

August 18, 2014

**VIA HAND DELIVERY AND E-MAIL**

Kristi Izzo, Secretary of the Board  
New Jersey Board of Public Utilities  
44 South Clinton Avenue  
9<sup>th</sup> Floor  
P.O. Box 350  
Trenton, New Jersey 08625-0350

**Re: *In the Matter of the Board's Review of the Applicability and Calculation of a Consolidated Tax Adjustment***  
**BPU Docket No. EO12121072**

Dear Secretary Izzo:

The New Jersey Utilities Association (NJUA) hereby provides this response to the "Notice of Opportunity to Provide Additional Information" dated June 18, 2014 in the above referenced docket. An additional ten copies of this letter are enclosed. An electronic copy of these comments has also been provided to [rule.comments@bpu.state.nj.us](mailto:rule.comments@bpu.state.nj.us)

On June 18, 2014, the New Jersey Board of Public Utilities (Board) requested written comments on its proposed modification of the Board's consolidated tax adjustment (CTA) policy. Board Staff (Staff) has proposed that the Board continue application of the CTA with the following modifications: Staff proposes that the current CTA policy remain in effect except as amended by the following: 1) the revised time period for the calculation of the savings would look back 5 years from the beginning of the test year; 2) the savings allocation method would allow 75% of the calculated savings to be retained by the company and 25% of the calculated savings to be allocated to the ratepayers; and 3) transmission assets of the electric distribution companies would not be included in the calculation of the CTA.

The NJUA, on behalf of its participating member companies (Companies),<sup>1</sup> sincerely appreciates the willingness of the Board to continue its consideration of this issue. Further, the NJUA is sincerely grateful to Staff for conducting a thoughtful and intensive review of the Board's CTA policy and for considering the comments of all

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<sup>1</sup>The NJUA member companies participating in this submission are Aqua New Jersey, Inc., Atlantic City Electric Company, Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas Company, Jersey Central Power & Light, New Jersey Natural Gas Company, Public Service Electric & Gas Company, South Jersey Gas Company, Rockland Electric Company, Atlantic City Sewerage Company, Middlesex Water Company, New Jersey American Water, Gordon's Corner Water Company, Shorelands Water Company, United Water ("Companies"). The Companies reserve the right to assert arguments separately in this proceeding; by joining in this filing such Companies do not waive their rights to file additional material and participate individually in this proceeding. NJUA is the New Jersey statewide trade association for investor-owned utilities that provide essential water, wastewater, electric, natural gas, and telecommunications services 24 hours a day, 7 days a week, 365 days a year.

interested parties, including our own. It is apparent that Staff has undertaken careful deliberation throughout this process and thus has proposed a modification of the Board's CTA policy that is seemingly less onerous than the current policy. NJUA views the proposal as a step in the right direction and as recognition by Board Staff that the current policy is flawed. Nevertheless, the Companies continue to hold that application of any CTA in rate setting proceedings is improper. As demonstrated in the attached white paper, the CTA is not applied in the vast majority of regulatory jurisdictions and, in recent years, has been explicitly rejected by a number of regulatory commissions where application of a CTA had previously been considered. Most notably, the CTA may negatively impact investment in utility infrastructure.

### **Summary of Rationale for Rejecting the CTA**

NJUA has noted in the attached white paper that a number of regulatory commissions have rejected implementation of a CTA. For example, the Minnesota Public Utilities Commission (MPUC) has consistently rejected the CTA on multiple grounds. Notably, the MPUC held in 2006 that its rejection was consistent with cost and benefit allocation principles applied in previous orders in which it rejected the CTA. Those principles, as asserted by the MPUC, were adopted, not only in recognition of utility burdens, but also to protect ratepayers from the risks associated with utility diversification into unregulated enterprises.<sup>2</sup>

Certainly, the Board not only has a rational basis upon which to base its rejection of a CTA, but it has the legal authority to do so. While it has been argued that an adjustment must be made as a "well-settled" matter of law,<sup>3</sup> there exists no statute or regulation directing the Board to apply the CTA. Accordingly, a reading of the relevant case law does not reveal a New Jersey court imposed mandate regarding the application of a CTA. The leading cases concerning the application of a CTA were decided a number of years ago under a tax regime that is different from that which utility companies are subject today. Notably, the most recent of those cases in which a CTA was upheld was decided 35 years ago.<sup>4</sup> While the cases cited herein have upheld the Board's authority to provide for the application of a utility's tax savings resulting from a consolidated tax filing, not one included a mandate or established a standard related to such an application. Rather, the courts deferred to the Board's discretion in regard to ratemaking, rather than imposing a duty.

### **Financial Impact of a CTA**

At a time when the State is focused on increasing investment for infrastructure resilience, the CTA reduces rate base and negatively impacts a utility's ability to attract investment. Additionally, application of a CTA may result in adjustments that appear to have little or no relationship to the actual current and future tax situation of the utility, potentially resulting in unintended consequences and negative impacts on utility credit quality and cost of capital.

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<sup>2</sup> *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-002/GR-05-1428 (pps. 25-26) (September 1, 2006).

<sup>3</sup> Board Staff Initial Brief, 32, BPU Docket No. ER11080469, *In the Matter Of 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*.

<sup>4</sup> See *New Jersey Power & Light Company*, 9 N.J. 498, 89 A.2d 26 (1952); *Lambertville Water Company*, 153 N.J. Super. 24, 378 A.2d 1158 (1977); *Toms River Water Company*, 158 N.J. Super. 57, 385 A.2d 862 (1978) and *New Jersey Bell Telephone Company*, 162 N.J. Super. 60, 392 A.2d 216 (1978).

**Summary**

In closing, the Companies are united in their acknowledgment of Staff's diligent efforts in reviewing this matter, and are appreciative that Staff has clearly considered our prior comments. While Staff's proposal certainly appears, under most circumstances, to be less onerous than the current policy, the fact remains that New Jersey is one of a very limited number of regulatory jurisdictions (3 of 53) that currently applies a comprehensive CTA. In addition, application of a CTA runs counter to traditional rate making principles and stifles investment in the State's infrastructure.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Hendry", with a large, stylized flourish at the end.

Andrew D. Hendry  
President & CEO