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November 30, 2020

VIA ELECTRONIC MAIL

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Aida Camacho-Welch
Secretary of the Board
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
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RE: In the Matter of the New Jersey Board of Public Utilities' Response to the
COVID-19 Pandemic
BPU Docket No. AO20060471

Dear Secretary Camacho-Welch:

Pursuant the Order issued by the Board of Public Utilities (the "Board") on October 28, 2020 (the "October 28 Order"), please accept this correspondence in lieu of more formal comments from Atlantic City Electric Company ("ACE" or the "Company").¹ ACE recognizes and endorses the comments of the New Jersey Utilities Association ("NJUA") and offers these supporting, supplemental comments to ensure a complete record before the Board. Consistent with the October 28 Order, ACE files this correspondence electronically with the Board's Secretary and the New Jersey Division of Rate Counsel ("Rate Counsel"). No paper copies will follow.

¹ By Secretary's Letter issued in BPU Docket No. EO20100629U, the Board similarly requested comments on a formal petition of the New Jersey Division of Rate Counsel seeking varied relief regarding COVID-19 arrearages (the "Rate Counsel Petition"). ACE submits the within comments as also responsive to the Secretary's Letter.

BACKGROUND

The Board has consistently recognized the electric public utilities' immediate response to the COVID-19 Pandemic with significant efforts to assist customers. In March 2020, ACE was among the first companies in the nation to suspend service disconnections and waive new late payment charges for all customers. The Company expanded its customer support initiatives shortly thereafter to reconnect customers who previously had their power disconnected, provided it was safe to do so. ACE also took steps to directly help customers in need and expand awareness of the existing bill assistance programs available to customers facing temporary or extended financial hardship.²

To improve customer service, ACE has implemented various initiatives in the 2019 - 2020 period. For example, ACE developed an on-line energy assistance training module for call center employees to assist with customer inquiries; created bill messaging promoting the NJ SHARES customer contribution and company match campaign; developed wallet-sized energy assistance cards and distributed over 30,000 such cards to various churches, Local 54, and foodbanks; participated in discussions with the NJ Department of Community Affairs to agree to alternative requirements to accept past due notices in lieu of disconnect notices for customers applying for emergency benefits. In response to COVID-19, the Company also implemented initiatives to promote energy assistance while maintaining the safety for everyone involved. ACE's efforts include: providing energy assistance Fact Sheets to the Community Foodbank of South Jersey for inclusion with meal distribution at local schools in all eight counties; providing Fact Sheets to faith-based organizations, veterans associations and South Jersey foodbanks to distribute to their clients; and participating on the "Hurley in the Morning" radio show to provide listeners with sources of energy assistance information. Collectively, these efforts demonstrate ACE's commitment to customer assistance during this extraordinary time.

The Company also continued to work with the State and the Board to voluntarily extend the suspension of disconnections and waiver of new late payment fees through October 15, 2020. ACE took the additional step of advising customers of alternative payment options, such as Budget Billing and customized payment arrangements offered on a case-by-case basis. Like the other

² In addition to the assistance offered under the Low Income Home Energy Assistance Program ("LIHEAP"), ACE advises customers to check their eligibility for other programs such as: Helping Hands; the Universal Service Fund; Payment Assistance for Gas and Electric; New Jersey Shares; and Lifeline.

electric public utilities, ACE offered residential customers a flexible and extended Deferred Payment Arrangement (“DPA”) of at least 12 months and up to 24 months. In fact, from the period of March 16, 2020 through September 20, 2020, ACE enrolled 14,137 customers in installment arrangements, totaling approximately \$15.2 million. ACE further informed customers of the “Gift of Energy” program, which allows anyone to make a payment toward a friend or family member’s energy bill; the gift appears as a credit on the recipient’s future bill. All these programs offer customer relief, much the same as requested in the Rate Counsel Petition.

On October 15, 2020, Governor Philip D. Murphy signed Executive Order No. 190, which addressed a variety of Rate Counsel’s concerns. The Executive Order extends the moratorium protecting New Jersey residential customers from utility disconnection through at least March 15, 2021. Further, Paragraph 2 of the Executive Order addresses the prohibition against charging late fees and charges to reconnect services that have been disconnected. The Executive Order also requires that all residential services that were disconnected after social distancing measures went into effect on March 16, 2020 be reconnected.

On that same day, Governor Murphy and legislative leadership announced that \$15 million from the Coronavirus Relief Fund would be allocated to assist low income households in paying their utility arrearages. Governor Murphy also announced that the New Jersey Department of Community Affairs would use the funds to address arrearages among the most vulnerable, low income households. More recently, on November 18, 2020, Governor Murphy signed Senate Bill 2362, which will appropriate an additional \$5 million in aid for utility assistance. These additional funds will provide necessary support for customers.

ACE has also increased its support for New Jersey during the COVID-19 Pandemic. The Company anticipates approximately \$1.2 million of contributions to non-profits and COVID-19 relief efforts by the end of 2020. These contributions represent approximately \$500,000 more than the Company’s \$709,000 annual merger commitment. The Company has made these contributions to support relief efforts for food insecurity, loss of wages and assistance for children, families, and workers across South Jersey. These contributions also support the Community Scholars Program, for South Jersey students seeking careers in energy or related fields, as well as small business grants in partnership with the New Jersey Casino Redevelopment Authority in Atlantic City.

“To date, the Board has acted to address COVID-19 related issues and impacts as they emerged on a case-by-case basis, consistent with the approach the State has taken through the issuance of Executive Orders.” October 28 Order at 6. As examples of this case-by-case approach, the Board acknowledged its Order of July 2, 2020 authorizing COVID-19 related regulatory asset accounts as well as the separate Rate Counsel Petition regarding COVID-19 arrearages. *Id.* at 3-5. However, with the October 28 Order, the Board expressed its intent “to address the ramifications of the ongoing pandemic in a more comprehensive manner as it develops policies that will guide affected utilities subject to the Board’s oversight and their customers through the current crisis.” *Id.* at 6. Accordingly, the Board incorporated Rate Counsel’s Petition into the Board’s established regulatory asset docket and expanded the established regulatory asset docket into a generic proceeding to examine “all pandemic issues.” *Id.*

The Board explained that this generic proceeding will include, but not be limited to, issues concerning “impacts on rate setting, rate design, and utility financial strength; low income and other utility bill assistance programs; regulatory compliance; collections and termination of service; and ensuring the continued provision of safe and adequate service at just and reasonable rates, while recognizing the ramifications from the COVID-19 pandemic.” *Id.* In addition, the Board stated that it would “consider other regulatory priorities such as whether, and to what extent, if any, the current or planned clean energy programs or other utility filings or mechanisms should be modified, maintained, curtailed or accelerated.” *Id.* “The Board invite[d] utilities and other interested parties to provide comments on any issues related to the ramifications of COVID-19 on Board adopted tariffs, regulations, policies and programs, as well as on Board regulated entities, utility ratepayers, and Board adopted programs.” *Id.* Finally, the Board directed its regulated public utilities “to address the scope of the proceeding, issues to be addressed, and the timing for addressing the issues identified” in comments filed by November 30, 2020. *Id.* Consistent with the Board’s direction in the October 28 Order, ACE now offers the following comments.

COMMENTS

The Company joins the comments of NJUA and offers these supplemental comments to more specifically assert the Company's position in response to the Board's October 28 Order.

I. Scope of the Proceeding and Issues to be Addressed

The Board has sought comments on the issues presented and the scope of this generic proceeding. The Company recognizes the breadth of the issues the Board has already identified in its October 28 Order as well as the Board's desire to address these issues comprehensively. As an initial matter, ACE asks the Board to address the issue of growing customer arrearages in this proceeding. To address this issue and to avoid an overly burdensome record and undue delay, the Company urges the Board to focus on its core legal responsibility of ensuring safe, adequate, and proper utility service at just and reasonable rates. *N.J.S.A. 48:2-21, -23*. In so doing, the Board should determine that certain aspects of Rate Counsel's Petition are rendered moot by Governor Murphy's Executive Order 190 and related executive and legislative action. The Board should also determine that Rate Counsel's request to suspend rate cases and infrastructure filings is unconstitutional and the established prohibition against retroactive ratemaking would effectively undermine a utility's ability to furnish safe, adequate, and proper service. As such, the Company requests Board action to affirmatively declare that these matters are beyond the scope of the proceeding. Appropriately narrowing the scope of this proceeding will enable the Board to achieve a timely conclusion for the benefit of utilities and ratepayers alike.

A. COVID-19 Related Arrearages Should Be Addressed First.

As an initial matter, the Company requests that the Board address the issue of customer arrearages and related utility recovery. One important topic of discussion may include Arrearage Management Programs ("AMPs"), which may benefit ratepayers and the utility alike. ACE's sister utility companies have approved AMP programs in the District of Columbia and Delaware and have proposed an AMP program for Maryland. ACE recognizes that the economy will only begin recovering during 2021, as State restrictions related to COVID-19 lift and businesses reopen. Accordingly, ACE is committed to working with the Board to address this issue first and foremost.

B. Much of Rate Counsel's Petition Is Now Moot.

Where much of Rate Counsel's other requests for relief seek government action to continue or expand the utilities' previously voluntary efforts, these requests were addressed on October 15,

2020 by Governor Murphy's Executive Order 190 as well as the related legislative actions discussed above. Among other things, Rate Counsel requests a Board Order directing extension of the moratorium on utility service shut offs and the waiver of late fees and interest payments. Petition at 15. Rate Counsel further requests reconnection of customers disconnected after March 15. *Id.* Rate Counsel also seeks a Board Order directing further funding to financial assistance programs. *Id.* at 17. As these items have all been addressed by Executive Order or other legislative action, the Board need not take additional action as Rate Counsel requests. These requests are moot. Additional action on these claims unnecessarily expands the scope of the proceeding and runs the risk of conflicting with other government directives.

C. The Unconstitutional Denial of a Utility's Right to Earn a Fair and Reasonable Return Is Beyond the Scope of the Proceeding.

Rate Counsel's request that the Board "[s]uspend the filing of rate cases and infrastructure programs during the current public health emergency and until further order of the Board" amounts to an unconstitutional taking in violation of the Fifth and Fourteenth Amendments. It is well-established that utilities are constitutionally entitled to the opportunity to earn a fair rate of return. *See Petition of Valley Rd. Sewerage Co. for Approval of an Increase in its Rates for Sewer Serv.*, 285 N.J. Super. 202, 208 (App. Div. 1995) ("[a] public utility has the constitutional and statutory right to a reasonable rate of return") (internal citations omitted). Thus, "[w]hen existing rates are insufficient to provide a fair rate of return, the proper remedy for the utility is to file an application for higher rates." *Elizabethtown Water Co.*, 107 N.J. 440, 459 (1987) (citing *In re Revision of Rates Filed By Toms River Water Co.*, 82 N.J. 201, 213 (1980)).

The danger of delayed – let alone indefinitely suspended rate filings – is inherent. Utilities seek prompt consideration of rate adjustments, because they are prospective only. *Id.* at 452–459. Accordingly, there is "a right to have the regulatory agency which exercises the rate-making function do its job reasonably promptly, and with no more delay than is necessarily involved in the review process itself." *Matter of Aetna Cas. & Sur. Co.*, 248 N.J. Super. 367, 387 (App. Div. 1991) (internal citation omitted). Rate Counsel's requested relief would have the Board delay its action beyond what is necessary for "the review process itself."

As the regulatory agency that exercises this ratemaking function, the Board acts in the public interest to determine just and reasonable rates. *N.J.S.A.* 48:2-21, -25. Although the Board's

decision may be based upon petition of a given utility, each petition is evaluated on its own merit, with the full engagement of Rate Counsel, before the Board determines the rate. Indeed, it is this “legislative recognition that the public interest in proper regulation of public utilities . . . must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the State” that gives the Board its cited “sweeping” authority. *In re Public Service Electric and Gas Company*, 35 N.J. 358, 371 (1961); *see* October 28 Order (citing *id.*; *Township of Deptford v. Woodbury Terrace Sewerage Corp.*, 54 N.J. 418, 424 (1969); *Bergen County v. Dep’t of Public Utilities*, 117 N.J. Super. 304, 312 (App. Div. 1971).

Here, Rate Counsel asks for far more than what is necessary in the public interest. A blanket prohibition against the filing of new rate cases would amount to a *per se* denial of a utility’s constitutional right to the opportunity to earn a fair rate of return. The takings clause of the Fifth Amendment of the United States provides that “nor shall private property be taken for public use without just compensation.” U.S. Const. Amend. V.³ In this regard, with respect to public utilities, the United States Supreme Court has held that “[i]f the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.” *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). The New Jersey Supreme Court has similarly held that, “to avoid confiscatory results under the takings clause [with respect to regulated entities such as public utilities], ‘the return should be one which is generally commensurate with returns on investments in other enterprises having comparable risks.’” *State Farm Mut. Auto. Ins. Co. v. State*, 124 N.J. 32, 48 (1991) (internal citation omitted).

Rate Counsel’s desired relief would deny public utilities’ their right to an opportunity to earn a fair and reasonable rate of return. Rate Counsel would foreclose the Board’s ability to consider whether the rate of return was fair and reasonable, which is a core regulatory function of the agency. Despite the substantial efforts undertaken by the utilities to address customer impacts, Rate Counsel’s request would deprive utilities their sole remedy for inadequate rates—the constitutional right to seek a rate adjustment. Because the denial of this opportunity would be

³ This provision applies to the states through the Fourteenth Amendment.

contrary to law, ACE respectfully requests that the Board affirmatively declare that Rate Counsel's requested relief is beyond the scope of the proceeding.

D. Where Rate Counsel's Requested Relief Would Inhibit the Ability of Utilities to Provide Safe, Adequate, and Proper Service, the Board Must Determine It Beyond the Scope of the Proceeding.

Where Rate Counsel's requested relief would diminish a utility's ability to provide safe, adequate, and proper service, the Board must not entertain that issue within the scope of this generic proceeding. Notably, the longstanding prohibition against retroactive ratemaking, combined with Rate Counsel's requested suspension of rate cases, would effectively bar a utility from recovering, in a future rate case, the expenses that it was entitled to recover during the moratorium period. Under *N.J.S.A. 48:2-21(b)(1)*, in relevant part, the Board must "fix rates which shall be imposed, observed and followed *thereafter* by any public utility[.]" (emphasis supplied). The plain statutory language establishes that only prospective ratemaking is permitted.

"[R]etroactive ratemaking occurs when a utility is permitted to recover an additional charge for past losses, or when a utility is required to refund revenues collected, pursuant to then lawfully established rates." *Elizabethtown Water Co.*, 107 N.J. 440, 448 (1987) (quoting *Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n of West Virginia*, 300 S.E.2d 607, 619 (W.Va. 1982) (emphasis omitted). In other words, a "device that enables a utility to balance its accounts for a prior period of time by making a future adjustment to its rates' is retroactive ratemaking[.]" *Id.* at 448 (quoting *In re Central Vermont Pub. Serv. Corp.*, 473 A.2d 1155, 1158 (1984)).⁴ It is well-established that "retroactive ratemaking is prohibited regardless of whether such ratemaking benefits the utility or the ratepayer." *Id.* at 459.

"[R]ates that were inadequate because either rate relief was not fairly given or because of a prolonged review process cannot be retroactively increased or otherwise made up." *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 331 N.J. Super. 458, 477 (App. Div. 2000), *aff'd as*

⁴ There are only limited circumstances in which the Legislature has authorized the Board to engage in retroactive ratemaking. See *N.J.S.A. 48:2-21.11* (permitting electric utility to recover certain costs from an insurance carrier, legal action or settlement and the recovery may be used to reduce the utility's rates); *N.J.S.A. 48:2-29.3* and *N.J.S.A. 48:2-29.4* (providing that when the Board has authorized a surcharge for a specified purpose, the Board may require the utility to discontinue surcharge once purpose has been achieved and may order refund of excess). Generally, however, "when the Legislature has desired to authorize the Board to order refunds or reduce future rates by reason of past events it has expressly done so." *Elizabethtown Water Co.*, 107 N.J. at 452 (internal citation omitted). No such express legislative authorization exists here.

modified, 168 N.J. 255 (2001). The prohibition against retroactive ratemaking itself recognizes that the rate case review process takes time. When a utility petitions for a rate adjustment, the change in rate is not immediately effective.⁵ As discussed above, the Board undertakes a deliberate administrative process to review the rate petition. This process often takes many months to arrive at a just and reasonable rate. Additional delay is not necessary to protect the public good, because the Board itself acts in the public interest and, in accord with *N.J.S.A. 52:27EE-48a*, Rate Counsel always actively represents and protects the public interest in rate cases proceeding before the Board.

ACE is concerned that Rate Counsel's requested relief proposes a perpetual downward spiral that's sadly contrary to the public interest. Notwithstanding the utilities' community partnerships and willingness to accommodate customers during this on-going public health emergency, Rate Counsel's requested relief would block the utilities' ability to seek rightful rate recovery. Stated another way, Rate Counsel's requested relief would bar utilities from recovering, in a future rate case, the expenses they were entitled to recover during the time when filings were suspended. "[T]he continued inadequacy of ... rates, if indeed they are inadequate, would constitute a continually increasing loss that could never be made up. In these circumstances, all practical speed is the only acceptable pace for appropriate proceedings for review and evaluation of ... rates." *Matter of Mkt. Transition Facility of New Jersey*, 252 N.J. Super. 260, 278 (App. Div. 1991).

Finally, Rate Counsel's requested relief could inhibit utilities from fulfilling their statutory obligation to provide safe, adequate, and proper service. See *N.J.S.A. 48:2-23* and *3-3(a)*; *Matter of Valley Road Sewerage Co.*, 154 N.J. 224, 240 (1998) ("[T]he primary obligation of a utility is to provide safe, adequate, and proper service at fair and reasonable rates.") (internal citations omitted). ACE recognizes that the current public health emergency presents unique challenges for New Jersey ratepayers and has demonstrated a commitment to working with the Board to assist its customers. However, the COVID-19 Pandemic should not act as a barrier against utilities proceeding with the infrastructure investments necessary to ensure the delivery of safe, adequate, and proper service to those customers, and initiating the process of obtaining timely recovery of

⁵ See *N.J.A.C. 14:1-5.12(e)* (stating that a proposed increase in base rates may be implemented on a provisional basis after the expiration of the statutory suspension period).

the costs of those investments. If anything, the COVID-19 Pandemic has reaffirmed how essential it is to have a reliable electric grid and that infrastructure investment and related activities, such as ongoing maintenance and system operations, continue to serve as an important economic engine. Thus, because Rate Counsel's requested relief could compromise utilities' ability to provide safe, adequate, and proper service, the Board should deem it beyond the scope of this proceeding.

II. Timing for Addressing the Issues Presented

The Board also seeks comments on the timing for addressing the issues presented in this generic proceeding. The Company submits that "all practical speed is the only acceptable pace" for this proceeding, as with any "proceedings for review and evaluation of ... rates." *Matter of Mkt. Transition Facility of New Jersey*, 252 N.J. Super. at 278. Regarding the management of customer arrears, ACE specifically requests Board action establishing cost recovery mechanisms and the associated regulatory rules of the road no later than the end of the first quarter of 2021. The Board should evaluate additional issues for their priority and establish reasonable timelines for their resolution in the procedural order.⁶ Appropriately narrowing the scope of issues presented in this proceeding, as discussed above, should help the Board to focus and avoid parties causing undue delay by frustrating the administrative process. For its part, ACE is committed to engaging in this process with the Board to ensure adequate assistance for its South Jersey customers and to set appropriate cost recovery mechanisms that avoid unreasonable rates.

CONCLUSION

For the foregoing reasons, ACE respectfully requests that the Board reject Rate Counsel's Petition. ACE asks that the Board identify customer arrearages and associated cost recovery as the primary issue, which should be addressed in the first quarter of 2021. To avoid undue delay, the Company further urges the Board to focus on its core legal responsibility of ensuring safe, adequate, and proper utility service at just and reasonable rates. *N.J.S.A.* 48:2-21, -23. The Board should determine that Rate Counsel's request to suspend rate cases and infrastructure filings is unconstitutional. Further, the established prohibition against retroactive ratemaking would work to undermine a utility's ability to furnish safe, adequate, and proper service. In addition, the Board

⁶ The Board may establish priority for issues that impact the majority of utilities and establish separate tracks for issues that impact narrower groups of utilities.

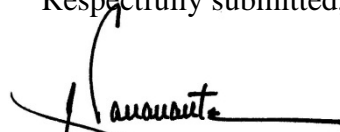
Aida Camacho-Welch

November 30, 2020

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should determine various aspects of Rate Counsel's Petition are now moot. As such, the Company urges the Board to affirmatively declare that these matters are beyond the scope of the proceeding. Appropriately narrowing the scope of this proceeding will ultimately enable the Board to address the issues presented at a practical speed, which will benefit utilities and ratepayers alike.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Passanante", written over a horizontal line.

Philip J. Passanante
An Attorney at Law of the
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In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic
BPU Docket No. AO20060471

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