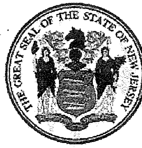

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June 25, 2018

VIA HAND DELIVERY
Hon. Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
P.O. Box 350
Trenton, New Jersey 08625-0350

Re: I/M/O the Petition of Atlantic City Electric Company for Approval of Amendments to its Tariff to Provide for an Increase in Rates and Charges for Electric Service Pursuant to N.J.S.A. 48:2-21 and N.J.S.A. 48:2-21.1, and for Other Appropriate Relief (2018)
BPU Docket No. ER18060638

Dear Secretary Camacho-Welch:

Please accept this letter in lieu of a more formal brief in support of the Division of Rate Counsel's ("Rate Counsel") Motion to Dismiss 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.

Background

On Friday, June 15, 2018, Atlantic City Electric Company ("ACE" or the "Company") filed a petition ("Petition") pursuant to N.J.S.A. 48:2-21 to increase its base rates for electric distribution service. The Petition seeks to increase base rates to produce additional revenues of

approximately $99.7 million ($106.3 million, including Sales and Use Tax) annually. The utility serves about 550,000 customers in southern New Jersey, and the proposed increase in rates will result in the average customer bill increasing by approximately $10.66 a month, or 8.25 percent. The Petition also seeks the implementation of a revenue decoupling mechanism or an automatic rate adjustment for certain customers and to make certain other tariff changes as more fully set forth in the Petition.

The proposed rate increase is based on a test year ending December 31, 2018, over six months beyond the Petition's filing date. The Company filed the Petition using only three months of actual test year data – January, February and March, 2018. Additionally, relying upon the Board of Public Utilities' ("BPU or Board") new interim rate regulations, ACE states in its Petition "that it intends to implement its proposed rates for service rendered on and after March 15, 2019 . . . if the Board . . . has not finally determined a just and reasonable tariff schedule prior to that date." Petition, p. 13, para. 15. ACE's Petition also contains a proposed schedule. Petition, p. 12, Para. 14. That schedule provides for the Company to provide its 12 + 0 update with full test-year actual data in February, 2019, after the record will have closed in the case and less than a month before interim rates would go into effect. Even under its absurdly compressed schedule, the Board would not issue a final decision until after interim rates went into effect.

ACE's Petition relies on three months of actual data and is therefore deficient. Board policy requires that utilities file base rate petitions with six months of actual data (or a minimum of five), and final rates may not by law be based on Company projections. This issue is compounded by ACE's stated intent to impose interim rates before the Board will have the opportunity to determine just and reasonable rates based upon actual data. For these reasons, as

explained more fully below, the Board should dismiss ACE's Petition[1] and require the Company to refile its petition with at least six months of actual data.

ARGUMENT

I. ACE's Petition is Deficient as it Fails to Comport With Board Policy Requiring Six Months of Actual Data in a Base Rate Case Filing.

The Petition in this matter relies upon three months of actual and nine months of projected data. The reliance on three months of actual data is in direct contradiction to the longstanding Board policy requiring six months actual test year data. In I/M/O Elizabethtown Water Co. Rate Case, BPU Docket No. WR8504330, May 23, 1985[2] ("Elizabethtown"), the Board set forth its policy for the appropriate test year to be used in base rate filings. The Board in Elizabethtown concluded "that as a general guideline for major utilities, rate case petitions should contain when filed, six months of actual test year data and six months estimated data or at a minimum five months actual and seven months estimated data." Id. at p. 2. In setting forth this requirement of six months actual test year data, the Board carefully reasoned that it "strikes the appropriate balance by enabling the parties to develop a substantive record based upon sufficient actual data, but also providing petitioner with the opportunity to propose rates which

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[1] The Board must dismiss the petition in order to correct the deficiencies of the filing. To hold the matter in abeyance until the Company files six months of actual data will not address the interim rates issue because the Board cannot suspend the rate increase beyond March 15, 2019. N.J.S.A. 48:2-21. The Company has simply made it impossible to process this case within the nine month period contemplated by the statute. See also, N.J.A.C. 14:1-5.4(b) (providing that the Board may dismiss a deficient petition and that the timeframes established in N.J.S.A. 48:2-21 do not run until a complete petition has been filed with the Board).

[2] For the Board's convenience, a copy of the Elizabethtown decision is attached hereto as Exhibit A.

should reflect conditions at the time the Board makes a determination in this matter and during the period of future rates." Id.

Based upon the 3+9 filing and the proposed schedule in the Petition, ACE is essentially asking the Board to set rates based upon a projected test year rather than actual data. The 12+0s are projected to be provided sometime in February, 2019. Petition page 12. By that date, under ACE's schedule, the parties will have already conducted evidentiary hearings, submitted initial and reply briefs and the Administrative Law Judge will have issued an Initial Decision. Hearings would be held two months before the end of the test year, presumably based upon 6 months of actual and six months of projected data. Under ACE's proposed schedule, the conclusion of the evidentiary hearings – the point in time when the record closes – will occur before the 12+0 data is provided. Thus, ACE, by filing with three months of actuals, and demanding a resolution of its case within nine months, is essentially asking the Board to adopt a projected test year and base final rates on Company estimated data.

The Board, however, is not allowed to base final rates on projected data, and therefore, the Petition should be dismissed until the Company provides a petition that will allow the Board to utilize actual data in setting just and reasonable final rates. See In re Proposed Increased Intrastate Indus. Sand Rates, 66 N.J. 12 (1974). In Industrial Sand Rates, the New Jersey Supreme Court stated that:

> The justness and reasonableness of a particular rate of fare can only be determined after an examination of a company's property valuation which constitutes its rate base; its expenses, including income taxes and an allowance for depreciation; and the rate of return developed by relating its income to the rate base.

Id. (quoting Public Service Coordinated Transport v. State, 5 N.J.196 (1930))

This ruling builds on the Court's holding in I/M/O the Revision of Rates Filed by New Jersey Power & Light Co., 9 N.J. 498, 508 (1952), in which it described the above analysis as "settled law in New Jersey." The Court in that case also noted the importance of looking at actual experience as "an important check on extravagant estimates," and the "danger in resting upon estimates of a conjectural character." Id. at 517. Emphasizing the utility's burden of proof, the Court stated further:

> The decision of the respondent [BPU] makes various adjustments in expense and revenue items purporting to reflect a normal year under prevailing economic conditions. The Utility submitted forecasts of revenues and expenses in which it gave effect to certain items on a normalized basis and later introduced evidence of the actual experience for the year 1950. The purpose of normalizing adjustments is to determine a normal level of net income in order to reasonably forecast income so that rates established will be fair to both the public utility and to the public, during the period for which the rates are designed to be effective. The respondent [BPU] is not under a duty to indulge in speculation as to such matters, however, for there is in its continuing supervisory power...a wholly adequate remedy for adjustment to shifting circumstances.

Id. at 526. The Court held further that "the Utility is allowed a deduction from gross income for *actual* operating expenses only (or actual normalized operating expenses) and not for hypothetical expenses which did not and foreseeably will not occur." Id. at 528.

The Board's ruling in Elizabethtown, supra, that utilities must file with six months actual data (or a minimum of five), and that any post-test-year additions must be "known and measurable" is consistent with this settled law. Indeed, in the Elizabethtown Order, the Board also required the company to file full test year results "as soon as practicable," but no later than two months after the close of the test year "so that the parties will be able to examine them prior to Board decision." Elizabethtown, at p. 2. By filing with only three months of actual data, ACE's Petition not only violates the long-standing Board policy set forth in Elizabethtown, it also makes it impossible for the Board to comply with the long-settled requirements of Industrial

Sand Rates and New Jersey Power & Light, supra, that require that final rates be based on actual, not hypothetical income and operating expenses, as the actual data will not be available until after the record in this matter will have closed. The petition is therefore deficient and should be dismissed.

The Board's ruling in Elizabethtown, supra, of requiring six months of actual data not only allows the Board to create a full record in the rate case proceeding, but also promotes administrative efficiency. Board Staff and Rate Counsel should not be required to begin their examinations based on only three months of actual data. This would result in an inefficient waste of resources, since the discovery process will have to be repeated in its entirety once these nine months of speculative forecasts are replaced with actual data.[3] Once the 12 + 0 update is filed, the record would need to be reopened, additional discovery and possible additional hearing dates and briefs would be needed there by pushing the dates that the Board can possibly issue a final decision even further.[4] This greatly increases the administrative burden on all parties. While the Company controls the timing of its base rate filings and the test year, there is clear Board policy that requires the Company's base rate filing to encompass six months of actual data at the time of filing. It is unreasonable for the Company to submit a deficient base rate case filing and then expect Board Staff and Rate Counsel to begin their reviews based on a largely forecasted test year that might bear no relation to actual test year data.

As a practical matter, once six months of actual data is received in a base rate case the Board Staff, Rate Counsel and their experts need time to review and understand the data and

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[3] Although ACE's proposed schedule does not contemplate a 6+6 or 9+3 update, presumably a final schedule would require both updates. Each will result in another round of discovery, and each of the three updates to the data could provide different results, changing the ultimate revenue requirement and underlying calculations number.

[4] Under the Uniform Administrative Procedure rules, motions to reopen the record after hearings may be granted "only for extraordinary circumstances." N.J.A. C. 1:1-18.5. The Company's refusal to file with 6+6 should not be considered "extraordinary circumstances".

potentially challenge or agree with the Company's assertions in the Petition. This review allows the parties time to narrow and resolve issues and avoid needless motion practice resulting from tight time schedules and disagreements that arise from a lack of complete information or facts. Efficiency of process, allowing a complete record of substance to be developed for Board consideration, should not be confused with a rush to a decision that curtails due process. If the Company filed its Petition with six months of actual data, that review could be completed, and the case processed within nine months thereafter. As filed, the case cannot be processed within nine months and will require significant additional work by Board Staff, Rate Counsel and its consultants.

II. The Company's Intent to Implement Interim Rates Requires the Board to Dismiss the Petition and Require ACE to File With Six Months of Actual Data.

ACE complains that "delays in the recovery of investments ...have contributed to the Company's inability to earn its authorized rate of return." The Company continues that "should the Board not have reached a final decision in this matter by the end of the eight-month suspension period, the ACE will implement its proposed rates on March 15, 2019 on an interim basis." Petition, p. 13, para. 15. ACE's aggressive schedule contained in its Petition, does not allow for a Board decision prior to the institution of its interim rates. By filing its Petition in violation of Elizabethtown, the Company is driving a schedule intended to put the Board in the position where it cannot allow both due process and a decision prior to the Company instituting interim rates pursuant to N.J.A.C. 14:1-5.12(c).

A typical rate case runs for approximately nine months. N.J.S.A. 48:2-21. If the case takes longer because of actions by the utility, such as filing an inappropriate test year, the Company bears the impact of delayed implementation of new rates. ACE's insistence on

instituting interim rates shifts the burden of its self-created regulatory lag to ratepayers, forcing them to provide ACE with a loan during the interim period (assuming, as has been the norm, that ACE does not get the full amount requested in the Petition). The purpose of the interim rates provision in N.J.S.A. 48:2-21.1 was to address the concerns of utilities regarding regulatory lag. Toms River Water Co. v. N.J. BPU, 82 N.J. 201, 210 (1980). ACE cannot file a rate case that cannot be completed within nine months and then complain that regulatory lag requires it to implement interim rates at the full amount proposed in its Petition at the expiration of the nine months. As the Court stated in Toms River, "the Board must devise appropriate administrative mechanisms for regulating utilities which elect to implement proposed tariffs at the end of a suspension period." Id. at 212. While ACE had exclusive control over the timing of its rate case, ACE's failure to comply with Elizabethtown has unfairly shifted the impact of not completing the rate case on ratepayers. The only appropriate administrative remedy is to dismiss the Petition and require ACE to file with six months of actual data.

ACE has filed five base rate cases since December 12, 2012. Each has settled for a significantly lower amount than originally sought by the Company in a significantly shorter period of time than proceeding to litigation. Unless the Board acts to bring fairness back to the ratemaking process, ACE's model will become the norm. The interim rate regulations will have taken away any incentive to settle or file a reasonable petition, as the utilities will be able to manipulate the process to collect higher rates for an interim period and will have no incentive to resolve or move the litigation forward expeditiously. Unless the Board devises appropriate mechanisms to address this practice, its efforts to address regulatory lag will become a means to game the system, decrease the likelihood of settlement and incentivize litigious behavior contrary to long-established public policy favoring settlement of litigation. Puder v. Buechel,

183 N.J. 428, 437 (2005) ("For nearly forty-five years, New Jersey Courts have found that '[s]ettlement of litigation ranks high in [the] public policy' of this State." (quoting Nolan ex. rel Nolan v. Lee Ho, 120 N.J. 465, 472)). Rather than serving the goal of striking an equitable balance to address regulatory lag, ACE's use of three months actual data, its suggested schedule that precludes establishing final rates based on actual data, and its intent to implement provisional rates as soon as the suspension period ends, serves to undermine the fairness of the ratemaking process.

CONCLUSION

For all of these reasons, ACE's June 15, 2018 Petition in this matter should be dismissed and the Board should order ACE not to refile until it can do so with at least six months of actual data.

Respectfully submitted,

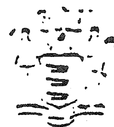
STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: [signature]
Brian O. Lipman, Esq.
Litigation Manager

BOL:lg

c: Service List *via e-mail and regular mail*

EXHIBIT A 5-23-85



State of New Jersey

BOARD OF PUBLIC UTILITIES
1100 RAYMOND BLVD
NEWARK NEW JERSEY 07102

IN RE ELIZABETHTOWN WATER COMPANY RATE CASE	))	DECISION ON MOTION FOR DETERMINATION OF TEST YEAR AND APPROPRIATE TIME PERIOD FOR ADJUSTMENTS

DOCKET NO. WR8504330

(APPEARANCES ATTACHED)

BY THE BOARD:

Petitioner has filed, on April 23, 1985, a motion to settle the test year applicable to the above docketed rate proceeding, and to settle the appropriate time period and standards that should apply to out-of-period adjustments. The motion was filed as a consequence of the impasse which developed at prehearing/settlement conferences held by Board's staff on April 18 and 19, 1985, with regard to the test year questions. The Board therefore retained the test year questions and on May 1, 1985 transmitted the case to the Office of Administrative Law (OAL) for hearing as a contested case, advising the OAL that the Board would resolve the test year question as expeditiously as possible so as not to delay the proceedings.

Petitioner's base rate case petition, filed on April 1, 1985, was supported by schedules proposing a test year ending December 31, 1985 with pro forma changes through December 31, 1986. Rate Counsel, in response to said motion, proposed a test year ending September 30, 1985 "which matches all aspects of the ratemaking process"1/. Staff, in response to said motion, filed a position paper proposing a test year ending September 30, 1985, with petitioner to be afforded the opportunity to place in the record known and measurable changes for expenses six months beyond the end of the test year, rate base adjustments three months beyond the end of the test year if such rate base adjustments are within service six months after the close of the test year, and changes in capitalization through new financing to be reflected in the record three months beyond the close of the test year. Staff's position is premised on the expectation that the rate case would be ripe for Board determination in January, 1986. It is not appropriate or necessary to recite the various proposals and counterproposals made by the parties in an attempt to resolve the issues at hand. Suffice it to say that the test year questions remain unresolved by agreement and require Board determination at this time.

The Board has before it two distinct, though related issues, the <u>first</u> being a determination of the appropriate test year for this proceeding and the <u>second</u> being to what extent and under what standard petitioner should be afforded the opportunity to make a record in support of proposed adjustments which extend beyond the end of the test year.

1/ Rate Counsel Response, dated May 7, 1985 at p. 17.

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With regard to the first issue, the Board has balanced the competing interests and positions of the parties and concludes that a test year ending September 30, 1985 is reasonable and appropriate to govern these proceedings. Such a test year is current rather than fully historic, but rejects the concept of a fully forecasted test year. It strikes the appropriate balance by enabling the parties to develop a substantive record based upon sufficient actual data, but also providing petitioner with the opportunity to propose rates which should reflect conditions at the time the Board makes a determination in this matter and during the period of future rates.

Based upon the above considerations, the Board concludes that as a general guideline for major utilities, rate case petitions should contain when filed, six months actual test year data and six months estimated data or at a minimum, five months actual and seven months estimated data.

The consequence of the above determination, is that petitioner must conform its present filing by now submitting at least five months actual test year results. Furthermore, petitioner must submit full test year results for the period ending September 30, 1985 as soon thereafter as practicable but no later than December, 1985 so that the parties will be able to examine them prior to Board decision.

With regard to the second issue, that is the appropriate time period and standard to apply to out-of-period adjustments, the standard that shall be applied and shall govern petitioner's filing and proofs is that which the Board has consistently applied, the "known and measurable" standard. Known and measurable changes to the test year must be (1) prudent and major in nature and consequence, (2) carefully quantified through proofs which (3) manifest convincingly reliable data. The Board recognizes that known and measurable changes to the test year, by definition, reflect future contingencies; but in order to prevail, petitioner must quantify such adjustments by reliable forecasting techniques reflected in the record. In Re New Jersey Bell Telephone Co., Docket No. 7711-1136 (January 31, 1978). Certainly, the Board's power to recognize adjustments beyond the test year is well-settled, so long as its judgment is grounded on sufficient relevant evidence. State v. New Jersey Bell, 30 N.J. 16 (1959) at p. 29.

Based upon the foregoing, the Board determines, for the purposes of this proceeding, that petitioner shall have the opportunity to make a record with regard to: (a) known and measurable changes to income and expense items for a period of nine months beyond the end of the test year; (b) changes to rate base for a period of six months beyond the end of the test year, provided there is a clear likelihood that such proposed rate base additions shall be in service by the end of said six-month period, that such rate base additions are major in nature and consequence, and that such additions be substantiated with very reliable data; (c) changes to capitalization for a period three months past the end of the test year, provided that such changes are major in nature and consequence, and that the results of said proposed financing are actual prior to the Board's determination in this case.

As a consequence of the above, petitioner shall conform its current filing to reflect proposed adjustments to the test year according to the above enunciated standard and the above delineated time periods. We note in passing that we do not find the test year determinations in the 1980 Elizabethtown Water Company Rate Case (BPU Docket No. 802-76) and the 1984 Elizabethtown Water Company Rate Case (BPU Docket No. 8312-1072) to be dispositive of the issues now at hand, due to the particular circumstances of those cases. The first reflected, in part, a period of high and continuing inflation, while the second reflected complex disposition of revenue requirement and over-earnings questions which are now before the Superior Court, Appellate Division of this State.

Therefore, the above determinations reflect: (a) the Board's ruling on the appropriate test year in this docket; (b) the guidelines that should apply to the test years to be filed in future by all major New Jersey Public Utilities; (c) the standard to apply for out-of-period adjustments; and (d) the specific time periods to apply under the circumstances of this case to out-of-period adjustments.

The parties are directed to exercise all due diligence to insure that this rate case may be ripe for final Board disposition in January of 1986. If contingencies develop which make the above timetable inappropriate, the Board should be advised at the earliest opportunity. If it appears that petitioner's proposed capital financing will be accomplished prior to Board determination but after December 30, 1985, appropriate application may be made to the Board for consideration of the rate-making implications of said financing.

DATED: May 23, 1985

BOARD OF PUBLIC UTILITIES
BY:

BARBARA A. CURRAN
PRESIDENT

GEORGE H. BARBOUR
PRESIDENT

ATTEST:

BLOSSOM A. PERETZ
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utility Commissioners

Blossom A. Peretz
Secretary

DOCKET NO. WR8504330

I/M/O the Petition of Atlantic City Electric Company for Approval of Amendments to its Tariff to Provide For an Increase in Rates and Charges for Electric Service Pursuant to N.J.S.A. 48:2-21 and N.J.S.A. 48:2-21.1 and for Other Appropriate Relief (2018)
BPU Dkt. No.: ER18060638

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