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November 7, 2024

Via Electronic Mail
Honorable Sherri L. Golden, Board Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 1st Floor
P.O. Box 350
Trenton, NJ 08625-0350

Re: In the Matter of Medium and Heavy Duty Electric Vehicle Charging Ecosystem
BPU Docket No. QO21060946

Dear Secretary Golden:

Please accept for filing this Motion for Reconsideration by the New Jersey Division of Rate Counsel ("Rate Counsel") in the above-referenced docket on an Order issued by the Board on October 23, 2024 with an effective date of October 30, 2024. This motion is being filed electronically with the Board's Secretary at board.secretary@bpu.nj.gov.

Please acknowledge receipt of this Motion for Reconsideration.

Thank you for our consideration and attention to this matter.

Respectfully submitted,

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

By: Maura Caroselli
Maura Caroselli, Esq.
Deputy Rate Counsel

MC
Enclosure
cc: Service List

In the Matter of Medium and Heavy Duty
Electric Vehicle Charging
Ecosystem
BPU Docket No. QO21060946

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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of Medium and Heavy Duty Electric Vehicle Charging Ecosystem	**)** **)** **)** **)** **)** **)**	**BPU Docket No. QO21060946**

DIVISION OF RATE COUNSEL
MOTION FOR RECONSIDERATION

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Dated: November 7, 2024

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INTRODUCTION

On October 23, 2024, the Board of Public Utilities ("Board" or "BPU") issued its order in In the Matter of Medium and Heavy Duty Electric Vehicle Charging Ecosystem, Dkt. No. QO2160946 (October 23, 2024) ("MHD Order"). In that Order, the Board directed the state's investor owned electric distribution companies ("EDCs") to propose medium and heavy duty electric vehicle ("EV") programs pursuant to enumerated minimum filing requirements. As part of the MHD Order, the Board allowed the EDCs to seek recovery of the costs and incentives, as well as any equipment installed pursuant to the MHD programs. The Board then found, "where a utility is preparing a site to install an EV charger at the request of an unaffiliated EVSE Infrastructure Company, that infrastructure shall be deemed 'used and useful,' even if the Make Ready is not immediately used." Id. at 9.

As explained below, this definition of "used and useful" is an error of law and must be corrected. It is a basic tenant of utility regulation that a regulated utility cannot recover for an investment until it is actually in service, or "used and useful." Expanding this definition would set the regulatory construct on its head and result in ratepayers paying for facilities that provide no benefit to anyone. With this motion, Rate Counsel seeks reconsideration of the definition of "used and useful" in the MHD Order.

STANDARD FOR RECONSIDERATION

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

A motion for rehearing, reargument, 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, reargument, 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 that 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 is 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). [sic] 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).[1]

Errors of Law or Fact

1. The Board made an error of law by failing to adhere to well settled New Jersey case law when it found that the Make Ready infrastructure completed in preparation of an EV charger at the request of an unaffiliated EVSE Infrastructure Company, shall be deemed "used and useful," even if the Make Ready is not immediately used. Rate Counsel seeks reconsideration and reversal of this error.

2. The Board made an error of law by failing to adhere to its own regulations regarding the definition of "in service" as it relates to rate recovery. Rate Counsel seeks reconsideration and reversal of this error.

[1] I/M/O the Implementation of L. 2012, ch. 24, 2014 N.J. PUC LEXIS 66 (N.J. P.U.C. March 19, 2014).

ARGUMENT

POINT I

RATEPAYERS MAY ONLY BE CHARGED FOR PROPERTY OWNED BY THE UTILITY THAT IS USED AND USEFUL IN THE PROVISION OF UTILITY SERVICE.

The Board's decision to deem Make Ready infrastructure as used and useful before it is actually being utilized by customers for its intended purpose is incorrect as a matter of law. Make Ready infrastructure will not be utilized to provide safe and adequate utility service until an EV charger is installed. This in fact implied with the name "Make Ready" which infers that the infrastructure is there but not yet ready to be utilized. Not only would ratepayers be paying for equipment that is not used and useful, ratepayers would pay for an EDC to earn a return on the on equipment that the Board states would be " not immediately used".[2] As set forth below, the law is clear that, ratepayers can only pay for utility property that is used and useful in the provision of safe and adequate service. The Board decision is in direct contravention of this basic requirement and that is a clear error that warrants reconsideration. To the extent the Board meant that once some subset of the overall EV chargers being built are energized, that is not clear from the language in the Board's MHD Order, and the Board should clarify this and ensure that any infrastructure a ratepayer pays for is in fact being utilized for the provision of service, and not simply sitting idly by waiting.

The used and useful principle has long been the law in the State of New Jersey. In 1974 the New Jersey Supreme Court in Alt. City Sewerage Co. v. Bd. Of Pub. Util. Comm'rs, supra, 128 N.J.L. at 365 ("Alt. City Sewerage"), held that "[t]he rate base is the fair value of the property used and useful in the public service." The Court further opined:

[2] MHD Order at 9.

> A corporation of this particular class performs a public function; and the public cannot be called upon for more than the fair value of the service rendered. The utility is entitled to a just return upon that fair value of the property at the time of its employment for the convenience of the public, and the public to protection against unreasonable exactions.…A rate based upon excessive valuation or upon property not used and useful in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied.[3]

Citing the exact language above, Alt. City Sewerage was reaffirmed by the State Supreme Court in 1950 in I/M/O/ Petition of Pub. Serv. Coordinated Transp., supra, 5 N.J. at 217, and again in 1974 in In re Proposed Increase Intrastate Indus. Sands Rates, 66 N.J. 12, 22 (1974).

As with our courts, the Board has, for decades, followed the used and useful principle. See, e.g. I/M/O Petition of Suez Water Arlington Hills Inc. For Approval of an Increase in Rates, BPU Docket No. WR16060510, Order dated November 13, 2017 (adopting recommendation of ALJ's Initial Decision to disallow rate recovery for a pump that was removed from service, on the basis that it was no longer used and useful); I/M/O Parkway Water Co. For an Increase in Rates & Charges for Water Service, BPU Docket No. WR05070634, 2006 N.J. PUC LEXIS 165 (adopting ALJ's recommendation to disallow from rates all costs associated with seven wells that had been contaminated by radionuclides, on the basis that such property was no longer used and useful); In re Electric Utility Nuclear Performance Standards, 120 P.U.R. 4th 620 (1990) ("Generally, utilities include the value of property used and useful in the provision of utility service in rate base.").

Indeed, the "used and useful" concept is not one specific to New Jersey.

> For nearly a century the "used and useful" principle, enunciated by the Supreme Court in *Smyth v. Ames*,169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1889), has

[3] Alt. City Sewage, at 365-66 (emphasis added).

> stood as a bedrock principle of utility rate regulation. The principle is simple — it requires that costs associated with electric power plants be paid by the ratepayers who benefit from the plant.

Kentucky Utilities Co. v. F.E.R.C, 760 F.2d 1321, 1324 n.4 (D.C. Cir. 1985).

Furthermore, the Board's regulations with respect to Infrastructure Investment Program expenditure recovery is limited to constructed facilities that are placed in service. The regulation defines "in service" as "functioning in its intended purpose, is in use (that is, not under construction) and useful (that is, actively helping the utility provide efficient service)."[4]

The Board's decision in this matter is in clear violation of the used and useful principle. The Make Ready Infrastructure, once installed will not be functioning in its intended purpose since the intended purpose of customer-side Make Ready is to facilitate the connection between the meter and the EV charger. In the minimum filing requirements in the MHD Order, the Board defined "Make Ready" in pertinent part as "the pre-wiring of electrical infrastructure …to facilitate ease and cost-efficient future installation of EVSE, including…chargers….'Make Ready' is synonymous with the term 'Charger ready'."[5] The Make Ready Infrastructure, though constructed, is neither used nor useful before connection to the charger since service cannot yet be provided. If costs are recovered before connection to a charger, the only party who benefits from not-yet-used Make Ready Infrastructure recovered through rates are the EDC's shareholders who will earn a return on an investment that is not used and useful.

Furthermore, the Board's decision creates an inherently high risk of stranded assets. If, for example, the EVSE Infrastructure Company requests service at a particular site, but later does not to install the charger for whatever the reason, ratepayers would be paying for an asset that

[4] N.J.A.C. 14:3-2A.6(a).
[5] MHD Order, p. 44.

was never placed in service. If the EV charger is later installed, either by another EVSE or the EDC itself, ratepayers would still be on the hook for an asset while it waited months or perhaps years to be placed in service. Either of these scenarios would subject ratepayers to the volatility of the market which is in direct contravention the well settled law in this area. This is an issue of timing – a utility asset cannot be deemed used and useful if is "not immediately used."

CONCLUSION

For all the foregoing reasons, Rate Counsel respectfully requests that the MHD Order's definition of "used and useful" be reconsidered and the error reversed.

Respectfully Submitted,

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