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May 15, 2015

Via Hand Delivery and Electronic Mail at
rule.comments@bpu.state.nj.us
Honorable Irene Kim Asbury, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Re: Comments New Jersey Division of Rate Counsel
Board of Public Utilities Rules of Practice N.J.A.C. 14:1
BPU Docket No.: AX15010031
Proposal Number: PRN 2015-028

Dear Secretary Asbury:

Please accept these comments on behalf of the Division of Rate Counsel ("Rate Counsel"). We are enclosing an original and ten copies of these comments. Please stamp and date the copy as "filed" and return it to our courier. Thank you for your consideration and assistance.

Rate Counsel submits its comments to the New Jersey Board of Public Utilities' ("BPU" or "Board") readoption of N.J.A.C. 14:1, published March 16, 2015 in the New Jersey Register. 47 N.J.R. 626. Rate Counsel appreciates the Board's desire to update its rules of procedure, however, Rate Counsel finds several of the amendments, as outlined below, to be problematic.

Amendment to N.J.AC. 14:1-1.3

In this proposed amendment, the BPU intends to expand the scope of the N.J.A.C. 1:14-1.3 to allow a "Presiding officer" to preside over contested cases. Rate Counsel opposes an amendment that would allow a member of Board Staff to be designated as a Presiding officer and conduct a hearing in a contested case. Rate Counsel contends that permitting Board Staff members to appear as presiding officers in contested matters is contrary to prevailing case law and is contrary to the 1978 amendments to the Administrative Procedure Act ("APA"), N.J.S.A. 52:14F-1 et seq. These amendments essentially eliminated presiding officers and created the Office of Administrative Law ("OAL") for contested cases. This proposed amendment needlessly unearths a debate that was well-settled in New Jersey prior to 1980.

Legislative statements made during consideration of the APA reflect that the amendments were specifically intended to eliminate the inherent bias involved in agency staff presiding over contested cases. The relevant Senate Committee Statement specifically emphasized that the changes "will tend to eliminate conflict of interests for hearing officers, promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice." Committee Statement to Senate No. 766-L.1978, c. 67.

In 2004, the New Jersey Appellate Division interpreted the APA to find that designating hearing officers to decide contested cases concerning police disciplinary actions violated the APA. Division of State Police v. Maguire, 368 N.J. Super. 564, 572 (App. Div. 2004), certif. denied 181 N.J. 545 (2004). At issue in that case was an agency rule which allowed the agency

head to delegate contested disciplinary hearings to another state trooper; the only requirement was that the trooper had to be higher-ranking than the officer requesting the hearing. Id. at 571.

The Appellate Division reasoned that a hearing officer in those matters could be influenced by agency policy not part of the record and the practice often contributed to a feeling that the hearing "was less than impartial." Ibid. Additionally, the Court noted that this practice of having hearing officers working within the agency deciding contested cases was eliminated with the 1978 amendments to the APA. Id. at 572 *quoting* In re Kallen, 92 N.J. 14, 22-23 (1983). In reaching its conclusion, the Court rejected the agency's argument that hearing officers can decide contested cases since the APA does not specifically preclude it. Maguire at 576. While the court agreed that the agency head may hear the matter directly, contested case hearings cannot be delegated since N.J.S.A. 52:14F-8(b) specifically requires the agency head to "conduct the case directly and individually." Id. at 576.

In 1981, the New Jersey Supreme Court provided context to significant changes to the APA:

> The major purpose of [the 1978 amendment to N.J.S.A. 52:14F-1 et seq., L.1978, c. 67, which created the OAL was] to bring impartiality and objectivity to agency hearings and ultimately to achieve higher levels of fairness in administrative adjudications. Committee Statement to Senate No. 766-L.1978, c. 67 ("Committee Statement"). While the law establishing the OAL deals with other important aspects of administrative practice and procedure ... the salient reform of the law is directed most particularly to the hearing function of agencies engaged in quasi-judicial proceedings.
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> ... Typically, such hearings were delegated to agency employees acting as hearing examiners. In the Administrative Procedure Act, to which the enactment creating the OAL was a supplement and amendment, these examiners were referred to as "presiding officers,"[1] N.J.S.A. 52:14B-10(a), and were usually employees of the agency with diverse duties in addition to their hearing responsibilities. They were often used only part-time in the hearing of cases and were generally subordinate and accountable to the decisional head of the agency with respect to the performance of their duties. It was widely perceived that this format for

[1] This discussion highlights that the term "presiding officer" in the current N.J.A.C. 14:1 is outdated which could be related to the antiquity of N.J.S.A. 48:2-32.1 as argued *infra*. [Footnote added.]

> administrative agency adjudication greatly diminished the impartiality and objectivity of agency decisions. **The use of such employees as hearing officers fostered an institutional bias or propensity in favor of the agency with respect to factfinding and recommended decisions that was felt to be unfair to the parties whose rights were being adjudicated**. Committee Statement, supra; see City of Hackensack v. Winner, 82 N.J. 1, 36-37 (1980). The OAL legislation was a response to this concern.
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> Unemployed-Employed Council, Inc. v. Horn, 85 N.J. 646, 649-651 (1981). [Emphasis added.] See also In re Kallen, 92 N.J. 14, at 22-23.

Although the Board may argue that the instant amendment is supported by N.J.S.A. 48:2-32.1 which allows the Board, by way of Order, to permit certain Board officers, and "any engineer, accountant, auditor or rate analyst of the board, or any person acting in such capacity as its representative in, and on its behalf to conduct, any hearing in any proceeding now or hereafter pending before said board as a hearing examiner," this statute was last amended in 1967 and should be deemed superseded by the 1978 amendments to the APA. See J.H. v. Mercer Cty Youth Detention Center, 396 N.J. Super. 1, 16 (App. Div. 2007) (where a subsequent legislative enactment clearly conflicts with an earlier statute affecting the same subject matter, courts will find the legislative intent to supersede the earlier law) (citations omitted).

The 1978 amendments to the APA were also specifically intended to extinguish the potential ethical pitfalls that arise when agency staff serve as hearing officers in contested matters. Hearing officers act in a judicial capacity and should be subject to similar rules regarding conflict and recusal. In this regard, N.J.S.A. 2A:15-49 provides:

> No judge of any court shall sit on the trial of or argument of any matter in controversy in a cause pending in his court, when he:... c. Has given his opinion upon a matter in question in such action; or d. Is interested in the event of such action.

See also, N.J. Court Rule 1:12-1. Board Staff are parties in contested cases and are in the unique position of being both litigant and decision-maker in contested matters before Board Commissioners and OAL Administrative Law Judges. A conflict inevitably arises when the Staff member who appears as a litigant in some matters before the Board sits as the hearing officer in another contested case which may contain the same parties and legal issues as a case where that Staff member is a litigant. This has the potential for the hearing officer to become "interested" in the matter since her decision in the matter, could be influenced by another similar case where she sits as a client. Moreover, since the hearing officer Staff member presumably works closely with other Staff appearing as litigants, she could have previously offered an opinion to the client on legal issues in the case or one related to it. Given the close working relationship between the Staff client and the Staff hearing officer, the possibilities for conflict, or the appearance of a conflict, are seemingly endless. The Board should not endeavor to cultivate the potential for conflicts by adopting the proposed amendment, and restoring a practice that was thoughtfully eliminated over thirty years ago.

This issue of conflict is closely related to the potential for *ex parte* communications which is prohibited by N.J.A.C. 1:1-14.5 and could reasonably occur between the hearing officer and her colleagues who sit as the litigant in a contested matter. Even if the proposed amendment did have statutory support and was adopted, new regulations regarding a communication screen between Staff hearing officers and other Board Staff should be proposed for comment.[2] At a minimum, the Board should seek counsel from the State Ethics Commission to insure Board Staff is in full compliance with the ethics and *ex parte* rules of the State.

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[2] See In re Petition for Review of Opinion No. 583 of Advisory Committee on Professional Ethics, 107 N.J. 230 (1987).

New Jersey Courts and the Legislature have been clear that an inherent bias or conflict exists when agency employees sit as hearing officers and adjudicate contested matters. Rate Counsel contends that the proposed amendment to N.J.AC. 14:1-1.3 directly conflicts with New Jersey statutes and case law. The change should not be adopted.

Amendments to N.J.A.C. 14:1-8.1and N.J.A.C. 14:1-9.1

In this proposal, BPU seeks to add language that permits Board Staff, in place of the Board, to make the initial determination of whether a matter is a contested case and this "initial determination" is then subject to review by the Board. Rate Counsel opposes the proposed amendment to N.J.A.C. 14-1:8.1(a) and the corresponding change to N.J.A.C. 14:1-9.1 because delegating to Board Staff the decision of whether the case is contested conflicts with the New Jersey Supreme Court's interpretation of the APA and an OAL regulation.

Shortly after the OAL was created, the New Jersey Supreme Court had an opportunity to analyze various aspects of the APA and opined in part:

> N.J.S.A.52:14F-7(a) provides that 'Nothing [in the APA] shall be construed to deprive the head of any agency of the authority....to determine whether a case is contested'.... It is the agency head who determines initially whether a case is contested and, if so, whether the case should be sent to the OAL for an adjudicatory hearing to be conducted by an administrative law judge.
> In re Uniform Admin. Proced. Rules, 90 N.J. 85, 104- 105 (1982).

Thus, it is the agency head, here the Board, that determines whether a case is contested. There is no basis in the APA to delegate that authority to the BPU staff. Moreover, the proposal conflicts directly with an OAL rule. N.J.A.C.1:1-4.1(a) provides:

> After an agency proceeding has commenced, the agency head shall promptly determine whether the matter is a contested case. If any party petitions the agency head to decide whether the matter is contested, the agency shall make such a determination within 30 days from receipt of the petition and inform all parties of its determination.

In the event of a conflict between the OAL rules and any relevant agency rule, the OAL rules prevail except where agency rules incorporate statutory requirements. N.J.A.C. 1:1-1.1(b). In addition, the OAL acquires jurisdiction over a matter "only after it has been determined to be a contested case by an agency head and has been filed with the [OAL]." N.J.A.C. 1:1-3.2(a).

If this proposed amendment is adopted, the decision of whether the case is contested would no longer be made by the Board. The determination would be made by Board Staff instead of the Board itself. That practice does not allow the Board to consider all the relevant facts and issues when making that determination and is therefore contrary to applicable statutory and regulatory law.

Proposed Additions to N.J.A.C. 14:1-5.6(k)

Rate Counsel is not opposed to the proposed changes to this section, but rather proposes that the Board add an additional subsection. Rate Counsel recommends that conveyed properties where environmental remediation of manufactured gas plants ("MGPs") has occurred should be subject to the requirements of N.J.A.C. 14:1-5.6(a) which require the utility to file a formal petition to the Board to obtain approval for the proposed sale or conveyance of the property and not qualify under the exemptions in N.J.A.C. 14:1-5.6(c), (d) or (e) for properties conveyed in the "ordinary course of business" as explained at N.J.A.C. 14:1-5.6(k). Under the current and proposed rule, MGP property can be exempted from the requirements regarding petition to the Board and inaccurately qualify as a conveyance within the "ordinary course of business" if it was conveyed for less than $500,000 or if it qualifies under another technical exemption of N.J.A.C. 14:1-5.6.

The conveyance of this property is not within the "ordinary course of business," which only requires utility notice of the conveyance and not a petition, because the cost to remediate

the property is subsidized by ratepayers. Any transference of the property, even if it is less than the $500,000 threshold specified by N.J.A.C. 14:1-5.6(d), must be petitioned to the Board and Rate Counsel for approval to ensure that the sale is appropriately reflected as a credit to ratepayers. In addition, Rate Counsel should be notified prior to the conveyance of MGP properties since the utility retains potential liability for additional remediation or other environmental matters even after the property is sold. MGP properties could contain residual contamination that make conveyance for some uses inappropriate.

Therefore, Rate Counsel proposes the additional language noted in bold below at N.J.A.C. 14:1-5.6(a) which states "Petitions for the approval of the sale, conveyance or lease of real or personal property, or the granting of an easement, or like interest therein as required by law, **or for property which was the site of a remediated manufactured gas plant** shall conform to the provisions of...." Rate Counsel also proposes an additional subsection at (a)(16) which would read "**16. A copy of all petitions regarding property that was a remediated manufactured gas plant shall be submitted to the Division of Rate Counsel.**"

Proposed New Additions to N.J.A.C. 14:1-5.16

Rate Counsel agrees that this section permitting interested parties to petition for rulemaking should be added to the chapter, but the Board's proposal does not include the new language proposed by the OAL to the companion rule, at N.J.A.C. 1:30-4.1[3] which allows petitions to be filed, in addition to hard copy, by email and requires agencies to publish on its website each petition for rulemaking. The rule was proposed for amendment by the OAL to comply with 2014 amendments to the APA which encouraged the use of the internet and electronic communication in the rule-making process. The OAL stated:

[3] This proposal appeared in the November 17, 2014 New Jersey Register, 46 N.J.R. 2221(a) but has not yet been adopted.

> "The [2014 amendments to the APA changed] the petition for rulemaking requirements at N.J.S.A. 52:14B-4(f) to eliminate the requirement for agencies to prescribe by rule the procedure for submission of a petition, providing instead that a petition may be submitted to an agency through mail, e-mail, electronic mailing list, or any other means. The proposed amendments to N.J.A.C. 1:30-4.1(a) and (b) incorporate these statutory changes. ... Proposed new N.J.A.C. 1:30-4.1(d) reflects the new requirement at N.J.S.A. 52:14B-3(4) for agencies to publish on their websites each petition for rulemaking received. In order to establish a reasonable time frame for them to do so, the new subsection requires such publication to occur no later than the date of publication of the notice of receipt of the petition in the New Jersey Register under N.J.A.C. 1:30-4.1(c). 46 N.J.R. 2221(a)

To comply with the 2014 amendments to the APA, Rate Counsel recommends identical language additions at N.J.A.C. 14:1-5.16(a), (b), and (d) to those proposed for N.J.A.C. 1:30-4.1(a), (b) and (d) respectively at 46 N.J.R. 2221(a). In addition, Rate Counsel proposes language which specifies that Rate Counsel will receive a hard copy of all petitions for rulemaking received at the Board as well. The language proposed to be added at the end of N.J.A.C. 1:30-4.1(a) is as follows: "Such petition may be submitted to an agency through mail, email, or, if designated to receive message, electronic mailing list or through any other means." 46 N.J.R. 2221(a). Rate Counsel also requests additional language added to N.J.A.C. 14:1-5.16(a) to read "A copy of each petition for rulemaking shall be filed by mail or hand-delivery at the Division of Rate Counsel, 140 E. Front St., 4th Floor, P.O. Box 003, Trenton, New Jersey 08625." Additionally, in the OAL's rule proposal, the word "submission" was deleted in the first sentence of N.J.A.C. 1:30-4.1(b) and the subsection N.J.A.C. 1:30-4.1(d) was added to read: "An agency shall publish on its Internet website each petition for rulemaking received, no later than the date of publication for the notice on receipt of the petition under (c) above." Ibid.

Rate Counsel thanks the Board for this opportunity to submit these comments. Thank you for your consideration and attention to this matter.

Respectfully submitted,

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