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July 24, 2014

By Hand Delivery

Ms. Kristi Izzo, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

Re: I/M/O the Verified Petition of Jersey Central Power & Light Company for Review and Approval of Increases in and Other Adjustments to its Rates and Charges for Electric Service, and for Approval of Other Proposed Tariff Revisions in Connection Therewith; and for Approval of an Accelerated Reliability Enhancement Program (“2012 Base Rate Filing”)
BPU Docket No. ER 12111052
OAL Docket No. PUC 16310-12

Dear Secretary Izzo:

With this Motion, the New Jersey Division of Rate Counsel (“Rate Counsel”) respectfully requests that the Board of Public Utilities (“BPU” or the “Board”) issue an Order directing that the current rates of Petitioner Jersey Central Power & Light Company (“JCP&L” or the “Company”), under review as part of JCP&L’s 2012 Base Rate Filing, be continued on a provisional basis as of August 1, 2014. Rate Counsel makes this request based on the Board’s

general rate setting authority to ensure that rates charged to New Jersey customers are just and reasonable. N.J.S.A. 48:2-21.¹

Although Rate Counsel recognizes that the relief sought with this Motion, setting current rates as provisional with an effective date for new rates before those rates have been approved by Board Order, is not usual base rate case procedure, Rate Counsel believes that the facts in this case warrant such extraordinary relief. Rate Counsel filed its motion alleging the Company was over-earning and asking for this base rate case almost three years ago. Evidentiary hearings took place last September with Initial Briefs filed on January 27, 2014 and Reply Briefs filed on February 24, 2014. It was not until June 30, 2014 that ALJ McGill notified the parties that the record was closed as of that date. At this point, it looks like this case may not be finally resolved until the end of this year, even though the record established a year ago demonstrates, as recognized by Board Staff, that the Company is significantly over-earning.

For too long now JCP&L's ratepayers have been waiting for the rate decrease justified by the evidentiary record. The Board should exercise its broad authority under N.J.S.A. 48:2-21 and set August 1, 2014 as the effective date for JCP&L's new rates with any rates collected under the current tariff collected on a provisional basis subject to refund until the new rates are established in a final Board order. To be clear, Rate Counsel is not suggesting that the Board change the Company's rates on August 1, 2014. Rate Counsel asks only that from that date, rates collected under the current tariff become provisional subject to refund until a Final Order has been issued and more reasonable rates are established.

¹ Rate Counsel files this motion directly to the Board pursuant to the Board's statutory authority to set rates and in order to expedite this process.

STATEMENT OF FACTS

This case was initiated by a Petition filed by Rate Counsel on September 7, 2011. In that Petition, Rate Counsel noted that it had been more than eight years since a full base rate case and more than six years since the Board, in a Phase II proceeding, set JCP&L's current rates for electric service.² Attached to that Petition was the Certification of Rate Counsel expert Robert J. Henkes in which Mr. Henkes stated that JCP&L "may be in a substantial overearnings position" based on a comparison of the Company's actual 2010 earnings with JCP&L's adjusted BPU-authorized rate of return.³ Accordingly, in that Petition, Rate Counsel requested that the Board direct JCP&L to file a base rate case with an historical 2010 test year, "in order to expedite the proceeding."

By Order dated July 31, 2012, the Board directed JCP&L to file a base rate case using an historical 2011 test year on or before November 1, 2012.⁴ The Board later extended the filing date to November 30, 2012. JCP&L filed the BPU-mandated base rate case petition and the Board transmitted the matter to the Office of Administrative Law ("OAL") on December 10, 2012 for hearing and initial decision.

Evidentiary hearings were scattered throughout September and October 2013 with a final hearing on depreciation issues held on November 19, 2013. Initial Briefs were filed on January 27, 2014 and Reply Briefs were filed on February 24, 2014. Rate Counsel, Board Staff, AARP and Walmart all filed briefs arguing that the record supported a substantial rate decrease. Rate

² I/M/O the Verified Petition of Jersey Central Power & Light Company for Review and Approval of an Increase in and Adjustments to its Unbundled Rates and Charges for Electric Service, and for Approval of Other Proposed Tariff Revisions in Connection Therewith, et al., BPU Docket No. ER02080507 et al., Order dated May 31, 2005 ("2005 Order") (emphasis added).

³ Division of Rate Counsel Petition dated Sept. 7, 2011, p.3.

⁴ I/M/O The Petition of Rate Counsel Requesting a Board Order Directing Jersey Central Power and Light Company to File a Base Rate Case Petition and Establishing a Test Year of 2010, BPU Docket No. EO11090528, Order dated July 18, 2012, p. 12 ("2012 Order").

Counsel called for a rate reduction of approximately \$215.0 million and BPU Staff largely agreed with Rate Counsel, calling for a \$207.4 million rate reduction.

On April 10, 2014, 45 days after the filing of the Reply Briefs, ALJ McGill directed that the parties be available for a conference call. On April, 17, 2014, a conference call was held with ALJ McGill regarding the completeness of the record and whether there was sufficient evidence for the ALJ to make a recommendation to the Board on all issues presented. On May 21, 2014, as directed by ALJ McGill, JCP&L and Rate Counsel filed letters with the ALJ identifying the portions of the evidentiary record that relate to the amortization period and appropriate carrying charge to be applied to the recovery of the 2011 Major Storm costs. In that April 22 letter, Rate Counsel reminded the ALJ that, as demonstrated during the evidentiary hearings and in briefs, JCP&L's ratepayers were paying unjust and unreasonable rates and requested that the ALJ close the record and issue an Initial Decision "as expeditiously as possible." On June 30, 2014, more than four months after final briefs were filed and three years after Rate Counsel first filed a Petition demonstrating that JCP&L was over-earning, ALJ McGill notified the parties that the record was closed as of that date.

ARGUMENT

In New Jersey, the Board is vested with broad powers over all aspects of public utility activity, including the power to fix the rates which a utility may charge its customers. N.J.S.A. 48:2-21. The Board must ensure that a utility's rates are just and reasonable for both ratepayers and shareholders. JCP&L customers have been denied this protection and are still paying rates identified as unreasonable and excessive almost three years ago.

This Board-ordered base rate case has dragged on, extensions have been granted at every step in the proceeding, from the postponed filing of JCP&L's Petition to the extension of time granted for filing post hearing briefs. JCP&L refused to file the necessary depreciation study with its Petition, forcing Rate Counsel to seek Board intervention, and pushing evidentiary hearings into November of 2013. The ALJ did not close the record in the proceeding until four months after the filing of post hearing briefs.

Because of the extraordinary length of time that this base rate case has taken and because ratepayers continue to pay excessive rates for electric service, the Board should exercise its broad regulatory authority and issue an Order setting the effective date for any Board-authorized change in JCP&L's rates for electric service to August 1, 2014, allowing for a refund to JCP&L's customers if the Board finds that JCP&L's current rates are excessive. Rate Counsel is not requesting that JCP&L's rates be changed on August 1, 2014 but only that new rates should become effective on August 1, 2014. On August 1, 2014, the Company's current rates would become provisional until the Board's Final Order is issued and reasonable rates are established, subject to refund if the Board lowers the Company's rates.

The Board's broad authority to set the rate effective date has been recognized by the New Jersey Supreme Court.⁵ In a base rate case proceeding, Lambertville Water Company requested a retroactive rate effective date, one that related back to the end of the nine month suspension period.⁶ The Board did not agree with Lambertville's proposal and set the effective date of the Board authorized increase beyond the end of the suspension period. Lambertville Water challenged the Board's authority to do so.⁷ The Appellate Division agreed with the water company and held that the new rates should have been made effective as of the end of the suspension period. The Supreme Court reversed the Appellate Division and held that when the Board authorizes a rate increase, other than the rate increase proposed by the utility, the Board "has broad discretion, based on circumstances, to fix an effective date for such increase."⁸ Accordingly, based on the extraordinary circumstances surrounding this case, Rate Counsel believes that the Board should exercise its authority to set an August 1, 2014 effective date for JCP&L's rates ultimately found to be reasonable by the Board in its Final Order.

By setting an effective date for the new rates before the new rates are set out in a final Board Order, the Board would be providing to ratepayers a remedy similar to the remedy provided to utilities for "regulatory lag." New Jersey courts have held that, as a remedy for regulatory lag, a utility could make the proposed rates effective subject to certain conditions.⁹ The new rate, implemented by the utility prior to any finding that the rate is just and reasonable, is provisional, subject to refund. After the Board makes its final determination, the utility is required to refund any excess income to the affected customers.

⁵ I/M/O the Revision of Rates Filed by Lambertville Water Company Increasing Its Rates for Water Service, 79 N.J. 449, 457 (1979).

⁶ N.J.S.A. 48:2-21(d) empowers the Board to suspend the effect of a proposed rate increase for up to eight months.

⁷ I/M/O the Revision of Rates Filed by Lambertville Water Company Increasing Its Rates for Water Service, 153 N.J. Super 24 (1977)

⁸ Lambertville Water Company, 79 N.J. at 457.

⁹ I/M/O the Revision of Rates Filed by Toms River Water Company Increasing Its Rates for Water Service, 82 N.J. 201, 211 (1980)

New Jersey ratepayers should be granted similar protections. As was established at the evidentiary hearings, JCP&L customers are paying unjust and unreasonable rates. Proofs at the hearing established that JCP&L's ratepayers are entitled to a \$200 million rate decrease. Board Staff concurred with this finding in their Initial Brief, filed in January of this year. And yet JCP&L's ratepayers are still paying unjust and unreasonable rates, and will continue to do so until the Board issues its Final Order. There is no justifiable reason to compensate utilities for regulatory lag but not ratepayers in circumstances such as those in this case. In the face of a pending rate decrease, ratepayers are left without a remedy for "regulatory lag" unless the Board exercises its discretion to protect them from these ongoing unreasonable rates.

In fact, excessively long rate proceedings was one factor listed by Congress when modifying the Federal Power Act (FPA) to allow for refunds when rates under review are determined to be excessive. Section 205 of the FPA governs applications by utilities for increases in rates, section 206 allows FERC on its own motion or pursuant to a complaint to set just and reasonable rates if it finds that the rate currently in effect is excessive. Under Section 205, a rate increase will go into effect automatically if the Commission fails to issue a final decision in a timely manner. Originally there was no parallel remedy under Section 206. Section 206 was subsequently modified to address "unjust and unreasonable" rates by providing that when FERC has determined a rate to be unjust and unreasonable, it "may order refunds of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force." 16 U.S.C. § 824e(b). At the time this amendment to the FPA was proposed, the Senate Report noted:

Resolution of section 206 proceedings requires two years on average. One probable reason for the longer period needed to resolve such proceedings is that

public utilities have no incentive to settle meritorious section 206 complaints since any relief is prospective. Under present law public utilities keep revenues collected during the pendency of a section 206 proceeding, even if those revenues are subsequently determined to be excessive. [The proposed amendment] would correct this problem by giving FERC the authority to order refunds, subject to certain limitations.¹⁰

Thus, Congress recognized the need to extend to captive ratepayers the same protections extended to public utilities, and authorized FERC to order refunds to ratepayers of amounts collected by the utility charging excessive rates. New Jersey should offer ratepayers similar protections.

In sum, the Board has a statutory obligation to ensure that New Jersey ratepayers are paying just and reasonable rates.¹¹ And yet, almost three years after Rate Counsel first raised concerns that JCP&L was substantially over-earning, JCP&L ratepayers are still paying these excessive rates. As was established at the evidentiary hearings, JCP&L's ratepayers are not paying just and reasonable rates. As shown during the evidentiary hearings and in briefs filed by both Rate Counsel and Board Staff, JCP&L's customers are entitled to an annual rate decrease of approximately \$200 million. The Board should therefore exercise its discretion and direct the

¹⁰ Regulatory Fairness Act, P.L. 100-473, S. Rep.No. 491, 100th Cong., 2ND Sess. 1988, USCCAN 2684, 1988 WL 169844.

¹¹ In re Redi-Flo Corp., 76 N.J. 21, 39 (1978) (“N.J.S.A. 48:2-13 charges the Board with the task of overseeing the operation of all public utilities in accordance with the purposes of the Public Utilities Act, and foremost among these responsibilities is its duty to ensure that rates are not excessive.”)

Company to set a new rate effective date of August 1, 2014 with the Company's current, unreasonable rates becoming provisional, subject to refund.

Respectfully submitted,

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DIRECTOR, DIVISION OF RATE COUNSEL

By: s/ Diane Schulze
Diane Schulze
Assistant Deputy Rate Counsel

c: Honorable Dianne Solomon, President (via hand delivery)
Honorable Jeanne M. Fox, Commissioner (via hand delivery)
Honorable Joseph L. Fiordaliso, Commissioner (via hand delivery)
Honorable Mary-Anna Holden, Commissioner (via hand delivery)
Honorable Richard McGill, ALJ (via UPS Overnight Mail)
Service List (Via Electronic & USPS Regular Mail)