALJ. Thereafter, ALJ Gertsman issued his Initial Decision granting Rate Counsel's Motion on June 15, 2020. SWNJ now files these Exceptions to ALJ Gertsman's Initial Decision pursuant to N.J.A.C. 1:1-18.4.

LEGAL ARGUMENT

I. THE LEGAL BASIS FOR EXCEPTIONS TO AN INITIAL DECISION.

The Company files these Exceptions pursuant to N.J.A.C. 1:1-18.4. Specifically, SWNJ sets forth its exception to the conclusion of law that the Company's proposed pilot program is "contrary to settled New Jersey case law[s]" see ID at 13, as well as to the ALJ's implicit finding as to the factual basis of the SWNJ pilot program. As set forth in greater detail herein, the Company requests that the Board reverse the Initial Decision and either retain jurisdiction to fully evaluate the merits of the proposed pilot program, develop a factual record, and explore the multiple ratemaking options available to accomplish the goal of reducing lead in tap water or, in the alternative, remand to the ALJ with specific clarifying instructions.[5]

[5] Once the Board reverses the Initial Decision and determines the law of the case using the correct application of ratemaking standards, the parties would be bound by that ruling whether the Board retains jurisdiction or remands to the ALJ.

II. THE ALJ'S APPLICATION OF THE "USED AND USEFUL" PRINCIPLE DOES NOT COMPORT WITH BASIC RATEMAKING PRINCIPLES OR THE LONGSTANDING APPROACH TO FLEXIBLE AND INNOVATIVE RATEMAKING UTILIZED BY THE BOARD.

The Initial Decision incorrectly applied the used and useful principle to recovery of expenses and therefore transformed that principle into *the* definitive ratemaking principle to the exclusion of all other methods and considerations, regardless of the topics being considered (or requested). It also adopts an incorrect bright-line when using that principle: that no recovery of expenditures regarding non-company owned property is legal in any circumstance. This is problematic in the real world and should be reversed for numerous reasons. First, the Company did *not* request rate base treatment to implement its pilot program and, therefore, the used and useful principle is inapplicable. The correct standard to apply to the company's cost recovery for its proposes pilot program is whether rates resulting from the program's implementation would be just and reasonable.[6]

Second, the Initial Decision's adoption of Rate Counsel's preclusionary application of the used and useful principle is at odds with this Board's longstanding approach to flexible and innovative ratemaking and inconsistent with the prevailing ratemaking law governing public utilities' rates.

A. The Company did not request Rate Base Treatment. As such, the Initial Decision's Application of the "Used and Useful" Principle was in Error.

"The rate base . . . is the fair value of the property of the public utility that is used and useful in the public service at the time of its employment therein[.]" In re N.J. Power & Light

[6] One of the items to be proffered and examined would be the estimated cost of a pilot program to address this issue. As noted in Section III, *infra*, in such a remanded proceeding the Company has estimated and would proffer a cost estimate of less than one dollar ($1.00) per month per customer based on the original proposal.

Co., 9 N.J. 498, 509 (1952).[7] The "used and useful" principle was developed as a methodology to determine the value of property eligible for inclusion in a utility's *rate base*. See, e.g., In re Petition of Jersey Cent. Power & Light Co., 85 N.J. 520, 529 (1981) (internal citation omitted). In other words, the "used and useful" principle is but one of many tools used to set utility rates, and is the tool generally used to determine "the value of utility property[.]" Jersey Cent. Power & Light Co., 85 N.J. at 529. Thus, the "used and useful" principle is always tied to the determination of a utility's *rate base*. Id. It is not utilized to determine any of the other aspects of ratemaking, and specifically not the request being made in the instant matter.

However, as the Company consistently advised the Administrative Law Judge, the proposal did **not** seek rate base treatment, and there was therefore no reason to apply the "used and useful" principle to the Company's request. Instead, the proposal sought to defer the net costs associated with the replacement of non-company owned LSLs via a regulatory asset through the term of the pilot program and amortize those costs over a seven (7) year period, with carrying costs applied to the unamortized balances.[8] No precedent prohibits such a proposal, nor do any statutes or regulations forbid it. The use of a regulatory asset proposed through SWNJ's pilot program is nothing more than a proper means to accomplish that same goal – an equitable result attempting to resolve a public health problem.

Rate Counsel has argued, (and the Initial Decision implicitly accepted) that the only difference here is that these expenditures are specifically identified as being related to non-utility owned property: *i.e.*, non-company owned LSLs. Indeed, by definition, non-company owned

[7] The "fair value" rule so rigidly described has been considered bad law for decades. Smyth v. Ames, 169 U.S. 466 (1898), overruled by Fed. Power Comm'n v. National Gas Pipeline Co. of Am., 315 U.S. 575 (1942).

[8] The Company's proposed pilot program nets a proposed $1,000 cost to the customer/owner of the residential building against the total costs of the non-company side LSL, and amortizes that difference over 7 years with carrying costs.

LSLs are owned by someone other than the utility. But that does not mean that such property does not impact the utility or its customers, for example, in developing water treatment protocols and their cost.

The use of regulatory assets in ratemaking often reflects timing differences between the expenditure of investor monies before recovery of those dollars. The use of a regulatory asset is an unquestionably acceptable ratemaking practice and has been used by the Board and other utility regulatory commissions around the country for decades, among other reasons, to stabilize rates where such cost recovery would otherwise disrupt the levels of customer rates by making them vastly more volatile.

Rate Counsel, and now the Initial Decision, conflate what may be included in customer "rates" with what they claim is not "used and useful," *i.e.*, not theoretically includable in "rate base." The Initial Decision failed to recognize this, in part, because the Administrative Law Judge found that the Company's argument was undercut since he concluded that Rate Counsel never argued that the Company was seeking "rate base" treatment. See Initial Decision ("ID") at 8-9. Thus, at Rate Counsel's urging, despite the fact that the Company requested the use of a regulatory asset and not rate base for these expenditures, the Initial Decision incorrectly applied the used and useful principle. This misapplication was the direct result of Rate Counsel's argument that the Company effectively sought rate base treatment. Id. (Rate Counsel asserted that the Company was "attempting to earn a return on property it does not own."). This is simply not the case.

In truth, SWNJ proposed to replace non-company owned LSLs and amortize those expenses over a seven (7) year period by creating and amortizing a regulatory asset including carrying costs. SWNJ concedes that it does not own and will not own customer-side LSLs, but

this is irrelevant since the Company is not requesting rate base treatment. However, it is nothing less than fundamental in ratemaking that there are differences in customer impact over time between including assets in rate base versus amortizing expenses over time and earning carrying costs upon those unamortized expenditures.

Using a simple example only, if one assumed a 10 year program to replace those LSLs where such costs are recorded in rate base, and a 60 year life for those LSLs (for ease of computation), customers would pay for recovery of, and a return on, those non-company side LSLs for 70 years (10 years to replace and install, then depreciated the last installed LSLs over 60 years). In contrast, under SWNJ's proposed pilot program, assuming that same 10 year program to replace and install the replaced non-company side LSLs, the maximum number of years rates likely to be impacted would be about 17 years (10 years to replace and install with the last LSLs replaced being amortized over the next seven (7) years). The earlier replacements would be amortized away well before the replacement program would even be completed.

Since the replaced non-company side LSLs would never be owned by the Company *nor put into rate base*, their useful lives would be irrelevant to the Company or any of its ratemaking calculations, since the Company would net the proposed customer/owner's $1,000 "share" against the total cost of the replacement and only that net amount would be added to the accumulating and amortizing account, and it would be amortized away over seven (7) years. By recovering that amortized regulatory asset over seven (7) years as a surcharge, the costs would be fully transparent to the Board and its customers and the pilot program and its surcharge would have a limited life. But the non-company owned LSLs connected to residences in the Company's service territory would be largely eliminated.

Other aspects of the utility ratemaking formula, individually or in some combination, easily provide the basis for the proposed pilot program: Expenses, Rate of Return, Revenues, Tariff/Rate Design. Each of these basic components of the ratemaking formula are essential to examine and determine in order for the Board set just and reasonable rates. The Board must not permit itself to be bound by the Initial Decision's rigid and inappropriate exclusion of replacement costs of non-company owned property in every conceivable situation, especially when the Company never asked for rate base treatment.[9]

B. The Initial Decision's Application of the "Used and Useful" Standard was Incorrect. It does not Prohibit a Utility from Recovering its Expenses for or Investment in Non-Utility Owned Property.

As set forth in Section II(A), *supra*, the Initial Decision should not have applied the "used and useful" principle to the Company's proposal. Compounding this error, the Initial Decision then *misapplied* the principle (despite ample precedent to the contrary) and, in so doing, improperly granted Rate Counsel's motion. ID at 10-11.

New Jersey Courts have held that ratemaking "is not a matter of formulas, but rather of a reasonable judgment grounded in a proper consideration of all relevant facts." Atl. City Sewerage Co. v. Bd. of Public Util. Comm'rs, 128 N.J.L. 359, 365 (1942).[10] Consistent with these constitutionally permissible ratemaking practices, the Board has long engaged in flexible, pragmatic ratemaking unhindered by fictitious bright-line restrictions such as the one adopted by

[9] Proposals by other utilities to address LSL replacement, whether or not they implicate rate base, are simply not relevant to the SWNJ approach or request. As will be discussed in detail below, the arguments Rate Counsel used to support its Motion, and which were accepted by the ALJ, were and remain irrelevant to the SWNJ's proposed pilot program because they address a request the Company never made and no one in this case proposed.

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

the Initial Decision. This flexibility is an inherent trait of regulatory law, which "'has [an] elasticity that permits it to adapt to changing circumstances and conditions[.]'" In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 347 (2011) (internal citation omitted).

The Board has long utilized this flexibility to craft appropriate ratemaking solutions based on the facts before it – including facts involving non-utility owed property and circumstances where to deal with certain public health or public policy expenditures are approved to be made. Pub. Serv. Coordinated Transp., supra, 5 N.J. at 214 (the "Legislature has delegated its rate-making power" to the Board, and the Board "is vested with broad discretion in the exercise of that authority."). Thus, the Board has the flexibility to assess each particular case in light of the unique facts and circumstances it presents. A.A. Mastrangelo, Inc. v. Envtl. Prot. Dep't., 90 N.J. 666, 685 (1982) ("BPU was intended by the legislature to have the widest range of regulatory power over public utilities.").

Here, however, Rate Counsel argued in its motion that "*because of its Constitutional nature*, the used and useful principle and its corollary that rates be just and reasonable, cannot be overridden by either legislation or regulatory or judicial decisions." See Rate Counsel's Motion ("RCM") at 11 (emphasis supplied). To be clear: in arguing their respective positions on the Motion for Summary Dismissal, *all briefing parties* affirmed the constitutional balance of utility law banning "takings" if a utility were required to expend monies but not be appropriately reimbursed for doing so. Those constitutional protections are clear-cut black letter public utility and constitutional law, and have been fully enshrined in utility law for over a century both in

New Jersey as well as in federal practice and law. SWNJ does not seek to displace them, nor does the proposed pilot violate them.[11]

With this in mind, however, the assertion that the "used and useful" principle is an insurmountable constitutional precept that "cannot be overridden by either legislation or regulatory or judicial decisions" is demonstrably false because it conflates two separate concepts within the ratemaking formula, rate base and expenses. As evidenced by the numerous examples that follow herein, the "used and useful" principle does not apply in the manner suggested by the Initial Decision, nor does it act as a constitutional or legal prohibition to prevent a utility from recovering prudent expenditures on non-utility owned property.

1. The Regional Greenhouse Gas Initiative Act.

The New Jersey Regional Greenhouse Gas Initiative ("RGGI") Act, N.J.S.A. 48:3-98.1 et seq. does precisely what Rate Counsel claims was constitutionally impermissible – a position that the Initial Decision adopted without question. See e.g., N.J.S.A. 48:3-98.1(a) (permitting public utilities to invest in, among other things, *customer-owned* energy efficiency and conservation programs, and to recover the costs of those non-company owned investments, plus carrying costs, in rates). Thus, RGGI is proof positive that the interpretation of the principles set forth by Rate Counsel and espoused by the Initial Decision misses the mark.

RGGI cannot be reconciled with the "constitutional" argument made by Rate Counsel that the "used and useful" principle "cannot be overridden by . . . legislation." See Rate

[11] For example, there is no doubt that if the DEP ordered a water utility to act (or proposed a regulation) to make expenditures to clear additional, *non-utility owned* land around its reservoirs to improve water quality, those expenditures would be appropriately recoverable from customers. SWNJ believes that in such a situation the Board would have the legal authority/obligation to both charge customers for those expenses and, in order to spread what may be significant costs over time, as one option, provide for a regulatory asset to provide carrying costs on those deferred recoveries while before those total recoveries were recouped. The authority for a pilot program to expend dollars to replace *non-company owned* LSLs in this case is no different. Treatment costs would clearly be impacted depending on the results of lead tests for residences, just as surely as would expenses spent on non-utility property around reservoirs.

Counsel's Motion ("RCM") at 11. Because RGGI indeed allows public utilities to recover for expenditures related to non-utility property, Rate Counsel's assertion (and the Initial Decision's tacit acceptance) that the "used and useful" principle is an absolute bar to utility cost recovery for expenditures related to non-utility owned property cannot stand.

2. Energy Efficiency Programs and Pre-Statutory Promotional Payments.

There is no legal prohibition against the relief SWNJ's proposal seeks. Indeed, if there was, no utility could *ever* have recovered energy star or energy efficiency rebates/incentives. Like RGGI, the mere existence of Energy Efficiency ("EE") programs also disproves the tenuous assertion that the "used and useful" principle is a constitutional bar prohibiting utilities from recovering their investments in non-utility owned property. Indeed, N.J.S.A. 48:3-98.1 mandates that "[a]ll electric public utility and gas public utility investment in energy efficiency and conservation programs or Class I renewable energy programs may be eligible for rate treatment approved by the board, including a return on equity, or other incentives or rate mechanisms that decouple utility revenue from sales of electricity and gas." If the "used and useful" principle "cannot be overridden by . . . legislation[,]" one wonders how RGGI and statutory EE programs can be constitutional. Are all such legislative enactments unconstitutional and void?

Further, a rebate in those circumstances is for the benefit of an individual ratepayer. While it has been argued that more energy efficient appliances reduce energy costs and thus benefit all customers, that is in fact no different than replacing non-company LSLs which would reduce and impact treatment costs for all customers paying rates. Utilities have long been permitted to recover costs and expenses associated with rebates – even before statutes permitting such recovery. *Watkins v. Atl. City Elec. Co.*, 67 P.U.R.3d 483 (N.J.B.P.U. Mar. 8, 1967)

(electric utility permitted to earn rate of return on promotional program incentivizing switch to electric heating).

3. Stranded and Other Costs.

There are many alternatives to providing recovery of expenditures made (with carrying costs) in the public interest, whether they be for public health concerns as in this matter, or to meet public interest demands in other cases. They do not require inclusion in rate base. See In re Atl. City Elec. Co., 1983 WL 913534 (BPU Docket No. 822-116 Jan. 13, 1983); In re Pub. Serv. Elec. and Gas Co. Electric and Gas Base Rate Proceedings, BPU Docket No. 7711-1107 (May, 1978). These examples were cited to the ALJ, but any discussion of these precedents is conspicuously absent from the Initial Decision.

For example, the Atlantic Generating Station ("AGS") was a planned floating nuclear power plant off the Atlantic City coast during the late 1970s, and was a project ultimately abandoned by PSE&G. The utility sought to recover costs associated with planning and designing its investment in the AGS, but were never placed into service. The parties agreed at that time, and the Board decided that all legitimate costs were to be amortized over a 20-year period. Although PSE&G agreed not to earn a formal rate of return on those expenditures, the utility recovered costs for a project that was neither built nor put into service. Thus, this example demonstrates that a utility has been permitted to recover costs in rates for expenditures that were arguably never "used and useful" – a completely contrary legal outcome to the one which Rate Counsel now maintains and which the ALJ accepted under their invalid extrapolation of the used and useful principle.

Also submitted to the ALJ, were the circumstances in which the Board more recently did this yet again in a fully litigated JCP&L rate case concerning the expenditures related to Superstorm Sandy. See In re Verified Petition of Jersey Central Power & Light Co. for Review

and Approval of Increases In and Other Adjustments to its Rates and Charges for Electric Service, 2015 WL 1773986, at *61, (BPU Docket No. ER12111052, March 2015). Expenses were amortized over a number of years with a return on those expended dollars.[12]

As far as SWNJ knows, there has never been any claim that Jersey Central estimated its expenditures on the basis of what was and was not utility property, nor that Jersey Central expended no dollars whatsoever on non-utility property cleanup. In a litigated case, the BPU authorized JCP&L to recover its cleanup expenses over time. At that time, Rate Counsel did not object to the concept as it does here; instead, it objected to the *calculation* of the expenditure.[13] Does the Board believe that Jersey Central, in its clean-up efforts in the wake of a devastating environmental event resulting in indiscriminate damage that Jersey Central, individually separated company and non-company owned property and only included its costs to clean up company owned property for recovery? There is nothing in the order indicating such a distinction.

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[12] Therefore, the Board **ACCEPTS** ALJ McGill's finding that O&M expenses associated with the 2011 storm costs should be amortized over six years with carrying costs on the unamortized balance but **MODIFIES** the Initial Decision to authorize a carrying cost rate of 2.52 percent. The 2.52 percent is equal to the 1.92 percent rate on 7-year constant maturity Treasury securities on January 2, 2015 (which is the date that this rate was set on or closest to January 1 of this year) plus 60 basis points.

[In re Verified Petition of Jersey Central Power & Light Co. for Review and Approval of Increases In and Other Adjustments to its Rates and Charges for Electric Service, 2015 WL 1773986, at *61, (BPU Docket No. ER12111052, March 2015) (emphasis in original)]. Note: relevant excerpts of the related documents are attached as Exhibit "D" to the Company's opposition papers.

[13] In re Verified Petition of Jersey Central Power & Light Co. for Review and Approval of Increases In and Other Adjustments to its Rates and Charges for Electric Service, 2015 WL 1773986, at *61, (BPU Docket No. ER12111052, March 2015).

4. Rate Counsel and the Initial Decision Misinterpret the RECO Order.

Additionally, the Initial Decision also adopted Rate Counsel's interpretation of the Board's Order in I/M/O Petition of Rockland Electric Co. For Approval of an Advanced Metering Program; and For Other Relief, BPU Docket No. ER16060524, Order dated 8/23/17 ("RECO Order") as evidence that the used and useful principle prohibits utility cost recovery for any expenditures or investment in non-utility owned property. On closer examination, the RECO does the exact reverse.

The RECO case involved a request to recover Advanced Metering Infrastructure ("AMI") installation costs through customer rates, including the costs of two types of work performed on the customer-side of the meter (*i.e.*, customer – not utility – property), specifically: (1) work necessary to install the AMI meter; and (2) incidental work to correct irregularities (*e.g.*, faulty electrical cables) that were unrelated to the AMI installation. In its Order, the Board ultimately concluded that the AMI meters would not be "used and useful" **without certain customer-side work** and permitted RECO to seek recovery of the costs necessary for AMI installation. See RECO Order, at 22.[14]

If such recovery was barred *by law*, as argued by Rate Counsel and adopted by the Initial Decision, see ID at 13, how could the Board have even considered that same recovery in the RECO Order? The Board also determined that any incidental, non-AMI-related work would continue to be the responsibility of the customer and was not eligible for cost recovery from ratepayers by the utility. Id. But that does not change the fact that Rate Counsel's suggested bright-line was crossed.

[14] A copy of the RECO Order is appended to Rate Counsel's motion.

5. The "Used and Useful" Principle is not a Constitutional Bar to LSL Replacement in other States.

Finally, other regulatory commissions have already accepted proposals similar or identical to the one at issue in this case. For example, in 2017 the Pennsylvania Public Utility Commission ("PAPUC") approved a settlement by York Water Company to replace non-company owned LSLs when it replaced company-owned service lines, as well as when customer-side LSLs were discovered in the normal course of business. See Petition of The York Water Company for an Expedited Order Authorizing Limited Waivers of Certain Tariff Provisions and Granting Accounting Approval to Record Cost of Certain Customer-Owned Service Line Replacements to the Company's Services Account Joint Petition for Settlement and Request for Certification, Pa. Pub. Util. Comm'n., Docket No. P-2016-2577404 (Jan. 23, 2017), and Order of the Pa. Pub. Util. Comm'n, Docket No. P-2016-2577404 (Mar. 2, 2017).

Under that water company's plan and the terms of the settlement approved by the PAPUC, the company was permitted to replace – but not own – non-company side LSLs *and record the replacement costs as a regulatory asset to be amortized in its next base rate case*. In permitting the company to replace non-company side LSLs and record the costs as a regulatory asset, the PAPUC noted that the company's prior test results had exceeded the action level set in the Lead Copper Rule ("LCR"). The PAPUC further recognized that "[r]eplacing the Company-owned lead lines addresses only part of the problem. Customer-owned lead lines also need to be replaced." In that case the PAPUC concluded by noting that LSL replacement was a "pressing health and safety issue[.]" The PAPUC's approval of this proposal occurred well before October, 2018, when Pennsylvania enacted legislation permitting the PAPUC to allow water utilities to replace non-company side LSLs and fully recover those expenditures. See 66 Pa. C.S.A. § 1311(b)(2)(ii).

Numerous other state regulatory bodies and legislatures have permitted a privately-owned utility to recover costs associated with customer-side LSL replacement. Indeed, numerous other states have addressed this problem through legislation, regulation, and/or individual cases. Despite this, it seems that, under the ALJ's Initial Decision, New Jersey should now be the only state in which such a proposal would be unlawful. See Michigan, Mich. Admin. Code § 325.11604; Missouri, In re Missouri-Am. Water Company's Request for Authority to Implement General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas, 2018 WL. 2388974, at *10-11 (Missouri Pub. Serv. Comm'n, Docket No. WR-2017-0285, May 2, 2018); Indiana, In re Petition of Indiana-American Water Company, Inc. for Approval of its Lead Service Line Plan, Indiana Utility Regulatory Commission, Order, Docket No. 45043 (Jul. 25, 2018); Wisconsin, Wis. Stat. Ann. § 196.372 (West 2020).

Despite the fact that the Company provided briefing concerning these comparable jurisdictions, the Initial Decision did not attempt to grapple with them. Instead, the Initial Decision merely cited the handful of cases concerning *rate base* cited by Rate Counsel, and concluded the Company's proposal was "contrary to settled New Jersey case law." This overbroad ruling is simply incorrect.

6. The Initial Decision Failed to Consider or Weigh the Foregoing Precedent and Authorities, resulting in an Incorrect Application of the "Used and Useful" Principle. The Board must Reverse the Initial Decision to Prevent it from serving as False Precedent.

The Initial Decision's failure to consider any of these precedents or valid ratemaking examples, even if not related to non-utility owned assets, underscores the need for the Board to substantively evaluate the Company's pilot and reach its own conclusions. Further, it should be noted that over the course of the last few months, Rate Counsel has made motions to dismiss elements of separate requests filed by Atlantic City Electric Company ("ACE") and Public

Service Electric and Gas Company ("PSE&G") regarding the provision of electric vehicle charging infrastructure in New Jersey.[15]

Both matters were retained by the Board and, on information and belief, both motions to dismiss advance the same argument that Rate Counsel has made in the instant matter, *i.e.*, *that as a matter of law* utilities may not invest in, expend dollars, or provide financial incentives for non-utility owned property which would then be recovered in utility rates in any way.[16] The same misapplication Rate Counsel succeeded with in this matter is being offered again in those matters, even though they are factually different. This application of the "used and useful principle" does not comport with appropriate utility ratemaking techniques, and is inconsistent with and unduly restrictive of existing Board practices and precedents. On June 26, 2020, Commissioner Chivukula denied Rate Counsel's motion in the ACE EV proceeding. See I/M/O the Petition of Atlantic City Elec. Co. for Approval of a Voluntary Program for Plug-In Electric Vehicle Charging, BPU Docket No. EO18020190, Order dated June 26, 2020.[17]

The Board has an opportunity to follow the Governor and Legislature's direction to confront the problem of lead in tap water. Given New Jersey's historic leadership on water quality and regulatory issues, If a Pilot Program is allowed to proceed it would be a model that

[15] See I/M/O the Petition of Public Service Elec. & Gas. Co. for Approval of its Clean Energy Future – Electric Vehicle and Energy Storage ("CEF-EVES") Program on a Regulated Basis, BPU Docket No. EO18101111; I/M/O the Petition of Atlantic City Elec. Co. for Approval of a Voluntary Program for Plug-In Electric Vehicle Charging, BPU Docket No. EO18020190.

[16] Specifically, Rate Counsel's motions in all three proceedings argue that the "used and useful" principle acts as an absolute bar to utility cost recovery for investment in non-utility property that is not used and useful—regardless of the rate treatment requested. For example, the argument concerning the "used and useful" principle on pages 7 to 13 of Rate Counsel's motion in this proceeding is, for all intents and purposes, identical to the argument concerning the "used and useful" principle on pages 11 to 16 of Rate Counsel's motion in the ACE proceeding. SWNJ asked the ALJ to take official notice of those motions and the papers filed by all parties on this particular issue, but in his Initial Decision, the ALJ indicated he declined to do so. See ID at 2, n. 1.

[17] In the Initial Decision, the ALJ stated, with respect to the EV proceedings: "[t]he parties are free to advise the undersigned if the Board makes a ruling germane to this matter prior to its resolution at the OAL." ID at 2, n. 1.

could be studied nationally. The Board should REVERSE the Initial Decision and either RETAIN the issue for further proceedings before a Commissioner or REMAND the matter with directions so options can be explored in detail.

III. SEVERAL OTHER VARIATIONS ON ACCEPTABLE RATEMAKING ALTERNATIVES MAY EXIST, WHICH WERE FORECLOSED BY RATE COUNSEL'S MOTION. ADDITIONAL CONSIDERATION SHOULD BE GIVEN TO MORE FULLY EXPLORE POSSIBILITIES TO ENCOURAGE LSL REPLACEMENT.

Once the Initial Decision's acceptance of Rate Counsel's incorrect "bright line" interpretations are rejected, the Board would have the opportunity to explore other possible ratemaking methods to accomplish the removal of non-company side LSLs using other aspects of the ratemaking formula. An example of this might be, but is not limited to an appropriately configured base rate program which begins to address the non-company side LSL issues. The Company suggested one avenue, but there certainly could be others that conform with other accepted ratemaking practices. There is often more than one reasonable way to allow cost recovery. The Board should avail itself of the opportunity to review analyses of the alternatives and their impact on customers, customer rates, and public health.

For example, other than additional acceptable regulatory options, a record must be developed and updated to include at least the following: (1) an update to test results and status of the Company's compliance with DEP regulations, (2) the costs of the associated proposal(s), and (3) the impact on ratepayers as a whole, and on individual customers.

But progress can only be made on this critical issue if the Board specifically reverses the Initial Decision and its incorrect application of the law. See I/M/O the Petition of Atlantic City Elec. Co. for Approval of a Voluntary Program for Plug-In Electric Vehicle Charging, BPU Docket No. EO18020190, Order dated June 26, 2020 (denying Rate Counsel's motion to dismiss

EV petition predicated on identical misapplication of "used and useful" principle).[18] Without a complete reversal and opportunity to develop a record, Rate Counsel will simply continue to say "No" to resolving the public health issue.

CONCLUSION

The Company respectfully requests that the Board REVERSE the Initial Decision and retain jurisdiction over this matter in order to fully develop the record and explore the multitude of options and potential for collaboration between the Company and all interested stakeholders to work toward reducing the problem of lead exposure caused by non-company lead service lines.

Respectfully submitted,

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[18] The ACE Order states, in relevant part:

> The pleadings filed by Rate Counsel and ACE present mixed questions of fact and law. Based on the evidence filed to date, there exists disagreement on certain issues that go to the heart of the "used and useful" principle, and what is and is not necessary to provide safe and reliable utility services. The record would benefit from a full factual exploration of whether some or all of the investments proposed by ACE would be owned by the Company, whether the public would benefit from those investments, and whether the proposed investments are factually similar to energy efficiency infrastructure investments, which are allowed, **regardless of ownership**.

I/M/O the Petition of Atlantic City Elec. Co. for Approval of a Voluntary Program for Plug-In Electric Vehicle Charging, BPU Docket No. EO18020190, Order dated June 26, 2020, pg. 5 (emphasis supplied).