



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF NEW)
JERSEY-AMERICAN WATER COMPANY, INC.) ORDER DENYING MOTION TO
FOR APPROVAL OF INCREASED TARIFF) ISSUE ORDER REJECTING THE
RATES AND CHARGES FOR WATER AND) COMPANY'S PROPOSED
SEWER SERVICE, CHANGE IN DEPRECIATION) PROVISIONAL RATES
RATES AND OTHER TARIFF MODIFICIATIONS) DOCKET NO. WR17090985
) OAL DOCKET NO. PUC 14251-2017S

Parties of Record:

Ira G. Megdal, Esq., Cozen O'Connor, PC, on behalf of New Jersey-American Water Company, Inc., Petitioner
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
William R. Holzapfel, Esq., on behalf of the City of Elizabeth, Intervenor
Jay L. Kooper, Esq., Middlesex Water Company, Intervenor
Stephen B. Genzer, Esq., Saul Ewing Arnstein & Lehr, on behalf of Aqua NJ, Intervenor
Bradford M. Stern, Esq., Rothfelder Stern, LLC, on behalf of Phillips 66 Company, Cogen Technologies Linden Venture L.P., Johanna Foods, Inc., Princeton University and Rutgers, The State University of New Jersey, Intervenor
Anthony R. Francioso, Esq., Fornaro Francioso LLC, on behalf of Mount Laurel Township Municipal Utilities Authority, Intervenor

BY THE BOARD:

BACKGROUND

On September 14, 2017, New Jersey-American Water Company ("Company" or "Petitioner"), a public utility of the State of New Jersey subject to the jurisdiction of the Board of Public Utilities ("Board") filed a petition pursuant to N.J.S.A. 48:2-18, N.J.S.A. 48:2-21, N.J.S.A. 48:2-21.1,¹ N.J.A.C. 14:1-5.7, and N.J.A.C. 14:1-5.12, seeking to increase rates for water and wastewater service. The combined proposed rates would increase the Company's annual revenues by

¹ The Board notes that although the petition cites N.J.S.A. 48:2-21.1, the petition does not include a request for an adjustment of rates during the pendency of the hearing.

\$129.3 million or approximately 17.54% over pro-forma present rate revenues. Petitioner serves approximately 631,000 water and fire service customers and approximately 41,000 sewer service customers. The increase in rates was proposed to become effective on October 15, 2017.²

According to the petition, the rate increase is required to: (a) establish an income level that will permit the Company to finance essential and continuing plant investment; (b) permit the Company to earn a fair and adequate rate of return on its net investment in used and useful property; (c) establish rates which will be sufficient to enable the Company, under efficient and economical operation, to maintain and support its financial integrity and to raise such funds as may be necessary for the proper discharge of its public duties; (d) provide earnings sufficient to attract investors and provide sufficient cash flow to fund the Company's operations; and (e) enable the Company to continue to provide safe, adequate and proper service to its customers.

On September 27, 2017, the Board transmitted this matter to the Office of Administrative Law ("OAL") and on October 20, 2017, the Board issued an Order suspending the Company's proposed rate increase until February 15, 2018. The matter was assigned to Administrative Law Judge ("ALJ") Jacob S. Gerstman. On December 18, 2017, ALJ Gertsman issued a Prehearing Order which scheduled evidentiary hearings on June 11, 13, 14, 18 and 21, 2018. On January 31, 2018, the Board entered an Order further suspending the Company's proposed rate increase until June 15, 2018.

The parties engaged in various discovery and settlement conferences during the pendency of this matter, but were unable to reach a resolution. As such, the Company sought to implement provisional rates after the expiration of the suspension period. On May 15, 2018, the Company filed its Rate and Refund Plan for Provisional Rates, pursuant to N.J.A.C. 14:1-5.12(f)(3), and proposed tariff with the Board. The Rate and Refund Plan for Provisional Rates described the tariff and rate design, which provide for an implementation a provisional rate increase, subject to refund, of approximately \$75 million or 12.3%, effective June 15, 2018³.

The Company also indicated in the Rate and Refund Plan for Provisional Rates that the Refund of Over-Recovery and Interest would be calculated for each customer, as applicable, for the period provisional rates were effective. The Company represented that the calculation of the difference between provisional and final rates would be prepared for each customer bill and each applicable charge within the bill, and the interest on the over-recovery balance would be calculated consistent with N.J.A.C. 14:3-13.3. The Rate and Refund Plan for Provisional Rates further indicated:

² On September 22, 2017, the Company filed a letter with the Board via electronic mail stating that it will not implement rates on an interim basis prior to the effective date of the Board's Suspension Order resulting from the Board's October 20, 2017 Agenda Meeting. However, the Company stated that it did not waive its "right to implement the proposed rates at the conclusion of the eight (8) month suspension period on June 15, 2018 should the Board not issue a final Decision and Order by that date." Id.

³ The Company's tariff indicates that the provisional rates were implemented on June 15, 2018. A copy of the tariff is available on the Company's website at https://dnnh3qht4.blob.core.windows.net/portals/1/Custom%20Service%20&%20Billing/Rates/Rate_Exhibits_and_Calculations.pdf?sr=b&si=DNNFileManagerPolicy&sig=2TAwDIUI3c3TGTxQV3HoGPtostCwY1nntFCVhm0zml%3D.

The Company will then allocate the total interest accrued on the over-recovery across the customer refunds based on the proportion of each customer's refund to the total Company over-recovery. The customer refund will be reflected as a unique line item on applicable customer bills. Should a customer who has been subject to provisional rates terminate service before the refunds are issued, and if the customer does not have an outstanding balance due, the customer will receive a check for the amount of the refund.

[Id. at 1.]

Pursuant to N.J.A.C. 14:1-5.12(f)(1)(ix), the Company stated it would send on May 11, 2018 a direct mailer to affected customers describing the implementation of provisional rates and the refund process. The Company also posted the direct mailer on its website. The Company stated that when final rates are effective, the Company will update its website with the relevant information, as well as provide a notification for affected customers describing the final rates, with an update on the refund process.

On May 23, 2018, the Company filed a certification indicating that it had complied with the requirements of N.J.A.C. 14:1-5.12(f). Board Staff did not raise objections, as permitted under N.J.A.C. 14:1-5.12(g), with regard to the Company's compliance with N.J.A.C. 14:1-5.12(f).

The Motion

On May 18, 2018, the New Jersey Division of Rate Counsel ("Rate Counsel") filed a letter brief in support of Motion to Issue Order Rejecting Company's Proposed Provisional Rates ("Letter Brief"). Rate Counsel maintains that allowing the Company to implement any provisional rate in this case would be unjust and unreasonable. Therefore, Rate Counsel requests that the Board exercise its authority and discretion to reject the Company's proposed provisional rates. (Letter Brief at 2).

In support of its motion, Rate Counsel asserts that the Board is vested with the authority and discretion to deny the implementation of provisional rates when it is unjust and unreasonable. Citing to Toms River Water Co. v. N.J. Bd. of Public Util. Comm'rs, 82 N.J. 201 (1980) ("Toms River"), Rate Counsel states that the New Jersey Supreme Court has stressed the importance of developing procedures that "strike an equitable balance between the interests of the utility and its consumers when 'regulatory lag' threatens the fairness of the ratemaking process." (Letter Brief at 4, citing Toms River, supra, 82 N.J. at 212.) Rate Counsel adds that the Court held that the Board "must devise appropriate administrative mechanisms for regulating utilities which elect to implement proposed tariffs at the end of the suspension period." Ibid. In adopting the provisional rate regulation, Rate Counsel claims that the Board intended to satisfy these obligations, setting for specific requirements for notice and implementing and retaining the discretion to deny provisional rate increases when appropriate. (Letter Brief at 5, citing N.J.A.C. 14:1-5.12(f).) Rate Counsel points out that the Board made clear that "No provision of these amendments waives the Board's statutory authority to ensure just and reasonable rates" when responding to comments with regard to the proposed regulation. (Letter brief at 5, citing 50 N.J.R. 625(b), response to Comment 43.)

Rate Counsel first argues that the procedural history of this matter compels the Board to exercise its discretion. Rate Counsel states that the Company chose to file with only five (5) months of actual data, so it would be impossible to litigate this matter with full twelve (12) month

test year data by the end of the eight (8) month suspension period set forth in N.J.S.A. 48:2-21. Because the Company chose to file with only five (5) months of actual data, precluding resolution of this matter in nine (9) months, there is no regulatory lag. The regulation was intended to address regulatory delay not within the control of a utility, not to provide the utility relief from its own choices, according to Rate Counsel. Rate Counsel argues that allowing provisional rates in this matter is therefore contrary to the policy goal of addressing regulatory lag and undermines the fairness of the ratemaking process. Letter Brief at 5-6.

Rate Counsel next argues that allowing the Company to implement provisional rates in this case would be contrary to the long established jurisprudential policy favoring settlement. (Letter Brief at 6, citing Puder v. Buechel, 183 N.J. 428,437 (2005).) Rate Counsel also argues that if the Board permits the Company to implement provisional rates, then the Company will be evading the consequences of its decision to litigate, thereby encouraging it, as well as all other utilities, to forego settlement in the future. Rate Counsel further states that the Board should expect this tactic to be used more frequently, which will significantly increase the number of cases that will not settle. (Letter Brief at 6.)

Lastly, Rate Counsel argues that the Company's plan to refund over-collections is woefully inadequate. According to Rate Counsel, the Company has failed to specify when the over-collection will be refunded, and how its calculations of over-recovery will be reviewed and verified by the Board and Rate Counsel in accordance with N.J.A.C. 14:1-5.12(h). (Letter Brief at 7.)

Rate Counsel also identifies several other issues with the practical implementation of the provisional rate regulation, including that customers whose cost of service may require no increase or a rate decrease in final base rates will still experience a provisional rate increase because the regulation requires the provisional rates to be implemented across the board on an equal basis. Rate Counsel states that this could have disproportionate impacts on municipal budgeting and on certain customers that are already paying more than their fair share. Rate Counsel asserts that the Company's plan should have included a discussion of how it will address these issues. (Letter Brief at 7-8.)

Rate Counsel reiterates that the Board has an over-arching obligation to ensure that the ratemaking process is fair and that rates are "just and reasonable" which cannot be abrogated by a regulation. N.J.S.A. 48:2-21(b)(1). (Letter Brief at 8.) While Rate Counsel recognizes that the statute does give the utility the option of implementing a provisional rate at the end of the suspension period, subject to refund and interest as indicated by Toms River, supra, it states the Board specifically reserved its authority under the regulations to reject proposed provisional rates, and the statute also provides that any adjustment of rates during the pendency of a hearing "shall at all times be subject to change through the proceedings provided for by this chapter, or through negotiation and agreement under this section," citing N.J.S.A. 48:2-21.1. (Letter Brief at 8.) Rate Counsel emphasizes that the Board should exercise this authority in this instance by rejecting the proposed provisional rates and the Company's refund plan. Ibid.

The Company's Opposition

On May 29, 2018, the Company filed a letter brief in opposition to Rate Counsel's motion ("Opposition Letter Brief"). The Company first alleges that Rate Counsel's Motion is an attempt to reargue issues that it raised, and which the Board rejected, during the stakeholder and rulemaking process amending N.J.A.C. 14:1-5.12. (Opposition Letter Brief at 1.) It states that

Rate Counsel opposed the proposed rules, and the Board addressed and rejected Rate Counsel's positions when it adopted the provisional rate rules, citing 50 N.J.R. 625(b) (2018). (Opposition Letter Brief at 1-3.)

The Company recognizes that Rate Counsel is entitled to its opinions, but notes that the Legislature, in enacting N.J.S.A. 48:2-21(d) has already decided that the Petitioner has the right to implement provisional rates. Citing to Toms River, supra, 82 N.J. at 211, the Company indicates that the New Jersey Supreme Court has already decided that it had the right to implement provisional rates. The Board has put in place a mechanism for the Company to do exactly what it plans to do on June 15, 2018. The Company claims this is not the proper forum for Rate Counsel to challenge NJAWC's implementation of provisional rates, and Rate Counsel's opportunity to challenge the rules has expired. (Opposition Letter Brief at 5.)

In addressing the notice requirements set forth by the regulations, the Company represents that it fulfilled all of the rules' notice and filing requirements. Citing to N.J.A.C. 14:1-5.12(f), the Company states that it complied with each requirement within the required timeframes. Regarding Rate Counsel's assertions that the refund plan is woefully inadequate and that the Company failed to provide detail on how it will accomplish the required refund, if necessary, the Company argues that there is no merit to these assertions, and that its refund plan met each of the requirements specified in the provisional rate rules and provided the Board with a step-by-step analysis of how NJAWC will provide refunds to customers, if necessary. (Opposition Letter Brief at 8-9.)

The Company further asserts that the Board's regulations provide that after filing of such certification, a utility may implement the provisional rate increase unless Board staff transmits written objections to the utility. According to the Company, Board Staff is the only party that may raise objections to a utility's plan to implement provisional rates under the regulations and Board Staff has not done so. (Opposition Letter Brief at 8-9.)

In addition, the Company argues that Rate Counsel's claim that there is no regulatory lag in this matter and, as such, the Company cannot implement the rates is without merit. Citing to the Elizabethtown Water Rate Case, BPU Docket No. WR8504330 (May 23, 1985), the Company avers that it is appropriate for a utility to file with five (5) months of actual data. Moreover, states the Company, the rule does not require the utility to demonstrate that there has been regulatory lag. The Company points out that more than nine (9) months have passed since its case was filed, the evidentiary hearings have not yet taken place, and, so, it is possible that a decision will not be made until the first quarter of 2019. (Opposition Letter Brief at 10-11.)

Rate Counsel's Reply

On June 4, 2018, Rate Counsel filed a letter reply ("Letter Reply") to the Company's opposition, claiming that it is not challenging the validity of the provisional rates rule, but rather the application of the rule to the facts of this matter. (Letter Reply at 2.) Rate Counsel states that this case presents the first opportunity for the Board to flesh out how its new regulations will be applied, but the Petitioner is arguing that the Board lacks discretion and Rate Counsel lacks standing to raise any issues with regard to the refund plan. Rate Counsel indicates that the Company is under the misimpression that Board Staff may object but only insofar as it believes the Company failed to meet the filing requirements set forth in the regulation. The fairness and efficiency of the administrative ratemaking process must still be maintained pursuant to Toms

River, supra, and Rate Counsel's motion is requesting that the Board ensure that issues of due process and fundamental fairness be applied. (Letter Reply at 2-3.)

Rate Counsel alleges that it has authority to raise the issues in this motion and the Board has authority to review the provisional rates and the Company's plan for implementation. (Letter Reply at 4-6.) Accordingly, the Company's argument, that "[t]he only objection that the Provisional Rate rules permit is one by the Staff of Board regarding an alleged failure to comply with the Rule's notice provisions," must be rejected. (Letter Reply at 7.)

Rate Counsel points out that under N.J.S.A. 52:27EE-48, it is the agency that may represent and protect the public interest. (Letter Reply at 4.) Rate Counsel asserts that it is also clear that the Board did not intend such a restrictive reading of its regulation and that it intended to maintain its overriding authority to ensure just and reasonable rates and fairness in the ratemaking process. Ibid. If, as the Company suggests, the intent was to exclude Rate Counsel, then it argues that the regulation would not satisfy the requirements of due process. Id. at 4-5, citing to N.J.S.A. 48:2-21. Rate Counsel states that the transcripts of the Board agenda meeting where the rule proposal was discussed confirm that nothing in the rule was intended to abrogate the Board's fundamental role in ensuring fairness and the justness and reasonableness of rates. Id. at 6.

Rate Counsel next argues that the Board should reject the refund plan filed by the Company in this matter. Id. at 7. Rate Counsel submits that allowing the provisional rates to take effect would be unjust and unreasonable and would violate principles of fundamental fairness. In addition, Rate Counsel maintains that the Company's proposed plan for the refund of any over-collections and interest is not sufficient and should be rejected. Ibid.

Rate Counsel reiterates that there was an insufficient amount of time to litigate the matter at the OAL and for the Board to review any decision from the OAL since the Company chose to file with only five (5) months of data. Id. at 8. While the Board may allow companies to file with "at least" five (5) months of actual data, Rate Counsel claims that this does not mean the Board cannot take that into account when reviewing the fairness of proposed provisional rates. Ibid., citing to In re Elizabethtown Water Company Rate Case, BPU Docket No. WR8504330 (May 23, 1985) ("Elizabethtown Water"). It would be entirely reasonable for the Board to harmonize the two rules with the goal of striking an appropriate and fair balance, particularly where, as here, the inability to resolve this matter within the suspension period is not due to any regulatory lag or any delay on the part of any other party. It is based solely on the decision of the Company to file its case in such a way that full test year actual data would not be available until seven (7) months into the nine (9) month suspension period. Id. at 8-9.

Rate Counsel recognizes that, once this matter is fully litigated, ratepayers will be entitled to refunds for any over-recovery with interest. Id. at 9. However, it states that this is insufficient to make ratepayers whole or to relieve them from the burden that comes with essentially requiring them to lend money to the utility for the interim period. Rate Counsel maintains that, based on the information that has been developed in discovery, this amount is still substantially more than what is likely to be supported by the record. Ibid. While the Legislature may have intended to allow the utilities to be relieved of the burden of regulatory lag, the purpose of the statute, and the Supreme Court's decision in Toms River, according to Rate Counsel, was to promote fairness in the ratemaking process, not to allow the Company to manipulate the process to obtain a forced loan from ratepayers. Ibid.

Rate Counsel submits that the Board should also deny the Company's proposed refund plan because it does not follow the requirements of the regulation "to the letter." Id. at 10. According to Rate Counsel, the regulation requires a detailed plan for how over-recoveries will be returned to ratepayers with interest "no later than the customer billing cycle 30 days after the effective date of the Board Order concluding the rate case." Ibid., citing to N.J.A.C. 14:1-5.12(h). Rate Counsel argues that the Company's plan does not indicate how it will meet that timeline or any dates whatsoever that will ensure this timeframe will be met, but merely indicates that the over-collection will be calculated. Letter Reply at 10. Rate Counsel claims that this is not the level of detail that should be required under the regulation and that the Company should be required to submit timelines to demonstrate that the refund dates will be met. Ibid.

Legal Services of New Jersey ("LSNJ") Motion to Intervene or Participate and Letter Brief in Support of Rate Counsel's Motion:

On June 15, 2018, LSNJ filed a motion with the Board to intervene or participate in this proceeding for the limited purpose of supporting Rate Counsel's motion to reject the Company's provisional rate increase. LSNJ claims its clients have an interest in the outcome of this case because low-income households across the state will face increased economic hardship and potential loss of basic water service if the Company's unapproved twelve percent (12%) rate increase goes forward. (Motion at 1). It argues low-income customers are especially vulnerable to high water charges, in part because they spend a greater proportion of their income on water service than higher-income households. LSNJ also states its clients' interests are different from those of any other party because no other party expressly focuses on the interests and concerns of the Company's low-income customers. LSNJ asserts it will add measurably and constructively to the scope of this case because of its policy expertise and experience in matters raising issues of particular importance to low-income utility customers. (Id. at 2).

In addition, LSNJ filed a letter brief in support of Rate Counsel's motion with the Board. LSNJ reiterated that the increase in rates would place the health and safety of low-income New Jersey residents at great risk. It claims many low-income households will lose their water service if a rate hike of this magnitude is imposed, even temporarily — and those that do manage to keep their service on will be able to do so only by making a forced low-interest loan to the Company, diverting funds that should be available to meet other pressing necessities. (Letter Brief at 1).

LSNJ adds that the concerns of low-income customers are partially acute in this matter, and a substantial number of New Jersey ratepayers live with the possibility of having to choose between food to eat and water for drinking and hygiene. (Id. at 2).

LSNJ requests that the Board exempt all low-income households that been identified as requiring financial assistance from the proposed provisional rate increase. (Id. at 3).

The Company's Opposition to LSNJ's Letter Brief in Support of Rate Counsel's Motion:

The Company indicated that it does not oppose LSNJ's request to intervene for the limited purpose stated in the Motion. The Company disagrees, however, with LSNJ's contention that the Board should enjoin it from implementing provisional rates. (Opposition Letter Brief at 1).

The Company recognizes the impact of water rate increases on low-income New Jersey residents. For that reason, the Company states it has offered in the past and will continue to

offer assistance to low-income customers under the H2O Help to Others program ("H2O Help"). Eligibility for H2O Help is based on income. The Company further states that H2O Help provides ongoing assistance to eligible customers in the form of a one-hundred percent (100%) discount on NJAWC's monthly fixed service charge. For the average residential customer described, the fixed service charge discount represents an over 25% decrease in annual water service bills. (Id. at 1-2).

Finally, the Company points out that it offers a Low Income Payment Program that provides aid to its most economically challenged customers. This aid can reduce a customer's monthly bill by as much as twenty percent (20%). As such, the Company argues that LSNJ's claim that its 'self-designed rate assistance program is tiny and inadequate' is incorrect. (Id. at 2).

AARP Letter Brief in Support of Rate Counsel's Motion:

On June 20, 2018, participant, AARP, Inc. ("AARP"), filed a letter brief in further support of Rate Counsel's motion. In urging the Board to reject the implementation of the Company's provisional rates, AARP reiterates (1) the Company chose to file its petition for a base rate increase with only five (5) months of actual data rendering it impossible to litigate this case with a full twelve (12) months of test year data by the end of the eight month suspension period; (2) the implementation of provisional rates in this matter contravenes the Board's policy favoring settlement; (3) the Company has failed to specify how any over-collections will be refunded to consumers; (4) the Company proposes to implement an excessive provisional rate increase of approximately 12.3% or \$75 million, when Rate Counsel's expert witness has testified that a rate decrease of approximately \$17 .1 million is just and reasonable; and (5) the Company's proposal is unjust and unreasonable, particularly because it has failed to demonstrate any financial hardship that would justify the imposition of the proposed provisional rates. (Letter Brief at 2).

AARP adds that rate increases for lifeline services, including interim rate hikes, is very burdensome to older customers and can threaten health and safety particularly for individuals such as our members-low and fixed income consumers. According to AARP, unjust and unreasonable interim rate increases for lifeline services, which too many older consumers are already struggling to afford, could lead to shut off notices and the loss of water service for many households, or require households to forego other necessities, including food and prescription medicine. AARP also argues that increasing the rates for water service through NJAW's proposed provisional rates will produce real and significant hardships on older consumers, and retroactive refunds of overcharges will not reverse the hardships endured by these residents during the provisional rates if they are not rejected. Finally, AARP claims the Company has failed to adequately demonstrate a financial hardship that would necessitate the use of their customers as a bank from which to draw loans not yet proven to be appropriate. Ibid.

DISCUSSION AND FINDINGS

The Board deems it necessary to first clarify that Rate Counsel filed its motion on Friday, May 18, 2018—four (4) days before the Board's next regularly scheduled agenda meeting on May 22, 2018. Because there was not sufficient time for the Board to consider the motion prior to the May agenda meeting, the Board must consider its ruling on Rate Counsel's motion as within time. Cf. N.J.A.C. 1:14-14.4(a) (allowing the Board to determine whether to accept a request for interlocutory review by the later of ten (10) days after receiving the request for interlocutory

review; or the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review). Nor did Rate Counsel claim any irreparable harm or injury by Petitioner's implementation of provisional rates subject to refund.

The Board also notes that LSNJ's motion was filed on the same date of the implementation of the provisional rate increase, and nearly one (1) month following the filing of Rate Counsel's motion. Not only is it untimely, but LSNJ has not been granted intervenor or participant status by ALJ Gertsman pursuant to N.J.A.C. 1:1-16.3 or N.J.A.C. 16:1-16.5. Instead, LSNJ filed its motion with the Board while evidentiary hearings were commencing at the OAL. Accordingly, the Board does not have jurisdiction to consider LSNJ's motion to intervene or participate and will not address the arguments advanced in its moving papers in support of Rate Counsel's motion.

The Board further notes that ALJ Gertsman was copied on LSNJ's motion to intervene, and the Board has not been informed of ALJ Gertsman's ruling on the motion. Nevertheless, all things considered, the absence of that ruling does not affect the Board's decision on Rate Counsel's motion opposing the implementation of the Company's provisional rates.

Turning to the merits of Rate Counsel's motion and AARP's letter brief in support thereof, N.J.S.A. 48:2-21(d) permits the Board to suspend proposed rates during the pendency of a base rate case for a period of eight (8) months. The statute provides that the Board "may order the suspension of the increase, change or alteration until the board shall have approved the same, not exceeding four (4) months. If the hearing and determination shall not have been concluded within such four (4) months the board may during such hearing and determination order a further suspension for an additional period not exceeding, four (4) months. The board shall approve the increase, change or alteration upon being satisfied that the same is just and reasonable." N.J.S.A. 48:2-21(d).

When regulatory lag exceeds the aforementioned suspension period, the legislature vested the Board with the authority to negotiate with a utility to implement interim rates. N.J.S.A. 48:2-21.1 provides:

The board may, during the pendency of any hearing instituted by it, on its own initiative or on petition, in which the approval or fixing of just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage or other special rates is in issue, or at any other time, negotiate and agree with any public utility for an adjustment of the individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage or other special rates for any product or service supplied or rendered by such public utility. Such adjustment may be for, or without, a specified limit of time. In no event shall any such adjustment be regarded as contractual. Such adjustment shall at all times be subject to change through the proceedings provided for by this chapter, or through negotiation and agreement under this section. The board as a part of any such negotiation and adjustment shall provide for the continuance, suspension or other disposition of any hearing of the character aforesaid then pending.

In Toms River, *supra*, the New Jersey Supreme Court recognized that a utility may implement proposed rate increases, but mandated specific notice requirements, stating:

We therefore hold that until the Board issues new regulations on remand, a utility must give the same form of notice at the end of a suspension period as when it files the original petition. Accordingly, it must (1) file notice with the Board 30 days before charging the new rates, (2) serve notice on the Public Advocate and pertinent municipal clerks 20 days in advance, and (3) give 20 days' notice to affected customers by publication or bill insert. Fairness also requires that the utility give direct notice 20 days in advance to any objectors or parties in the rate proceedings not otherwise receiving it.

[82 N.J. at 212-213.]

The Court reasoned that “[t]his practice of allowing automatic implementation of proposed rate increases upon advance notification protects the interests of both the utility and the public.” *Id.* at 213.

The Board recently promulgated rules to address the implementation of provisional rates following the expiration of the suspension period. N.J.A.C. 14:1-5.12(e) states: “A proposed increase in base rates may be implemented on a provisional basis, subject to refund with interest, after the expiration of the suspension periods pursuant to N.J.S.A. 48:2-21(d).”

N.J.A.C. 14:1-5.12(f) sets forth the notice requirements, consistent with N.J.S.A. 48:2-21 and Toms River. It provides, in part, that a utility seeking to implement a provisional rate increase shall:

1. Serve written notice of the intended provisional rate increase at least 30 days in advance of the provisional rate increase, but not earlier than 75 days in advance of the provisional rate increase, upon:
2. File with the Board and serve on the Director of the Division of Rate Counsel, a copy of the utility's proposed tariff, at least 30 days in advance of the provisional rate increase, but not earlier than 75 days in advance of the provisional rate increase;
3. File with the Board and serve on the Director of the Division of Rate Counsel, a plan detailing the utility's method for providing any refunds and interest owed to ratepayers, to account for the potential that the Board's final order in the subject rate case includes a determination of over recovery by the utility, at least 30 days in advance of the provisional rate increase; and
4. File with the Board and serve on the Director of the Division of Rate Counsel, a certification that the utility has complied with the requirements set forth in (f)1, 2, and 3 above at least 20 days in advance of the provisional rate increase.

In addition, N.J.A.C. 14:1-5.12(g) provides:

After filing the certification required under (f)4 above, a utility may implement the provisional rate increase permitted by this section on the date noticed by the utility, unless Board staff transmits written objections to the utility. Any such objections shall address only the utility's compliance with (f) above, and shall be transmitted to the utility no later than five days in advance of the provisional rate increase.

The Board is only given the discretion to suspend the implementation of proposed rates during the eight (8) month suspension period, unless the Board obtains a waiver or consensual extension which purpose "would be to prevent the utility from taking advantage of the expiration of the suspension period." Toms River, *supra*, 82 N.J. at 211. In fact, the Supreme Court indicated that "the utility's proposed rates may immediately become effective subject to conditions, such as refund, dependent upon the Board's final determination." *Ibid.* (citing In re Redi-Flo Corp., 76 N.J. 21, 39 (1978); Hackensack Water Co. v. Board of Pub. Util. Comm'rs, 96 N.J.L. 184, 188 (E & A 1921)).

The Board recognizes that the Company filed with five (5) months of data. However, as stated in In re Elizabethtown Water, *supra*, base rate case petitions "should contain when filed, six months actual test year data" or "at a minimum, five months actual" data. *Id.* at 2. Therefore, the Company, having filed the instant base rate case with five (5) months of actual data and seven (7) months of projected data, was not in violation of the Elizabethtown Water guidelines. The Board thus rejects Rate Counsel's argument that the Company somehow contributed to the "regulatory lag" and as a consequence should not be permitted to implement the provisional rates.

Moreover, the Board **FINDS** that the Company complied with N.J.A.C. 14:1-5.12(f) as to its proposal to implement provisional rates on June 15, 2018. The Company filed a certification on May 23, 2018 indicating that it complied with the notice requirements of N.J.A.C. 14:1-5.12(f)1 through 3. Pursuant to N.J.A.C. 14:1-5.12(e), the provisional rate plan allocates the provisional rate increase to all rate classes utilizing the Company's existing Board approved rate design. The provisional rate plan excludes the Company's Distribution System Improvement Charge, Purchased Water Adjustment Clause, and Purchased Sewerage Treatment Adjustment Clause. The refund plan submitted by Petitioner provides that customers will be given a refund, with interest, if the final Board-approved rates are lower than the provisional rates.⁴ If the final Board-approved rates are higher than the provisional rates, then customers will not be billed retroactively for the difference. In addition, upon receipt of the refund plan, Board Staff did not file an objection.

Indeed, consistent with N.J.S.A. 48:2-21, N.J.A.C. 14:1-5.12, and Toms River, the Company has complied with all requirements for implementing provisional rates and therefore Rate

⁴ Interest on any over-recovered balance will be calculated pursuant to N.J.A.C. 14:3-13.3. Current customers who were subject to the provisional rates will receive refunds through a specific and unique line item on their bills. Customers who were subject to the provisional rates, and who terminate service prior to the Board's final determination in this matter, and whose accounts do not have an outstanding balance due, will receive a check in the amount of the refund.

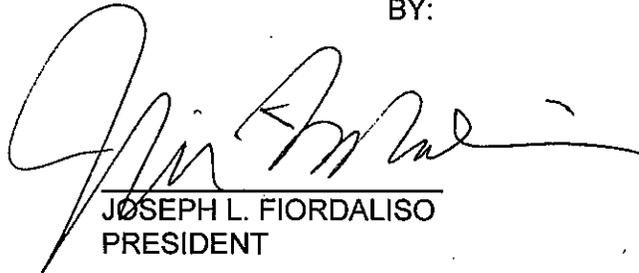
Counsel's motion is rejected, as within time. Accordingly, the Board **HEREBY DENIES** Rate Counsel's motion to issue an Order rejecting the Company's proposed provisional rates.

The Board is cognizant; however, that the new rate to be charged to the Company's customers has not yet been determined as "just and reasonable" and this burden rests with the Company. The Board emphasizes the rates are provisional, binding "neither the Board nor the public" until a final rate has been determined, at which time the Company may be required to refund any excess income.

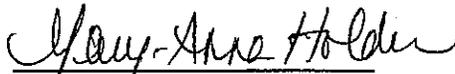
This Order shall be effective on July 2, 2018.

DATED: 6/22/18

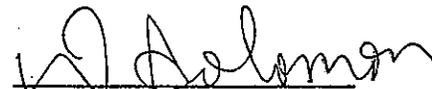
BOARD OF PUBLIC UTILITIES
BY:



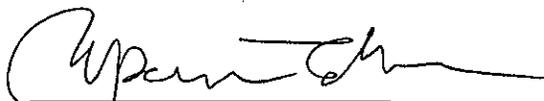
JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



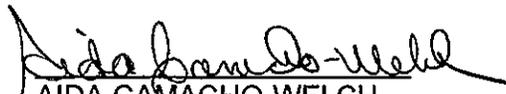
DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

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

IN THE MATTER OF THE PETITION OF NEW JERSEY-AMERICAN WATER COMPANY, INC.
FOR APPROVAL OF INCREASED TARIFF RATES AND CHARGES FOR WATER AND
SEWER SERVICE, CHANGE IN DEPRECIATION RATES AND OTHER TARIFF
MODIFICATIONS - BPU DOCKET NO. WR17090985
OAL DOCKET NO. PUC 14251-2017S

SERVICE LIST

Ira G. Megdal, Esq.
Cozen O'Connor
457 Haddonfield Road, Suite 300
Post Office Box 5459
Cherry Hill, NJ 08002
imegdal@cozen.com

Jay L. Kooper, Esq.
VP, General Counsel & Secretary
Middlesex Water Company
1500 Ronson Road
Iselin, NJ 08830
jkooper@middlesexwater.com

Bradford M. Stern, Esq.
Rothfelder Stern, LLC
22 Lakeview Hollow
Cherry Hill, NJ 08003
bstern@rothfelder.com

William R. Holzapfel, City Attorney
City of Elizabeth – City Hall
50 Winfield Scott Plaza
Elizabeth, NJ 07201
wholzapfel@elizabethnj.org

Stephen B. Genzer, Esq.
Saul Ewing Arnstein & Lehr
One Riverfront Plaza, Suite 1520
Newark, NJ 07102
Stephen.genzer@saul.com

Stefanie A. Brand, Esq., Director
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003
sbrand@rpa.state.nj.us

Aida Camacho-Welch
Secretary of the Board
Board of the Board
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Aida.camacho@bpu.nj.gov

Maria L. Moran, Director
Division of Water
Board of the Board
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Maria.moran@bpu.nj.gov

Megan Lupo, Esq.
Legal Specialist
Board of the Board
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Megan.lupo@bpu.nj.gov

Alex Moreau, Esq.
Deputy Attorney General
Department of Law & Public Safety
Division of Law
Public Utilities Section
124 Halsey Street,
Post Office Box 45029
Newark, NJ 07101-45029
Alex.Moreau@law.njoag.gov

Anthony R. Francioso, Esq.
Fornaro Francioso, LLC
98 Franklin Corner Road
Lawrenceville, NJ 08648

David McMillin, Esq.
Legal Services of New Jersey, Inc.
100 Metroplex Drive at Plainfield Avenue
Suite 402, P.O. Box 1357
Edison, New Jersey 08818-1357
dmcmillin@lsnj.org

Janine G. Bauer, Esq.
Szaferman, Lakind, Blumstein, & Blader, P.C.
101 Grovers Mill Road, Suite 200
Lawrenceville, NJ 08648
jbauer@szaferman.com

Evelyn Liebman
AARP
Forrestal Village
101 Rockingham Row
Princeton, NJ 08540
eliebman@aarp.com