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February 24, 2023

**Via E-Mail and Overnight Mail**

Honorable Jacob S. Gertsman, A.L.J.  
New Jersey Office of Administrative Law  
3444 Quakerbridge Road, Building 9  
Mercerville, New Jersey 08619

**Re: I/M/O Petition of Middlesex Water Company for Approval to Change the Levels of its Purchased Water Adjustment Clause Pursuant to N.J.A.C. 14:9-7.1 et seq.**  
**BPU Docket No. WR22030138**  
**OAL Docket No. PUC 02047-2022S**

Dear Judge Gertsman:

Enclosed please find Intervenor Old Bridge Municipal Utilities Authority and Marlboro Township's ("Intervenor") opposition to the submitted Stipulation of Settlement in the above-captioned matter.

Please contact my offices if there are any questions or concerns with respect to this filing.

Very truly yours,

**RAINONE COUGHLIN MINCHELLO, LLC**

By:   
Michael R. Burns, Esq.

MRB/rmn  
Enclosure

cc: Service List (attached) (w/encl.) (via email)  
Judith Matthews, Office of Administrative Law (w/encl.) (via email)



## OAL SERVICE LIST

In the Matter of the Petition of Middlesex Water Company for Approval To Change the Levels  
Of Its Purchased Water Adjustment Clause  
OAL Docket No. PUC 02047-2022S  
BPU Docket No. WR22030138

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*Attorneys for Intervenors Township of Marlboro and Old Bridge Municipal Utility Authority*

**IN THE MATTER OF THE  
PETITION OF MIDDLESEX  
WATER COMPANY FOR  
APPROVAL TO CHANGE THE  
LEVELS OF ITS PURCHASED  
WATER ADJUSTMENT  
CLAUSE PURSUANT TO  
N.J.A.C. 14:9-7.1, ET SEQ.**

OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. PUC 02047-2022S  
BPU DOCKET NO. WR22030138

**BRIEF IN OPPOSITION TO PROPOSED  
STIPULATION OF SETTLEMENT**

**TO: The Honorable Jacob S. Gertsman, ALJ**  
**New Jersey Office of Administrative Law**  
**3444 Quakerbridge Road**  
**Building 9**  
**Mercerville, New Jersey 08619**

**ALL PARTIES DESIGNATED ON THE  
ATTACHED SERVICE LIST**

**PLEASE TAKE NOTICE THAT** the Intervenors, Township of Marlboro and Old Bridge Municipal Utilities Authority (“Intervenors”) objects to and files this brief in opposition to the proposed Stipulation of Settlement (“Stipulation”) submitted by Middlesex Water Company (“Middlesex”, “Company”, or “Petitioner”) in the above captioned matter. In support of this opposition, Intervenors submit the below brief and request that the Office of Administrative Law conduct a full hearing on the just and reasonable criteria for any rate increase.

Dated: February 24, 2023

By: \_\_\_\_\_  
Michael R. Burns, Esq.

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**IN THE MATTER OF THE  
PETITION OF MIDDLESEX  
WATER COMPANY FOR  
APPROVAL TO CHANGE THE  
LEVELS OF ITS PURCHASED  
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CLAUSE PURSUANT TO  
N.J.A.C. 14:9-7.1, ET SEQ.**

OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. PUC 02047-2022S

BPU DOCKET NO. WR22030138

**ORDER DENYING PROPOSED SETTLEMENT**

Michael Burns, Esq., Rainone Coughlin Minchello, LLC on behalf of Marlboro Township and the Old Bridge Municipal Utilities Authority

Jay L. Kooper, Esq., Vice President, General Counsel & Secretary, Middlesex Water Company

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel

This matter having been presented to the Honorable Jacob S. Gertsman, ALJ and the Office of Administrative Law by Michael R. Burns, Esq., attorney for Intervenor, Marlboro Township (“Marlboro”) and the Old Bridge Municipal Utilities Authority (“OBMUA”), on notice to the parties and persons set forth on the attached Service List, having read and considered the moving papers and other documents on file in this matter, including the Brief in Opposition to the Proposed Stipulation of Settlement and other good cause appearing; and

The Court, finding that the Opposition to the Proposed Stipulation of Settlement is in accordance with law and in the public interest, **HEREBY ORDERS:**

1. The proposed Stipulation of Settlement is **HEREBY DENIED**
2. The parties shall proceed to a contested hearing on all issues currently in dispute with the full and fair opportunity to present all evidence.

DATED: \_\_\_\_\_, 2022

By: \_\_\_\_\_  
Honorable Jacob S. Gertsman, ALJ

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**IN THE MATTER OF THE  
PETITION OF MIDDLESEX  
WATER COMPANY FOR  
APPROVAL TO CHANGE THE  
LEVELS OF ITS PURCHASED  
WATER ADJUSTMENT  
CLAUSE PURSUANT TO  
N.J.A.C. 14:9-7.1, ET SEQ.**

OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. PUC 02047-2022S  
BPU DOCKET NO. WR22030138

**BRIEF OF INTERVENORS TOWNSHIP OF MARLBORO AND OLD BRIDGE  
MUNICIPAL UTILITIES AUTHORITY IN OPPOSITION TO THE PROPOSED  
STIPULATION OF SETTLEMENT SUBMITTED BY MIDDLESEX WATER  
COMPANY**

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## **INTRODUCTION**

Intervenors Marlboro Township and Old Bridge Municipal Utilities Authority (“Intervenors”), by and through their counsel, hereby submit this brief in opposition to the Stipulation of Settlement (“Stipulation”) submitted by Middlesex Water Company (“Middlesex”, “Company”, or “Petitioner”) in OAL Docket No. PIC 02047-2022S and BPU Docket No. WR22030138. By way of the Stipulation, Middlesex seeks approval by the New Jersey Board of Public Utilities (the “Board”) to recover increased purchase water costs, together with deferred costs, through its use of the Purchase Water Adjustment Clause (“PWAC”) mechanic under N.J.A.C. 14:9-7.3. They seek to do so without the opportunity for Intervenors to have a fully litigated presentation of evidence before the OAL and in an attempt to subvert the statutory rights of the Intervenors to a hearing on a contested matter.

In support of the Stipulation, Middlesex presents a truncated procedural history that begins in March of 2022 and focuses solely on the mechanical calculation of what they presume to be their right to recovery under the PWAC calculations. Middlesex has taken this approach throughout the entirety of these proceedings and without contemplation for the just and reasonable findings necessary for the adoption of any rate increase, whether it is a base rate case or a PWAC. Accordingly, the relevant procedural history of this matter is as follows:

In April of 2021, the Petitioner filed a base rate case in which they sought to increase base rates by approximately 60% for contract customers. The Intervenors took part in the base rate case which ultimately resolved by way of settlement in December of 2021. As a result, Middlesex ultimately increased their revenues from \$82,376,603 to the present \$103,054,328 that they currently seek to increase through a PWAC. This additional revenue of \$27,713,843

represents a phased increase of 33.63% over the following two years. The Intervenors under Rate Schedule No. 5 have therefore seen quarterly bills for contract customers increase by \$40.94 in 2022 and an additional \$13.65 in 2023. Over and above this initial rate increase, in March of 2022, Petitioners filed the instant PWAC increase seeking Board approval to increase their annual operating revenue by an additional \$3,725,535 – or an additional 3.62%. Although that has been reduced to \$2,675,866 (or 2.6%) in the Stipulation, it is the rationale behind this massive increase that the Intervenors find problematic and the method by which Middlesex has chosen to pursue this increase that the Intervenors feel is in contravention of the intent and purpose of the PWAC.

Although Middlesex lays out the timeline for the New Jersey American Water Company rate increase filing in the Stipulation, including the increased purchase water charges that would nominally be proper grounds for the requested PWAC increase, this rate increase really only represents an increase in the minimum annual cost for water service of approximately \$326,700, far below the negotiated \$2,675,866 of the Stipulation. Petitioner’s PWAC filings show that the bulk of the increased cost comes from the shut-down of their Park Avenue wellfield and the need to replace approximately 25%<sup>1</sup> of their water production with water purchased from other sources. This information, while contained within the Stipulation to some degree, is presented as something that occurred suddenly and without warning.

In fact, however, Middlesex has been monitoring the presence of Per- and Polyfluoralkyl Substances (“PFAS”) since at least 2008<sup>2</sup> and including that information in their Annual Consumer Confidence Report. Additionally, in anticipation of New Jersey regulatory standards,

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<sup>1</sup> Estimates are taken from Middlesex Water Company representations as set forth in Vera v. Middlesex Water Co., Docket No. Mid-L-6306-21

<sup>2</sup> Information provided by the October 22, 2021 Notice issued by Middlesex Water Company to affected customers.

Middlesex began evaluating treatment options in 2019 – which included the design of a new treatment plant to remove PFOA contaminants. It should be noted that because the Intervenor do not receive water from the Park Avenue wellfield, customers in their localities were not issued warning notices. This is an issue because during the 2021 base rate case, the fact that Middlesex intended to and was, at the time, actively of shutting down the Park Avenue Wellfield was never raised during base rate negotiations or as a potential issue moving forward. This lack of transparency has carried over into the PWAC proceedings as every attempt at obtaining additional information has been stymied.

As a result, Intervenor were denied a meaningful opportunity to investigate or object to the base rate calculations that Petitioner anticipated immediately increasing by a further \$3.7 million dollars to account for the planned additional purchases. By arranging the release of information in this way, Middlesex has relied on the belief that the implementation of a PWAC is a mechanical calculation rooted solely in the base consumption established in the 2021 rate case, despite the lack of any meaningful negotiations on that base consumption number. This issue was further clouded by the Company's own Cost of Service ("COS") model, as prepared and presented in the Company's 2021 full rate filing. In that COS model, purchased water costs associated with purchases from the New Jersey American Water Company ("NJAWC") (denoted in the Company's COS model as "Purchased Water – E'town") are not allocated to ANY of the wholesale customers of the Company. Based on these representations in the base rate case filing, there was never even a consideration on behalf of the Intervenor that increased water purchase costs would be immediately allocated directly to them.

Accordingly, the proposed Stipulation, allocating as it does the increased costs of purchasing water, based on Middlesex's decision to operate their wellfields until a forced

shutdown was inevitable, must be rejected by this Court as violating the basic principles of a just and reasonable increase to the Intervenors. By deliberately excluding this information from the base rate case, Petitioner chose a procedure that avoided the enhanced scrutiny and procedural requirements inherent in the base rate case in favor of what was intended to be speedy PWAC increase with limited discovery or investigation.

## LEGAL ARGUMENT

### **Petitioners have failed to establish the proposed rate increase is just and reasonable**

Although a PWAC rate is implemented based upon the projected purchased water costs, there is a facet to this procedure that has not yet been addressed and that the proposed Stipulation attempts to make irrelevant to the discussion. Any rate increase must be examined to determine whether the increase is both just and reasonable. Pursuant to N.J.S.A. 48:2-21, the Legislature has entrusted the Board with ensuring that utility rates are just and reasonable. In that regard, the statute provides “the burden of proof to show that the increase, change or alteration is just and reasonable shall be upon the public utility making the same.” Id. While this can be established by the utility proving “(1) the value of its property or the rate base, (2) the amount of its expenses, including operations, income taxes and depreciation, and (3) a fair rate of return to investors”, these are not the sole determining factors that the Board is constrained by. In re Petition of Pub. Serv. Elec. & Gas, 304 N.J. Super 247, 265 (App. Div. 1997). In that context, the Court has made clear that “rate making is a legislative and not a judicial function, and that the [BPU], to which the Legislature has delegated its rate-making power, is vested with broad discretion in the exercise of that authority.” In re Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 214 (1950). What this means is that despite Petitioner’s urgings that this is a mechanical calculation utilizing only base consumption numbers, the Board actually has far

more discretion to examine the circumstances surrounding a requested rate increase in order to determine whether it is appropriate to the attendant facts and circumstances.

This idea is backed by N.J.A.C. 52:14B-10(a)(1) regarding evidence in a contested case which permits that “parties shall not be bound by rules of evidence whether statutory, common law, or adopted formally by the Rules of Court. All relevant evidence is admissible.... for a full and true disclosure of the facts.” This idea that all relevant evidence is admissible is further codified into the PWAC procedures which permit, pursuant to N.J.A.C. 9-7.6(f), that the Board may consider “such additional relevant information or financial analysis as it deems appropriate.” This aspect of the administrative process invests in the Board, and this Court, the wholly discretionary ability to examine and analyze any and all information that the Board may deem to be relevant in making the just and reasonable determination required of a utility increase.

What this means with respect to this inquiry is that the Board has a responsibility not to grant a PWAC based solely on increased costs to the utility – but rather to examine the rationale behind those increased costs and determine, if necessary, whether the utility has acted in good faith to maintain the revenue stream that they have been granted. “In a rate proceeding utility expenses, to be allowable, must be justified. Good company management is required; honest stewardship is demanded; diligence expected; careful, even hard, bargaining in the marketplace and at the negotiation table is prerequisite. As so it must be with regard to expenses recapture by “flow through” to consumers by dint of a comprehensive adjustment clause.” In re Board’s Investigation of Telephone Companies, 66 N.J. 476 (1975).

Since the ruling In Re Board’s Investigation, the Board has required that there be an “unimpeachable and firm relationship” between interim rate increases in clauses and the rate

case validating the justness and reasonableness of those rates. See In re Redi-Flo Corp., 76 N.J. 21, 41 (N.J. 1978). This was further codified into the PWAC statutes by the explicit requirement that utilities establish the nexus to a rate case by ensuring that the utility had been in for a rate case within at least 3 years of filing for a PWAC or PSTAC. See, N.J.A.C. 14:9-7.3, 38 N.J.R. 1538(a). That inescapable legal nexus, therefore, requires full and honest disclosure by the utility regarding not just the basis for the rate increase, but also full disclosure of those facts which would, of necessity, inform the discussions around the rate increase. Middlesex, by deliberately excluding relevant information in the base rate case that would further increase rates immediately following the settlement of that case, pays lip service to the legal nexus requirement without honoring its intention. Furthermore, by implementing a Cost of Service model in their base rate case that is ignored in a subsequent PWAC filing in order to allocate costs to customers not otherwise receiving water through NJAWC purchases, Middlesex has twisted the regulations to serve only their own self-interest at the expense of consumers.

With that in mind, the Court has made clear that the Board is not bound by “any single formula or combination of formulae” in making a determination as to the just and reasonable nature of a rate increase. In re. Pub. Serv. at 217. Rather, the Board’s determinations “should reflect the reasonable judgment of the Board based upon all the relevant facts.” Id. In extreme cases, the Board is empowered to go so far as to deny rate relief even in those circumstances where a “reasonable” rate of return - when evaluated in terms of not only the interests of the investors, but also those of the consumers and the general public - would result in revenue dropping below that which has been approved previously by the Board. See In re Valley Road Sewerage Co. for Approval of an Increase in its Rates for Sewer Service, 285 N.J. Super 202 (App. Div. 1995). The utility has a responsibility to “furnish safe, adequate and proper service,”


N.J.S.A. 48:2-23 and the public “is entitled to demand that no more money be extracted from it than the services rendered by the utility are reasonably worth.” In re Valley Road, at 210. For this relationship to work, however, “honest stewardship is demanded.” Id. citing In re Board’s Investigation of Tele. Cos. at 495.

Middlesex’s obligations in the instant proceeding and the Court’s requirement to make a proper determination of the just and reasonable rate increase therefore requires that the actions of Middlesex be taken into account before permitting any settlement of the issues. By excluding information regarding planned large-scale purchases of water from NJAWC and presented a flawed and misleading COS model to the Intervenors and the Board in the previous rate case, Middlesex severed the critical legal nexus between determinations made in the base rate case and their current PWAC proceeding. A full and fair hearing on the issues at play in this matter, including information regarding when they knew about the coming changes, how they made the determination to proceed with the base rate case without this information, and what steps they took to mitigate the impact of their decisions on the consumers is absolutely critical to determining if their request to evenly split the cost of their increased purchases between all wholesale recipients is a just and reasonable result. Furthermore, Middlesex is currently engaged in litigation with multiple parties as both the defendant and as a plaintiff regarding the contamination of their wellfields, but the Stipulation makes no mention of the costs they hope to recover or whether they have any obligation to seek compensation on behalf of the rate-payers who will have born the pass through cost of the shut-down.

**CONCLUSION**

Based on the foregoing, Intervenors respectfully request that this Court reject the Proposed Stipulation of Settlement until such time as a full hearing on the merits can be held and a final determination made as to the just and reasonable nature of the proposed rate increase be determined. A full and fair accounting of the processes and procedures of the Petitioner must be made and the establishment of the legal nexus between the information presented in the preceding rate case and subsequent PWAC petition must be determined before the presentation of any recommendation to the Board of Public Utilities can take place.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael R. Burns", is written over a horizontal line.

Michael R. Burns, Esq.  
Rainone Coughlin Minchello

Dated: February 24, 2023