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May 12, 2017

VIA HAND DELIVERY
Irene Kim Asbury, Secretary
State of New Jersey, Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
CN Box 350
Trenton, New Jersey 08625-0350

Re: BPU Announcement of Stakeholder Process Straw Proposal for the Implementation of Provisional Rates

Dear Secretary Asbury:

Please accept for filing an original and ten copies of the Division of Rate Counsel's ("Rate Counsel") comments regarding the above referenced matter. Please date stamp the additional copy as "filed" and return it in the enclosed, self-addressed, stamped envelope. Thank you for your consideration and attention to this matter.

Introduction

At an agenda meeting on April 21, 2017, Board of Public Utilities ("Board" or "BPU") President Richard S. Mroz reported to the Board that Staff is "looking at the possibility of putting forward a straw proposal for comment" on guidance to utilities seeking to implement provisional rates. See Closing Remarks, 3:11 to 18 (April 21, 2017). In response, Board Staff issued an "Announcement of Stakeholder Process" that contained a straw proposal on April 26,

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2017 ("Straw Proposal"). The purpose of the 'process' was to "receive comments and proposals regarding potential regulations and filing requirements for implementation of provisional base rates during the pendency of a rate case matter." (Straw Proposal, para. 2) The Announcement provided that the provisional rate straw proposal would be the subject of a "stakeholder meeting" on May 4, 2017 and written comments would be received on May 12, 2017. On May 4, 2017, an unrecorded meeting was held where parties presented initial reactions to the straw proposal to various members of Board Staff. There was no discussion among the stakeholders, parties were not allowed to respond to other parties' comments and Board Staff provided no statement or explanation regarding the proposal.

At the May 4 meeting, several commentators asked that additional process be held so that the Board could have the benefit of comprehensive input from all stakeholders. The outcome of this process has the potential to significantly impact ratepayers in New Jersey, subjecting them to higher rates and possibly subsequent refunds. A comprehensive stakeholder process is needed.

Indeed, shortly after taking office, Governor Chris Christie recognized the importance of the stakeholder process in effective rulemaking, issuing Executive Order No. 2. (Christie, January 20, 2010). In that Order, Governor Christie required that state agencies conduct a stakeholder process prior to proposing new regulations. Id. at para. 1a. In fact, in the Red Tape Review Commission's February, 2012 Findings and Recommendations, the Commission recognized the requirement that agencies solicit opinions from stakeholders prior to proposing new rules. See "Red Tape Review Commission, Findings and Recommendations," February, 2012, pp. 4 and 8 (http://www.nj.gov/state/pdf/red-tape-reports/2012-0208-red-tape-review-report.pdf).

The departure from normal stakeholder process procedures is significant here where there has been no evidentiary record developed to establish the need for regulations. As stated by Rate Counsel Director Stefanie Brand and echoed by the New Jersey Large Energy Users Coalition and AARP during the May 4 meeting, due process dictates that a thorough and deliberative process with all interested stakeholders must be convened to fully vet the issues raised by this proposal. Indeed, many other parties supporting the proposal echoed the same concern, assuming that this was just the beginning of a process where stakeholders could work together and attempt to create a workable proposal. Therefore, Rate Counsel respectfully requests that Staff be directed to have stakeholder meetings that will flesh out the issues and continue the dialogue so that if it is determined a regulation is needed, a fair and reasonable regulation can be developed.

Regulations for Implementation of Interim Rates During the Pendency of a Base Rate Case Are Unnecessary.

All utilities already have the right to implement interim rates after nine months under statute. N.J.S.A. 48:2-21.1; see also, Toms River Water Co. v. N.J. Bd. of Public Util. Comm'rs, 82 N.J. 201 (1980). For a variety of reasons, however, the utilities have not done so. For those same reasons, the proposed regulations should not be promulgated.

First, there is no problem here that needs solving. Rate Counsel conducted a review of the rate cases filed in the past five years, by electric, gas and major water utilities. (See Exhibit A). There were 20 rate cases in that category, three of which are pending (Atlantic City Electric, South Jersey Gas and Elizabethtown Gas). Of the remaining 17, only the JCP&L 2012 rate case took more than ten months for the Board to resolve. That case obviously was not routine because it was ordered by the Board, was fully litigated, included many extensions requested by the OAL, and there was significant motion practice up and down to the Board throughout the case.

Of the remaining 16, only two took more than nine months to resolve. Those two cases took ten months to resolve only because the companies, New Jersey Natural Gas and South Jersey Gas, filed their petitions with only three months of actual data and nine months of forecasted data. It was thus not possible to resolve those cases within nine months because the full test-year of actual data was not available in that timeframe. The Utilities control the test year and the amount of forecasted data to be provided when they file their rate case. Where they have filed with three months actual and nine months forecasted data without prior agreement or approval, Rate Counsel has asked the BPU to require that they file with more months of actual data but the Board has not granted such relief. In most of those cases Rate Counsel has often "agreed in principle" to a settlement and had to wait for the full test year's data (the "12+0s") to be filed before the settlement could be finalized. This adds to the time needed to complete a case. However, if the data is presented in a timely fashion, history shows that the case is likewise completed in a timely fashion. The water utilities generally file with at least five months actual data and all eight water rate cases analyzed were completed within eight months or less. (See Exhibit A).

Second, any interim rates are almost certainly going to be subject to large refunds due to the fact that the utilities routinely file for more than the Board ultimately concludes they are entitled and because they poorly forecast their actual revenue requirements in the remaining portion of the test year. In each of the 17 completed base rate proceedings in the past five years, the BPU approved rate increase was significantly less than the increase requested in the initial petition. In the 2012 JCP&L matter, the Company sought a $31.47 million increase and the Board ultimately ordered a $115 million decrease, a difference of $146.47 million. (Exhibit A). If JCP&L had been permitted to put in an interim rate increase, the unfairness of their years of

over-earning would have been compounded. Ironically, a motion was filed in that case to put in interim rate *decreases* due to the time it took for the OAL and the BPU to decide that case. The Board did not approve that request.

In the 2015 New Jersey Natural base rate case that took ten months to resolve, the Company filed for an increase of $147.6 million based upon three months of actual data. Upon filing twelve months of actual data, the request decreased to $112.8 million. The final Board order approved an increase of only $45 million, over $100 million less than initially requested. (Exhibit A).

In the 2015 South Jersey Gas case that took ten months to resolve, the Company also filed with only three months of actual data, precluding resolution within a nine month period. When the full year's actual data came through, the $62.6 million requested fell to $54.4 million. That case was ultimately settled and approved by the Board for $20 million – less than a third of what the Company originally sought. (Exhibit A).

In a 2015 water/wastewater case filed by New Jersey American Water with only four months of actual data, the parties reached a tentative settlement well before nine months, and then had to wait until the full test year's actual data was available. The difference between the forecasted numbers and the actual numbers was so great that the parties had to go back to the negotiating table. In the end, the case was settled for about one third of what the Company had initially asked for. (Exhibit A).

The use of interim rates while rate cases are pending has led to problems in other states that have allowed them. In Oklahoma, two legislators have filed bills that would put an end to interim rates in response to recent Oklahoma Gas and Electric Company and Public Service Co. of Oklahoma ("PSO") cases. *Oklahoma Legislators File Bills to End Utility Interim Rates, Ok*

Energy Today, (January 26, 2017) (http://okenergytoday.com/2017/01/oklahoma-legislators-file-bills-end-utility-interim-rates). In PSO's latest rate case, the Company filed for an increase of $130 million. The Commission ultimately approved a $14 million increase. PSO collected about $65 million in higher interim rates since January of 2016, which it now needs to refund to its customers.

The Straw Proposal states that "Utilities rarely avail themselves of" the remedy of interim rates. This is not because of the absence of regulations. It is because interim rates are not needed and are bad policy for both the Board and the utility, not to mention ratepayers. Simply, this is a bad solution in search of a non-existent problem.

Interim Rates Promote Rate Volatility and Discourages Settlement.

Interim rates will cause significant rate volatility. Rate stability has long been an important public policy followed by the Board. Utilities strive for revenue stability as well, i.e., the ability to predict sales and revenues. Yet, both rate stability and revenue stability are thwarted when interim rates are placed into effect. As demonstrated in Exhibit A, it is clearly the rule, rather than the exception, that the Board approves rate increases that are significantly below the utility's original request. Thus, when interim rates reflecting the utility's original rate request are implemented, ratepayers are subjected to an unnecessary, albeit temporary, rate increase only to be followed by a rate reduction when final rates are approved. This type of yo-yoing of rates wreaks havoc on the budgets of businesses and families, particularly during the peak summer and winter months.

That refunds with interest are provided for in the proposal is simply not enough to remedy the harm to vulnerable ratepayers caused by excessive and unnecessary rate changes. There are some damages that will be permanent and cannot be fixed by refunds with interest such as for example, families losing their housing due to temporary excessive rates. Moreover,

interim rates, to the extent they are later found to be excessive, provide no real benefit to the utility either. Proper accounting requires utilities to establish a contingent liability for their anticipated refund obligation. The contingent liability undermines the utility's ability to rely on the increased revenues to replace or expand its infrastructure or to improve its service quality. With no accurate mechanism to calculate the refund, the utilities may be reluctant to use monies collected as interim rates subject to refund to fund additional investment. Thus, excessive revenues collected under interim rates will do nothing to encourage capital spending but will provide a low interest loan. Given the clear track record that initial rate requests by New Jersey utilities are excessive, the damages caused to ratepayers due to rate volatility presents a much greater risk than any "benefit" the utilities receive by collecting excessive interim rates subject to refund.

Additionally, interim rates will discourage settlements. Board Staff and Rate Counsel have limited resources and are not able to litigate and commit the extensive resources often needed to settle cases at the same time. If Rate Counsel has to ensure that cases are fully litigated in nine months in order to ensure that ratepayers are not subject to interim rates higher than what the utilities deserve, Rate Counsel will have to focus on preparing to litigate, rather than pursuing settlement. Promoting settlements has up until now been a policy of the Board, and this potential regulation is directly contrary to that policy. An interim rate policy could also make cases last longer and be more difficult to litigate. If a utility can put its interim rates in effect, even if it faces future refunds, it has no incentive to meet litigation deadlines, respond to discovery on a timely basis or engage in settlement efforts.

If a Rule is Proposed, the following provisions must be imposed:

First, the regulations should provide that a utility must get Board approval of its proposed interim rates. The Board should be able to reduce the rate if it is unrealistic or deny the ability to

impose the interim increase if the utility has not met all litigation deadlines.[1] It would be monumentally unfair and patently unreasonable to simply allow a utility to implement its proposed rates on an interim basis, subject to refund. The reasons for this are many: (1) utility rate requests are routinely found to be significantly excessive; (2) utility rate requests often contain new, previously unvetted tariff and/or rate design proposals that result in significant changes to some or all customers; and (3) actual operating results vary significantly from the initial forecasts filed by the utility. Thus, a utility should be required to seek Board approval of its proposed interim rate.

Second, the Board's rate case filing regulations must be amended if interim rate regulations are adopted. As was demonstrated on Exhibit A, recent rate cases generally have been completed within the present eight-month suspension period when the utilities' initial filing reflected six months or more of actual operating results. Conversely, only in recent cases where the utility filed with less than six months of actual results did rate cases extend beyond the eight-month period. It is simply impossible for` Board Staff and Rate Counsel to thoroughly review a rate filing and to wait for twelve months of actual operating results all within an eight-month suspension period when the initial rate filing relies predominately on forecasts and contains less than six months of actual operating results. Therefore, so that rate investigations can be completed within the eight-month suspension period, the filing regulations should require utility rate applications to include no less than six months of actual operating results.

[1] Rate Counsel recognizes that the Straw Proposal allows an interim rate of less than the full increase requested in the base rate case, however, because the utility may request the full amount of the requested increase, Rate Counsel raises these issues. Indeed, even an interim rate less than the full requested increase may be excessive.

Third, the regulations must prohibit utilities from filing for approval of new or renewing programs in their rate cases. There will be no time to address other programs in the rate case so separate petitions should be required.

Fourth, the interest rate paid on refunds must compensate ratepayers for use of their funds, at their cost of capital. The monies to be refunded from interim rates were collected involuntarily from customers. Thus, refund obligations should appropriately be considered as short-term, customer-contributed capital. In that sense, utilities should be required compensate its customers for the use of customer-contributed funds at the customers' cost of capital, in the same way that customers are required through the ratemaking process to compensate utility investors at the investors' cost of capital. As an example of customer short-term debt costs, presently, consumers pay anywhere from 12 percent to over 21 percent, annually on short-term revolving credit card debt. The refund interest rate must be set high enough to discourage or eliminate arbitrage opportunities for the utilities. That is, there should be no incentive to "borrow" money from ratepayers to invest in higher return, short-term financial instruments. Both, the recognition that refunds are customer-contributed capital and the elimination of arbitrage incentives require that the refund interest rate be set significantly above the utilities' authorized rate of return. This is also equitable, as a customer unable to pay all of his/her bills may likely bridge the gap by carrying more credit card debt. Rate Counsel recommends that the interest rate on refunds be set at no less than 12 percent per annum. Even an interest rate of 12 percent cannot remedy all of the damages that may result from implementing interim rates. Some damages are beyond the Board's ability to remedy.

Fifth, the regulations must make clear that any administrative costs incurred to implement interim rates and provide refunds for over-collection should be borne by the utility's

shareholders and not ratepayers. To the extent the interim rate is higher than the rate approved by the Board, that amount is not just and reasonable and must be refunded. See Toms River Water Co. at 213. Ratepayers should not be required to pay administrative costs to refund an unjust and unreasonable rate collected by the utility. Utilities often express concerns about the time, effort, and cost they incur to implement a rate change. These efforts and costs often involve changes in computer software. The time, effort and costs will be more than double for the utility when interim rates are implemented, due to the additional time, effort and costs incurred to implement a refund of the excessive charges. To the extent the utilities' additional costs are considered a "normal operating expense," ratepayers will end up paying additional costs for unnecessary rate changes. Indeed, the refund could potentially be swallowed whole by the administrative costs of implementing the refund.

Sixth, in the event that a utility seeks to implement interim rates, the Board should require a specific and detailed refund plan ("Plan"). The Plan should be filed by the utility along with its request for interim rates and should specify, in detail, the utility's strategy for insuring that ratepayers receive full refunds of all over-payments, plus interest. The Plan should demonstrate the utilities' ability to effectuate refunds on an accurate and timely basis, either through bill credits or refund checks. The Plan also should state the strategy for locating customers who discontinued service during the period in which the refund obligation accrued. Also, the utility must ensure its ability to pay the refund with interest. In Delaware, a utility is required to file a surety bond with the Commission prior to implementation of interim rates. See 26 Del. C. §306. See also Toms River Water Co., supra., 82 N.J. at 212 ("a requirement that a utility post a bond for the excess income collected under provisional, unapproved rates" is one procedure "that would strike an equitable balance between the interests of the utility and its

consumers" when provisional rates are implemented). A similar requirement should be imposed here. The Board should require New Jersey utilities to file a surety bond and the Plan should confirm that the utilities' surety bond is sufficient to demonstrate their ability to pay the refunds with interest when due. Finally, the Plan should map all audit parameters so that the Board Staff or an independent auditor can verify the accuracy and completeness of the utilities' refund. It is not unreasonable to anticipate that a refund and the subsequent audit of the refund may take longer to resolve than did the original rate filing, and a refund plan is needed to make sure both are done in an orderly fashion.

Seventh, in the event that interim rates are made effective, the regulations should specify the maximum rate increase[2] to be authorized on an interim bases and the specific rate design to be used to collect interim rates. Because utility rate requests frequently far exceed the Board's ultimate rate awards, it is not reasonable to allow utilities to implement their full proposed rate increase. Also, utilities often introduce in rate proceedings new rate designs that have not previously been approved by the Board. The new rate designs could have far-reaching adverse impacts on target groups of customers. Therefore, it is unacceptable that utilities should be allowed to implement the full proposed rates and new rate designs on an interim basis. Rather, the Board's regulations must establish a maximum revenue increase for interim rates, either as a fixed dollar amount or as a percent of base rate revenue (i.e., excluding purchased power, water, sewer and gas expenses). In addition, the regulations should specify that the interim rate design should be applied as a uniform percentage increase on all base rate charges in all rate classes, except that the increase would not be applied to monthly customer service charge.

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[2] Delaware's statute permitting interim rates limits the interim rate to "15% of the public utility's annual gross intrastate operating revenues or $2,500,000 annually, whichever is less." 26 Del. C. §306(c).

Eighth, notice by publication to customers is insufficient. Bill inserts and designation of interim rates directly on bills must be required. I/M/O Additional Methods to Inform the Public Concerning Utility Filings, Docket No. AO13030252 (October 15, 2013). Ratepayers have a right to know they are paying interim rates and the ability to recoup their money when the Board orders refunds.

Ninth, when the utility files the proposed interim tariffs with the Board, it should also be required to serve Rate Counsel, municipal clerks and any intervenors or participants in the rate case as well. See Toms River Water Co. at 212-13.

Tenth, a utility should be restricted from filing more than one rate case at a time. Enacting interim rate regulation could result in pancaking of rate filings. Presently, New Jersey statutes do not prescribe the frequency of utility rate filings. Thus, the timing and frequency of rate increase filings are left entirely up to the utilities. In the absence of a prescription on the frequency of filings, however, implementing interim rates provides a perverse incentive for utilities to "pancake" their rate requests on top of each other, in effect rendering interim rates effectively permanent. For example, a utility could time its rate filings so that it has two or more rate applications before the Board at one time. Then, as one case is being finalized, interim rates would be placed into effect on the subsequent case. In effect, the utility never will have permanent rates in effect. The Board, through its rulemaking, must insure that "interim" rates do not become *de facto* permanent rates.

Finally, and critically, the proposed regulations need to make clear that this relief can go both ways. If, in a rate case it appears that a utility is overearning and ratepayers are entitled to a rate decrease, there must be a mechanism set forth in the regulations to allow for interim rate decreases to go into effect in an amount approved by the Board.

Conclusion

For all the foregoing reasons, the Board should determine that regulations and filing requirements for implementation of provisional base rates during the pendency of a base rate case are not necessary. To the extent the Board determines that regulations are needed, the Board should include the ratepayer protections enumerated above.

Respectfully submitted,

Stefanie A. Brand, Esq.
Director, Division of Rate Counsel

By: ______________________________
Stefanie A. Brand, Director