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October 11, 2022

Via Electronic Mail

Carmen D. Diaz, Acting Secretary
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**Re: I/M/O the New Jersey Board of Public Utilities' Response to the
COVID-19 Pandemic
BPU Docket No. AO20060471**

Dear Acting Secretary Diaz:

Please accept for filing in the above-referenced matter the Division of Rate Counsel's (Rate Counsel) reply to the responses and comments of other parties on the COVID-19 Related Regulatory Asset and Cost Recovery questions presented in the July 20, 2022 Order of Board President Fiordaliso. This reply supplements the responses and comments filed by Rate Counsel on September 19.

Consistent with the March 19, 2020 Board Order in *I/M/O the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, copies of this comment letter are being provided to each person on the service list by electronic mail only. No paper

Carmen D. Diaz, Acting Secretary

October 11, 2022

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copies will follow. **Please acknowledge receipt of this comment letter.** Thank you.

Very truly yours,

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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**

**Reply of the New Jersey Division of Rate Counsel
To Responses and Comments by Other Parties
On the COVID-19 Related Regulatory Asset and Cost Recovery Questions
Presented in the July 20, 2022 Order of Board President Fiordaliso**

October 11, 2022

These reply comments supplement the responses and comments filed by Rate Counsel on September 19, 2022, and are directed primarily to the responses and comments of the New Jersey Utilities Association (“NJUA”) in response to Questions 7.a, 7.b and 12.

- 7.a. Should the deferred COVID related expenses, including the arrearages, be shared between shareholders and ratepayers?
- 7.b. If yes, what would the accounting treatment be?
- 12. If a shareholder contribution were approved for the COVID-related uncollectibles, what should be the appropriate sharing for ratepayers and shareholders?

Rate Counsel answered 7.a in the affirmative, and in response to 7.b and 12 suggested both an equitable sharing of COVID-related expenses between shareholders and ratepayers and several accounting treatments to accomplish that sharing. Basically, Rate Counsel recommends that: 1) each utility’s shareholders share a percentage of its incremental uncollectibles that reflects the severe contraction in the United States economy during the pandemic, and 2) each utility may recover the ratepayers’ percentage of its incremental uncollectibles through a special purpose, time-limited COVID-19 tracker, subject to a final true-up in a base rate case.¹

NJUA answered questions 7.a, 7.b and 12 by recommending against the sharing of any of the deferred COVID related expenses, and arguing that every utility should recover every dollar from their ratepayers. (NJUA also suggested that it is inappropriate for the Board to even ask them to share.) As explained briefly below, none of NJUA’s arguments support its recommendation.

¹ Except for those small water utilities for whom a base rate case may be prohibitively expensive. It may be appropriate for those small utilities to pursue recovery through their filings in this current COVID-19 proceeding.

1. Sharing a portion of the deferred COVID related expenses is not an unconstitutional taking of utility property. Instead, it is entirely consistent with the balancing of shareholder and ratepayer interests long recognized by our courts. As stated by the United States Supreme Court: “The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.”²

The Board’s procedures to oversee utility rates must constantly balance shareholder and ratepayer interests. The current COVID proceeding is only the first step in this process, and will merely determine each utility’s recoverable share of incremental COVID-related expenses. The shareholders’ share will represent merely one line item on the utility’s financial spreadsheets. And the exact value of that line item will not be known until the true-up of its special purpose, time-limited COVID-19 expense tracker.

The effects of a Board order in this proceeding can only be analyzed in the context of the utility’s entire financial situation, including its rates, revenues, expenses, payments and savings from all sources. The utility’s COVID-related expense claim, recoverable or not, is merely one of many items material to this analysis. That analysis will occur through the traditional procedures of a base rate case, where the Board reviews the entirety of the utility’s finances to set just and reasonable rates.

Only then can a court begin to consider whether the Board decision on the utility’s rates is an unconstitutional regulatory taking.³ The United States Supreme Court has succinctly described the constitutional standard: a Board order is not an unconstitutional taking of the utility’s property if “the total effect of the rate order cannot be said to be unjust and unreasonable.”⁴

NJUA’s argument relies on Duquesne and suggests that any shareholder contribution towards a utility’s incremental COVID-related uncollectibles would constitute a per se regulatory taking. That is clearly incorrect in both practicality and legality. As noted above, the effect of the Board orders in this COVID-19 proceeding upon each utility’s rates will not be known until resolution of its next base rate case. Rather here, a mechanism will be created to allow for the sharing of uncollectibles. Only after the next rate case could a court determine whether the utility’s shareholders have been afforded “sufficient compensation.”

Legally, the courts recognize that ratesetting requires administrative flexibility and discretion to balance ever-changing shareholder and ratepayer interests. As the Eleventh Circuit has noted,

² Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989).

³ The Board lacks jurisdiction to rule on a regulatory taking claim. Adjudication of such constitutional claims lies in the Superior Court. See e.g., Hunterdon Cent. High Sch. Bd. of Ed. v. Hunterdon Cent. High Sch. Teachers’ Ass’n, 174 N.J. Super. 468, 474-75 (App. Div. 1980), aff’d o.b., 86 N.J. 43 (1981).

⁴ Federal Power Comm’n v. Hope Natural Gas, 320 U.S. 591, 602 (1944).

“[c]ases like Duquesne Light stand for the proposition that rates can be regulated so long as they are not so ‘unjust’ as to be confiscatory, and within this range the regulatory agency has broad discretion.”⁵ Duquesne does not stand for the proposition that a utility must recover every uncollectible dollar it claims.

2. Sharing a percentage of the utility’s incremental uncollectibles with its shareholders, to reflect the severe contraction in the United States economy during the pandemic, is entirely consistent with the regulatory compact. First, the regulatory compact recognizes that public utilities have obligations to both their shareholders and their customers. Refusing to allocate any of the incremental COVID-related expenses to shareholders would entirely ignore ratepayer interests.

The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market. ... Each party to the compact gets something in the bargain. As a general rule, utility investors are provided a level of stability in earnings and value less likely to be attained in the unregulated or moderately regulated sector; in turn, ratepayers are afforded universal, non-discriminatory service and protection from monopolistic profits through political control over an economic enterprise....⁶

Second, most industries nationwide, including both their shareholders and customers, suffered financially during the pandemic. Regulated public utilities are not shielded from all risk, but instead are provided the opportunity to earn a reasonable return on their investments. The Board has provided this COVID-19 proceeding to afford the utilities an additional opportunity to recover a portion of their incremental COVID-related expenses that might otherwise have been entirely unrecoverable. Unlike regulated utilities in New Jersey, unregulated businesses subject to market forces have no such recourse to recoup any of their pandemic-related losses. To shield utility shareholders from all risk would not balance interests but instead would force ratepayers to serve as guarantors of shareholder returns.

The New Jersey Supreme Court expressly rejected such an overreaching regulatory taking claim: “[A] participant in a highly regulated industry must anticipate that its profit levels can be capped

⁵ Alabama Power Co. v. FCC, 311 F.3d 1357, 1367 (11th Cir. 2002).

⁶ Jersey Central Power & Light Co. v. Federal Energy Regulatory Comm’n, 810 F.2d 1168, 1189 (D.C. Cir. 1987).

or even reduced by changes in government regulation. There is no constitutional entitlement to maximum profits.⁷

3. NJUA claims that any sharing violates the regulatory compact by prohibiting the recovery of “prudently incurred costs.”⁸ However, the prudence of the utilities’ deferred COVID related expenses has not been established. Other than tracking the amounts, there has not been any review of the costs incurred or the utilities’ arrearage collections activities. Without establishing these basic and fundamental facts, there is insufficient evidence to support NJUA’s claims that the entirety of the deferred expenses were, in fact, prudent. As the Board has handled other incremental cost-recovery proceedings, prudence should be established in a base rate case when the Board has the ability to look at the utility’s entire financial situation.

4. The statute authorizing the Societal Benefits Charge for electric utilities does not support allocating the utilities’ incremental COVID-related uncollectibles to ratepayers. The Legislature has directed the Board to “permit each electric public utility and gas public utility to recover some or all of the following costs through a societal benefits charge ... as appropriate.” N.J.S.A. 48:3-60(a)(emphasis added). Those costs include “the costs for the social programs for which rate recovery was approved by the board prior to April 30, 1997,” N.J.S.A. 48:3-60(a)1; however, the plain language of the statute (“some or all,” “as appropriate”) does not mandate complete recovery of an uncollectible claim. When the language of a statute is clear, there is no need to turn to secondary sources to discern the intention of the Legislature. Accordingly, the NJUA’s claim that a utility is legally entitled to recover every uncollectible dollar from its ratepayers simply has no support in this statute.⁹

5. The claim that sharing the utilities’ incremental COVID-related uncollectibles with their shareholders will undermine investor confidence in regulated public utilities in New Jersey is at least speculative if not entirely incorrect. A cursory review of published public utility financial statement reveals that they have done very well financially despite the COVID-19 pandemic.

⁷ State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 49-50 (1991) (citing Edgewater Inv. Assocs. v. Borough of Edgewater, 103 N.J. 227, 240 (1986)) (emphasis added).

⁸ NJUA Comments at 4.

⁹ We note that NJUA did not quote the express qualifying language of N.J.S.A. 48:3-60(a) (i.e., “some or all,” “as appropriate”).

For example, according to a July 12, 2022 press release by New Jersey Resources (NJR), the parent company of New Jersey Natural Gas Company, “NJR has paid quarterly dividends since its inception in 1952 and has increased its dividend in each of the last 26 years.”¹⁰

According to an August 2, 2022 press release by Public Service Enterprise Group Incorporated (PSEG), the parent company of Public Service Electric and Gas Company, PSEG reported second-quarter 2022 adjusted operating earnings of 64 cents per share, which missed the Zacks Consensus Estimate of 65 cents per share by only one cent, or 1.5%. PSEG also reported that its second-quarter 2022 revenue increased by 10.8% from the second- quarter 2021 revenue of \$1,874 million.¹¹

In early May, PSE&G reported that its first quarter 2022 net income was up 6.7%, compared with 2021. According to Ralph Izzo, the President, Chairman and CEO of PSEG, PSEG has a five-year capital spending plan of \$15-17 billion, with about 90% of that directed towards PSE&G. Mr. Izzo reported that PSE&G remains “on track” to invest \$2.9 billion during 2022 as part of that plan.¹²

These reports, and many others like them, do not suggest any financial crisis for the regulated public utility industry. Significantly, these financial gains came despite the pandemic. Indeed, throughout the economic crisis, regulated utilities continued to invest capital, raise rates and earn significant returns. The same cannot be said for ratepayers, many of whom lost their jobs and have seen the costs for all aspects of their lives – including electricity, natural gas and water – increase considerably. For ratepayers who cannot afford their bills and face the loss of utility service, and the ratepayers being asked to pay more to safeguard utility shareholders from any financial damage caused by the COVID-19 pandemic, the financial picture is not as bright.

Conclusion

Based on the foregoing, the Board should reject the meritless arguments of the utilities and NJUA regarding sharing and adopt Rate Counsel’s recommendations.

¹⁰ NJR Press Release, “New Jersey Resources Celebrates 40th Anniversary of Listing on the New York Stock Exchange,” 7/12/2022, available at <https://investor.njresources.com/news/news-details/2022/New-Jersey-Resources-Celebrates-40th-Anniversary-of-Listing-on-the-New-York-Stock-Exchange/default.aspx>.

¹¹ Zack’s Equity Research, PSEG (PEG) Q2 Earnings Miss Estimates, Revenues Rise Y/Y, 8/2/2022, available at <https://finance.yahoo.com/news/pseg-peg-q2-earnings-miss-155903201.html>.

¹² Robert Walton, “PSE&G continues to grow rate base, expects decision on \$848M ‘last mile’ program this fall,” Utility Dive, 5/4/2022, available at <https://www.utilitydive.com/news/pseg-continues-to-grow-rate-base-expects-decision-on-848m-last-mile-pr/623153/>.

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