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September 17, 2020

VIA ELETRONIC MAIL ONLY
Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Ave., 10th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350

RE: I/M/O the Petition of Suez Water New Jersey, Inc. for Approval of a Pilot Program to Facilitate the Replacement of Lead Service Lines and a Related Cost Recovery Mechanism
BPU Docket No. WO19030381
OAL Docket No. PUC 07138-19

Dear Secretary Camacho-Welch:

Please accept this Motion filed by Rate Counsel seeking reconsideration of the September 9, 2020 Order of the Board in this matter. Rate Counsel seeks reconsideration of this order because it is palpably incorrect as a matter of law, overlooks relevant precedent, and fails to cite any relevant law that supports the legal conclusion reached. The Order also appears to misconstrue the arguments of the parties and the issue between them. The mis-citation of prior Orders issued by the Board, combined with the failure to discuss the many cases in which the Board and our courts have applied the basic principle that utilities may not charge ratepayers for property that is not owned by the utility and "used and useful" in the provision of utility service, is clear error that warrants reconsideration.

BACKGROUND

This case involves a proposal by Suez to offer a "pilot" program to pay for most of the costs of replacing lead lines on customer-owned property. These lines are not owned by Suez and will still not be owned by Suez after the work is done. Suez proposes to defer the costs of replacing the customer owned lead lines with carrying costs as a "regulatory asset." This will allow them to recover these costs in their next rate case and earn from them, even though the lines are not utility property. The "asset" that would be deferred via this regulatory asset is property owned by customers, not the utility. Rate Counsel moved for summary judgment, citing the well-established principle that utilities may only recover from ratepayers the costs of utility property that is "used and useful" in providing utility service. The facts were not in dispute between the parties, only the applicability of the used and useful principle. The Administrative Law Judge accepted the agreed upon facts and applied the well-established law, granting Rate Counsel's motion for summary judgment.

The Board accepted in part and rejected in part the ALJ's initial decision. The Board accepted the ALJ's adoption of the agreed-upon facts, and his recitation of the law on summary judgment, but rejected his application of the law to the substantive issues raised. In doing so, the Board failed to address why the long-standing legal principles applied by the ALJ do not apply here, and simply concluded that it had plenary power to allow the deferral of any cost based on general policy concerns, even if those costs could not ultimately be legally recovered. The Board's decision purports to defer the decision on ultimate recovery as well, even though it clears the way for ratepayers to be charged for these costs and for the utility to profit off of this work in the meantime. While Rate Counsel obviously disagrees with the utilization of this sleight of hand to avoid well-established principles of law, this motion seeks reconsideration not simply

based on disagreement with the outcome. The Motion is based on the utter lack of a legal basis for the Board's decision. The Board ignores the law cited by Rate Counsel and the ALJ, cites previous orders in support of its ruling that simply do not stand for the proposition for which they are cited, and provides no legitimate legal basis whatsoever for its ruling. The errors of law are arbitrary, unreasonable and palpably incorrect.

STANDARD FOR RECONSIDERATION

N.J.A.C. 14:1-8.6 provides that

A motion for rehearing, rearmament, or reconsideration of a proceeding may be filed by any party within 15 days after the effective date of any final decision or order by the Board.

> **1.** Such motion shall state in separately numbered paragraphs the alleged errors of law or fact relied upon and shall specify whether reconsideration, re-argument rehearing or further hearing is requested and whether the ultimate relief sought is reversal, modification, vacation or suspension of the action taken by the Board or other relief.

See also, N.J. Court Rule 4:49- 2 (stating that a Motion for Reconsideration "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred…")

The Board has interpreted this rule as follows:

> A motion for reconsideration requires the moving party to allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). In considering whether or not to grant a Motion for Reconsideration, the moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). [*14] A party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. See, e.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App.Div.1996).

IMO the Implementation of L. 2012, ch 24, 2014 N.J. PUC LEXIS 66 (N.J. P.U.C. March 19, 2014).

ERRORS OF LAW AND FACT

In this case, Rate Counsel alleges the following errors of law and fact:

1. The Board has erred by misconstruing the arguments of the parties. Rate Counsel does not dispute that the Board may order that expenses incurred between rate cases be deferred as regulatory assets. Rate Counsel's maintains, however, that such treatment may not be afforded to property that is not owned by the utility or used and useful in the provision of utility service.

2. The issue of whether property owned by others may be deferred by the utility as a regulatory asset for recovery at a later date is not addressed at all by the Board in its Order. While the Board recites the arguments made by Rate Counsel, it does not address, distinguish or harmonize any of the cases cited by Rate Counsel that establish and uphold the long-standing requirement that utilities may only charge ratepayers for utility property that is used and useful in the public service.

3. The Board states that

> The Board is vested with the discretion to determine whether or not a utility may be compensated for expenditures made on non-company owned assets and to carry them on its books as a deferred expense. The BPU has exercised this discretion by permitting deferred accounting treatment on a case-by-case basis. Then, at a later date, the Board can make a determination about that asset, including the appropriate accounting treatment to be afforded to the regulatory asset. [Order p.16] (emphasis added)

The Board cites no authority for the emphasized statement. This may be because it is legally incorrect. While the Board does have such authority to determine whether and when a utility may be compensated for expenditures related to company owned assets and expenses related to the provision of utility service, it does not have such discretion with respect to assets owned by

other people. The many cases cited by Rate Counsel in support of this legal proposition were not addressed by the Board in its Order.

4. On page 16 of its Order, immediately after the language quoted above, the Board states:

> For example, the creation of a regulatory asset and deferred accounting for a regulatory asset have been permitted by the Board for a number of health and safety, as well as environmental reasons, where the utility will suffer significant financial harm.

The Board then cites five cases as "examples" that purportedly support its statement that it has authority to determine how and when a utility may be compensated for non-company owned assets. However, none of the cases cited involved non-company owned assets. In re the Petition of Suez Water Princeton Meadows, Inc. for Deferred Accounting Authority for the Financial Impact of Waste Removal from the Sludge Lagoons, BPU Docket No. WF17030186 (July 26, 2017) involved costs related to the retirement and removal of detention lagoons owned by the Company. There was no issue in that case regarding recovery of or on property owned by others or that was not used and useful in the provision of utility service. In re the Petition of Aqua, New Jersey, Inc., for Approval of Deferred Accounting Treatment for Certain Costs Related to Water Quality Treatment for Radio Nuclides, BPU Docket No. WR06120897 (January 17, 2007) related to costs incurred to treat Company-owned wells that exceeded Maximum Contaminant Levels. There was no issue in that case related to recovery of property not owned by the utility or not used and useful in the provision of utility service. In re New Jersey Natural Gas Company's Request for Deferral Accounting Authority for Storm Damage Restoration costs Related to Hurricane Sandy, BPU Docket No.GR12111036 (May 29, 2013), In re the Board's Review of the Prudency of the Costs Incurred by the New Jersey Utility Companies in Response to Major Storm Events in 2011 and 2012, BPU Docket No. AX13030196 (March 20, 2013) and In re the Board's Establishment of a Generic Proceeding to Review the Prudency of the Costs

Incurred by New Jersey Natural Gas Company in Response to Major Storm Events in 2011 and 2012, BPU Docket No. GO13070610 (October22, 2014) all related to requests to defer costs incurred by utilities to prepare for or recover from storms. They all involved actual costs incurred by the utilities such as overtime pay, mutual assistance costs and storm preparation costs that were directly related to the provision of utility service. Thus, none of these cases serve as "examples" to support the proposition that the Board may "determine whether or not a utility may be compensated for expenditures made on non-company owned assets." The mis-citation of these cases, combined with the failure to discuss at all the many cases cited by Rate Counsel that uphold the "used and useful" principle, is clear error that warrants reconsideration.

5. The Board also cites the provisions of the Electric Distribution and Energy Competition Act, N.J.S.A. 48:3-49 et seq., that establish the societal benefits charge, and N.J.S.A. 48:3-98.1, which allows utilities to engage in competitive services related to energy efficiency and renewable energy, in support of its abandonment of the "used and useful" principle. The Board fails to address in any way the fact that there is no such legislative provision supporting the result here. Instead, the Board cites a legislative enactment in Pennsylvania and a case that resulted from that enactment, without ever acknowledging that there is no such statute in New Jersey. The absence of legislative authority for the Board's decision here, and its failure to address that legal issue is further legal error that warrants reconsideration.

6. Much of the Board's analysis talks about the perils of lead in water and the general problem of customer side lead lines. Rate Counsel does not dispute that this is a serious problem. However, it is not necessarily one that may be solved by assigning the costs to other ratepayers. The Board's analysis and discussion of these issues ignores the Appellate Division decision in In re Centex Homes, 411 N.J. Super. 244 (App. Div. 2009) in which the Appellate

Division struck down an attempt by BPU to address "smart growth" and environmental issues through its main extension rules. The Court in that case found that "[w]hile the BPU was intended by the Legislature to have the widest range of regulatory power over public utilities, that power has never been cast in environmental terms. Rather, the cases speak of the BPU's broad power to regulate economic aspects of utilities." Id. at 265-266 (citations omitted). If the Board seeks to overturn long-standing precedent relating to the economic regulation of utilities in order to further environmental or public health goals, it must address how doing so does not run afoul of the Appellate Division's decision in Centex Homes.

7. The Board also justifies its decision by noting on page 18 that "[t]he Board has used the discretionary authority under N.J.S.A. 48:2-21 to defer accounting on a number of occasions where the health of the public, or the ability of the utility to continue to provide service, were in peril." However, once again, none of the cases cited by the Board involved property that was not owned by the utility or used by it to provide utility service. The first two cited cases were discussed above and involved only utility-owned property. The third case, In re the Petition of United Water West Milford Inc. for Deferral Accounting Authority for the Financial Impact of the Settlement of Litigation with Bald Eagle Commons Building Association, Docket No. WF14070804 (December 17, 2004), related to costs incurred by the utility with respect to a settlement of litigation involving disputed ownership of a retaining wall adjacent to the Company's drying beds. However, in that case, the homeowners association replaced the disputed wall, and the Order specifically provides that "[t]his Order shall not be construed as directly or indirectly fixing for any purposes whatsoever the value of any tangible or intangible assets not owned or hereafter to be owned by Petitioner." Finally, In re the Petition of Jersey Central Power & Light Co., 85 N.J. 520 (1981) is also mis-cited. JCP&L clearly owned the

Three Mile Island nuclear plant. While the accident at the plant rendered it no longer used and useful, that formed the basis for the Board to remove the plant from JCP&L's rate base. Thus, that decision supports the legal doctrine cited by Rate Counsel rather than the proposition found by the Board.

8. The Board goes further to cite a recent Order it issued on COVID related costs in support of its decision to reject the ALJ's legal determination. There are a number of reasons why this reliance is misplaced. First, that Order in no way addresses property not owned by the utility or expenses incurred on other people's property. It simply allows utilities to defer their COVID-related costs until the next rate case. Second, that order was issued sua sponte without any process at all, so none of the legal issues raised herein were addressed. Finally, the Order was based on an emergency declaration issued by the Governor relating to the COVID-19 pandemic. No such emergency order has been issued with respect to customer-owned lead-lines. Thus, that Order also provides no support for the decision here.

DISCUSSION

The eight errors of law listed above warrant reconsideration by the Board. If the Board is to turn aside long-established law, it must cite some legal authority to do so. Here, the Board's Order does not explain the legal basis for taking such a sharp departure from prior precedents. It appears that the only basis is the belief that the Board has authorized this before when in fact it has not. The Board cites no cases where it has allowed recovery on non-company owned property absent specific legislative authority, and the cases it cites are inapposite. In contrast, a mere search for "used and useful" among the Board orders on its website yields over 200 cases where the Board applied or acknowledged the used and useful doctrine.[1] Without explaining a valid legal basis for this departure, the Board's Order is palpably unreasonable, arbitrary and

[1] See, https://www.state.nj.us/bpu/agenda/orders/index.html

capricious. Accordingly, Rate Counsel respectfully requests that the Order be reconsidered and that the ALJ's decision be reinstated.

Respectfully submitted,

By: *Stefanie A. Brand*_____
Stefanie A. Brand, Director
Division of Rate Counsel

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

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IN THE MATTER OF THE PETITION OF SUEZ WATER NEW JERSEY INC. FOR APPROVAL OF A PILOT PROGRAM TO FACILITATE THE REPLACEMENT OF LEAD SERVICE LINES AND A RELATED COST RECOVERY MECHANISM	BOARD OF PUBLIC UTILITIES DOCKET NO. WO19030381 OAL DOCKET NO. PUC 07138-19 **MOTION FOR RECONSIDERATION**

TO: SECRETARY, BOARD OF PUBLIC UTILITIES
44 South Clinton Avenue
9th Floor*S*
P.O. Box 350
Trenton, New Jersey 08625

OTHER PARTIES as set forth on the attached Certification of Service:

PLEASE TAKE NOTICE that Counsel of record for the Division of Rate Counsel moves before the Board of Public Utilities for a Motion for Reconsideration.

PLEASE TAKE FURTHER NOTICE that Rate Counsel relies on our Brief in Support of the Motion annexed hereto.

Respectfully Submitted,

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: *Stefanie A. Brand*
Stefanie A. Brand, Director

Dated: September 17, 2020

CERTIFICATION OF SERVICE

I, Stefanie A. Brand, Esq., Director of the New Jersey Division of Rate Counsel, certify as follows:

I certify that I have, on September 17, 2020, caused an electronic copy of (1) Rate Counsel's Motion for Reconsideration and (2) Certification of Service to be delivered:

AIDA CAMACHO-WELCH, SECRETARY
New Jersey Board of Public Utilities
44 South Clinton Avenue
9th Floor
P.O. Box 350
Trenton, New Jersey 08625

In addition, on September 17, 2020, I served a copy electronically of the same upon all parties on the attached service list.

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully Submitted,

STEFANIE A. BRAND,
DIRECTOR, DIVISION OF RATE COUNSEL

By: *_Stefanie A. Brand*_____
Stefanie A. Brand, Esq.
Director

Dated: September 17, 2020