Agenda Date: 9/9/20
Agenda Item: 5A

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF SUEZ WATER NEW JERSEY, INC. FOR APPROVAL OF A PILOT PROGRAM TO FACILITATE THE REPLACEMENT OF LEAD SERVICE LINES AND A RELATED COST RECOVERY MECHANISM	)	ORDER ADOPTING INITIAL DECISION SUMMARY DECISION, IN PART, AND REJECTING AND REMANDING INITIAL DECISION SUMMARY DECISION, IN PART
	)	BPU DOCKET NO. WO19030381
	)	OAL DOCKET NO. PUC 07138-19

Parties of Record:

Stephen B. Genzer, Esq., Saul Ewing Arnstein and Lehr, LLP, on behalf of SUEZ Water New Jersey, Inc.
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD

BACKGROUND AND PROCEDURAL HISTORY[1]

On March 22, 2019, SUEZ Water New Jersey, Inc. ("Petitioner," "SUEZ," "SWNJ," or "Company"), a public utility providing water service to approximately 258,000 customers located in portions of Bergen, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Sussex, and Warren Counties, filed a petition with the New Jersey Board of Public Utilities ("Board" or "BPU"), pursuant to N.J.S.A. 48:2-21, N.J.S.A. 48:2-21.1, N.J.S.A. 48:2-23, N.J.A.C. 14:5-1.2, and N.J.A.C. 14:1 et seq., seeking approval of the following: (1) a lead service line ("LSL") replacement surcharge pilot program ("Pilot Program"); (2) a modification to SUEZ's tariff[2] to charge all General Metered Service water customers a LSL Replacement Surcharge;[3] (3) deferred accounting treatment for all costs related to the Pilot Program and all costs already incurred for the LSL replacement program to date; and (4) a modification to SUEZ's tariff, on an interim basis, allowing the Company to perform LSL replacements on the customer-owned side of the service line and

[1] The Board is merely reciting the contentions as they are detailed in the petition, motion papers and exceptions, and makes no findings of facts and conclusions of law as to whether the proposed Pilot Program is just and reasonable, as the matter is being remanded to the Office of Administrative Law ("OAL").
[2] The proposed LSL replacement surcharge tariff is attached as Exhibit D to the petition.
[3] The proposed calculation for the surcharge is attached as Exhibit C to the petition and was subsequently updated by the Company on April 1, 2019, to correct a typographical error.

charge the customer $1,000 for the work.[4] The petition also requested that the Board retain this matter for hearing and appoint a presiding Commissioner to oversee the proceeding.

According to the petition, the replacement of LSLs was in response to SUEZ's exceeding the action level for lead concentrations in more than 10 percent (10%) of its customer taps sampled; as per the guidelines of the Lead and Copper Rule of the United States Environmental Protection Agency ("EPA"), which are enforced by the New Jersey Department of Environmental Protection ("NJDEP"). The Petitioner states that there are 2,258 known customer-owned LSLs in its service territory, and 153,155 customer-owned service lines in its service territory where it is unknown if the lines are made of lead based material.

SUEZ represented that it will prioritize the replacement of LSLs and will replace at least seven percent (7%) of Company-owned LSLs and goosenecks, or approximately 2,338, in 2019 as required by the NJDEP, and will offer to replace the customer side LSLs where applicable.[5]

By correspondence dated April 8, 2019, SUEZ withdrew its request for an interim tariff, and indicated that it would continue to offer to replace the customer-owned side of the LSLs, but at the customer's expense. Nonetheless, the Company continued to request that under the Pilot Program, it should offer to replace the customer side (if lead is found) at a cost to the customer of $1,000, with proposed regulatory treatment.

On May 24, 2019, the Board transmitted this matter as a contested case to the OAL, where it was assigned to Administrative Law Judge ("ALJ") Jacob S. Gertsman. On July 8, 2019, ALJ Gertsman conducted a telephonic prehearing conference with the New Jersey Division of Rate Counsel ("Rate Counsel"), SUEZ, and Board Staff (collectively, "Parties"). Following the prehearing conference, the Parties agreed to a revised procedural schedule which was sent by the Company to ALJ Gertsman via correspondence dated September 9, 2019. The revised procedural schedule provided, i*nter alia*, that responses to discovery and testimony be served by January 7, 2020.

SUEZ filed the direct testimony of Mark McCoy and James Cagle on August 19, 2019 in further support of its petition. Rate Counsel filed direct testimony of Howard Woods on October 18, 2019. SUEZ filed the reply testimony of James Cagle on December 10, 2019.

The Parties engaged in several settlement discussions, but were unable to reach an agreement. ALJ Gertsman conducted a telephonic conference on October 8, 2019, at which time he established a procedural schedule for the filing of all dispositive motions. ALJ Gertsman also scheduled a follow-up status conference on December 11, 2029 and oral argument on March 23, 2020 with regard to the dispositive motions. In addition, evidentiary hearings were scheduled for June 1, 4, and 5, 2020, if necessary.

On January 8, 2020, the Parties entered into a Statement of Material Facts Not in Dispute ("Stipulated Facts") as follows:

1. Petitioner Suez Water New Jersey ("SWNJ") is a public utility providing water service to approximately 258,000 customers throughout the State of New Jersey, including a large portion of Bergen and Hudson Counties.

[4] The LSL replacement tariff is attached as Exhibit E to the petition.
[5] Pursuant to federal regulation at 40 CFR 141.84 (b) "Lead service line replacement requirements."

2. Among numerous other statutes and regulations, SWNJ is required to comply with the Federal Lead and Copper Rule, 40 C.F.R. Chapter 1, Subchapter D, part 141, Subpart I.

3. New Jersey has adopted the Federal Lead and Copper Rule ("L & C") by reference at N.J.A.C. 7:10-5.1.

4. SWNJ is also subject to the Water Quality Accountability Act, N.J.S.A. 58:31-1 et seq.

5. In accordance with the Lead and Copper Rule sampling requirements, SWNJ has been sampling 100 or more customer taps every six months.

6. Using approved DEP/EPA testing protocols, during the July to December 2018 sampling period, 15 out of 108 samples exceeded the 15 parts per billion (ppb) Lead Action Level resulting in a 90th percentile of 18.4 ppb, and during the January to June 2019 sampling period resulting in a 90th percentile of 15.6 ppb, 14 samples out of 106 exceeded the 15 ppb Lead Action Level.

7. The original 15 samples were located in residential properties in eleven towns in Bergen and Hudson Counties.

8. Per the currently in place L & C, the Lead Action Level is exceeded if the 90th percentile exceeds 15 ppb utilizing the NJDEP approved interpolation method. 40 C.F.R. 141.80(c)(1). As a regulation, the L & C can change over time. All references in this Statement of Material Facts Not in Dispute refers to the L & C in place as of 3/22/19.

9. Due to the current Lead Action Level exceedances for the July 2018-December 2018 and January 2019-June 2019 periods, the L & C requires SWNJ to replace seven percent of the Lead Service Lines ("LSLs") in its distribution system on an annual basis. 40 C.F.R. 141.84(b)(1).

10. Sometimes a residential building is customer-owned and sometimes it is owned by someone else. SWNJ considers its 'customer' to be the person or entity on record with SWNJ as being responsible for paying its regular water or wastewater utility bills to SWNJ.

11. For purposes of this statement, 'service lines' are defined as those pipes or connecting segments of pipe or 'lines' connecting the water mains in the street to customer premises. Usually, but not always, that service line is made up of two segments: a company-owned segment connecting the main in the street to a connecting 'curb box' or 'meter barrel' (usually located at or near the residential building's property line at the curb--a part of which is sometimes called a 'gooseneck'), and a non-company owned segment connecting the 'curb box' to the meter in or next to the residential building. Sometimes this non-company owned portion of the service line is referred to as the 'customer' side. The 'service line' is referred to as a 'Lead Service Line' ("LSL") if the material or any part of any portion of that entire service line is, in whole or in part, made up of the mineral 'lead'.

12. During these particular exceedance periods of July-December 2018 and January-June 2019, the L & C requires SWNJ to replace "that portion of the lead service line that it owns." 40 C.F.R. 141.84(d).

13. The current L & C requires SWNJ to notify the customer or owner of the property, that SWNJ is planning to replace the company owned portion of the LSL and/or gooseneck and must at the same time offer to replace the non-company owned portion of the line at the owner's or customer's cost. 40 C.F.R. 141.84(d). SWNJ reports that it has been complying with this provision by coordinating and facilitating the non-company side replacement with the contractor and customer/owner.

14. If SWNJ is going to replace the company owned portion of an LSL, SWNJ must offer to replace the non-company owned or customer-side portion of an LSL, under the L & C, but SWNJ "is not required to bear the cost of replacing the privately-owned portion of the line, nor is it required to replace the privately-owned portion where the owner chooses not to pay the cost of replacing the privately-owned portion of the line…." 40 C.F.R. 141.84(d).

15. Following its initial Lead Action Level Exceedance for the July-December 2018 period, SWNJ filed the Petition in the current matter on March 22, 2019.

16. SWNJ's Petition proposes a "pilot program" involving replacement of non-company owned, or customer-side, Lead Service Lines.

17. Under the proposed pilot program, when SWNJ is performing replacement work on company-owned LSLs or goosenecks, SWNJ will investigate whether the customer-owned portion of the line also contains lead, by testing in an easily available and reasonable manner either the end of the non-company owned LSL near the curb box or the other end of the noncompany owned portion of the service line, near the meter, if accessible, to determine whether the service line contains lead at that location.

18. Within this proposed pilot program, when a non-company side LSL is identified, SWNJ proposes to offer to replace the non-company side portion of the LSL when SWNJ is performing work on adjacent company-owned Lead Service Lines or goosenecks.

19. In replacing the non-company side portion of the LSL, SWNJ proposes to charge the individual customer (or owner of the residential building) $1,000 of the total replacement cost. The proposed pilot program would allow the customer to pay this surcharge as a monthly charge of approximately $83.33 per month for 12 months.

20. SWNJ proposes that the total difference between the full cost of LSL replacement and that $1,000 from each affected customer/owner be recovered from all SWNJ's water customers by accumulating those dollars into a separately tracked account, and that account would be recovered from all SWNJ's water customers.

21. SWNJ proposes these costs (plus administrative and carrying costs on the unamortized balance) would be amortized and recovered from ratepayers over a period of seven years. SWNJ proposes to identify and recover the dollars within that account as an identified surcharge on customers' bills.

22. SWNJ proposes to recover carrying costs at its authorized overall rate of return on the unamortized balance of the separately tracked account. The regulatory mechanism SWNJ proposes in order to obtain rate recovery on this account is that SWNJ would establish a regulatory asset for the unamortized costs to be recovered over time from all SWNJ water customers.

23. As of August 16, 2019, the average cost to replace customer-owned service lines has been approximately $3,000 per service.

24. In addition to recovering the costs of replacing non-company owned LSLs through the pilot program surcharge, SWNJ proposed to include the recovery of the company-owned portion of Lead Service Lines through the surcharge. The Company agreed in discovery from Rate Counsel to include the company-owned portion of Lead Service Line replacement through the DSIC surcharge, so is no longer requesting that regulatory treatment through this proposed pilot program mechanism. The issues in dispute in this matter are limited to whether a pilot program should be adopted by the BPU ordering other SWNJ water customers to pay for replacement of non-company side LSLs through a surcharge mechanism.

25. SWNJ and Rate Counsel acknowledge that SWNJ does not own nor is it in control of the non-company owned portion of the service line. This will not change under the proposed Pilot Program.

26. The Board of Public Utilities transferred this matter to the Office of Administrative Law on May 21, 2019, with the Honorable Jacob Gertsman being assigned to preside.

27. SWNJ has replaced certain non-company owned LSLs, at shareholder expense, in certain instances where sampling has indicated a Lead Action Level exceedance.

28. The American Water Works Association and the American National Standards Institute have adopted ANSI/AWWA C810-17, titled Replacement and Flushing of Lead Service Lines.

29. Among other things, ANSI/AWWA C810-17 includes a sampling and flushing procedure which a customer should follow if a customer declines to replace the non-company owned side of an LSL (Sections 4.2 through 4.4 and Section 5.2) and partial replacement is done. SWNJ is currently advising customers of this procedure.

30. The total actual number of non-company side lead service lines is currently unknown, but is in the process of being ascertained.

After publication of notice in newspapers in general circulation in the Company's service territory, ALJ Gertsman presided over the public hearings in this matter on January 21, 2020 in Hackensack, New Jersey at 4:30 and 5:30 p.m. Several members of the public spoke in opposition to the Company's petition at the public hearings.

Rate Counsel's Motion for Summary Decision

Following discovery and the filing of testimony, Rate Counsel filed its motion for summary decision on January 10, 2020. SUEZ filed opposition to the motion on February 3, 2020, and Rate Counsel filed its reply on February 10, 2020. Board Staff did not file a response to the motion. Oral argument with regard to the motion was held on February 25, 2020 at the OAL.

In support of its motion, Rate Counsel argued that the petition should be denied as a matter of law, as the proposal involves using ratepayer funds to replace customer-owned property that is not used and useful in the public service. Rate Counsel stated that ratepayers are only required to pay for utility property that is used and useful in the public service, and SUEZ cannot recover costs associated with replacing customer-owned service lines from ratepayers, whether that recovery is in rate base or as a regulatory asset, because it is contrary to both federal and state case law. Rate Counsel cites to Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365 (Sup. Ct. 1942) ("Atlantic City Sewerage"); accord In re the Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 217 (1950); In re N.J. Power & Co., 9 N.J. 498, 509 (1952); Verizon Communications v. Fed. Communications Comm'n., 535 U.S. 467, 484 (2002); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) for this proposition. Rate Counsel asserted that this mandate encompasses two individual but related requirements. First, the property in question must consist of assets of the public utility, and, second, the property of the public utility must be "used and useful in the public service," citing In re N.J. Power & Light Co., supra, 9 N.J. at 209. According to Rate Counsel, while public utilities are entitled to just compensation under the Fifth and Fourteenth Amendments, our courts were equally concerned with the rights of the ratepayers.

Rate Counsel stated that "the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests." Fed. Power Comm'n v. Natural Gas Co., 320 U.S. 591, 603 (1944). While shareholders are entitled to reasonable rates in return for devoting their property to public use, the public is protected against "unreasonable exactions" solely in order to pay dividends to shareholders. Smyth v. Ames, 169 U.S. 466, 544-45 (1898). The balance required between the rights of the public and the rights of regulated utilities gave rise to the development of the "used and useful" principle, citing In re N.J. Power & Light Co., supra, 9 N.J. at 209. This principle, according to Rate Counsel, limits a utility's compensation to the value of utility property that is used and useful in the public service, citing for example Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989).

Rate Counsel claimed that more recently in 2017, the Board decided a fully litigated matter that presented the exact same issue raised in this motion as to whether a utility can recover in rates an investment in customer-owned property. Rate Counsel asserted that the Board determined that that such recovery is not allowed, citing In re the Petition of Rockland Electric Co. for Approval of an Advanced Metering Program: and for Other Relief, BPU Docket No. EM16060524 (August 23, 2017) ("Rockland"). Rate Counsel explained that in Rockland, Rockland Electric Company ("Rockland") requested pre-approval to install advanced metering infrastructure ("AMI") throughout its entire service territory, and as part of the installation plan, Rockland proposed to perform work on the customer side of the electric meter in order to facilitate installation of the new meters. Rate Counsel stated that this is similar to customer-owned LSLs, because the property was located on the customer's side of the meter, the property was customer-owned. Rockland proposed to capitalize such costs in rate base and therefore would earn a return of and a return on customer-owned property, which is similar to

SUEZ's proposal. Rate Counsel explained that the Board found Rockland's proposal to be contrary to New Jersey law. Even though the Board believed such work was necessary for the safe installation of AMI, the Board agreed with Rate Counsel that the Company's proposal "violates settled New Jersey case law," citing to In re the Petition of Rockland Elec. Co. for Approval of an Advanced Metering Program: and for Other Relief, BPU Docket No. EM16060524 (August 23, 2017) at *22.

In addition to not being owned by the Company, Rate Counsel added that the customer-owned portions of LSLs SUEZ intends to replace are not dedicated to the public service, and therefore ratepayers cannot be required to pay a return on and of such costs by law, citing for example, Atl. City Sewerage Co., supra, 128 N.J.L. at *365-66.

In conclusion, Rate Counsel emphasized that SUEZ's proposal to replace customer-owned LSLs, and earn a return of and on its investment in the process, is contrary to law. Ratepayers cannot be forced to pay for the proposal, which adds no used and useful public utility assets to the Company's infrastructure. Rate Counsel also argued that the Constitutional and judicial limitations on what can be collected in rates exist to avoid "unreasonable exactions" from ratepayers such as the one SUEZ requests in this matter. Rate Counsel asserted that SUEZ's ratepayers cannot be asked to fund an investment in assets owned by private individuals, and not used and useful in the public service. Accordingly, Rate Counsel once again argued that SUEZ's request to find replacement of customer-owned service lines in rates should be denied as a matter of law.

SUEZ's Opposition to Motion for Summary Decision

SUEZ asserted that Rate Counsel has not met its burden pursuant to N.J.A.C. 1:1-12.5, as there are numerous issues that remain in need of resolution in this matter, including a determined set of priorities for identifying the schedule of non-Company owned replacements; whether those priorities are geographic, operational, or using some other method; a determination as to how to handle the customer/owner commitment to cover the first $1,000 if the customer and owner of the residential property containing a LSL are different; and what to do with customers/owners who have actually replaced their non-Company owned service lines after some specified date, but before this program is implemented.

According to SUEZ, Rate Counsel's motion is based on issues not presented by the petition. SUEZ argued that its proposal does not seek rate base treatment for any non-Company owned property. Instead, it stated that the proposal seeks to defer the costs associated with the replacement of non-Company owned LSLs through the term of the Pilot Program and amortize those costs over a seven-year period. The Company claimed that Rate Counsel's arguments are contrary to the case law, as there is no precedent that prohibits such a proposal. According to SUEZ, the Board has allowed these techniques before. SUEZ pointed to Hope Creek, and the Atlantic Generating Station from the 1970s and 1980s as examples of other alternatives to providing recovery of costs expended in the public interest, whether they be for public health concerns as in this matter, or to meet public interest demands in other cases. SUEZ asserted that the expenses do not have to be included in rate base and these alternatives are available, citing to In re Atl. City Elec. Co., 1983 WL913534, BPU Docket No. 822-116 (Jan. 13, 1983); In re Pub. Serv. Elec. and Gas Co. Electric and Gas Base Rate Proceedings, BPU Docket No. 7711-1107 (May, 1978).

In referring to the Atlantic City Generating Station as an example where a utility was permitted to recover expenses that were never in rate base and never used and useful for rate base purposes, SUEZ explained that the Atlantic Generating Station was a planned floating nuclear power plant off the Atlantic City coast that was abandoned by Public Service Electric and Gas Company ("PSE&G"). PSE&G sought to recover the costs associated with planning and designing its investment, and the Parties agreed that all legitimate costs were to be amortized over a 20-year period.

SUEZ also pointed to Jersey Central Power & Light's ("JCP&L") rate case, wherein expenses associated with Superstorm Sandy were permitted to be amortized over a number of years with a return on those expended dollars. In re the Verified Petition of Jersey Central Power & Light Co. for Review and Approval of Increases in and Other Adjustments to its Rates and Charges for Electric Service, BPU Docket No. ER12111052 at *61 (March 18, 2015).

The Company also indicated that its proposal is designed to benefit its customers and their communities by addressing a legitimate tap water problem, i.e., removing lead from drinking water. Without a viable program to replace non-company side LSLs, the Company stated that lead will remain in the service lines. The Company also stated that the safest solution is replacement of the entire lead service – both Company and non-Company owned – at the same time. The Company suggested that the Board use its flexible authority to ensure that the public's health and safety are protected by deferring a necessary and prudent expense and amortizing it over a reasonable number of years. Under the proposed Pilot Program, no part of a replaced non-Company-side lease service line would be placed into rate base. Instead, SUEZ indicated that it would be expensed and amortized over seven years. Thus, argued the Company, the Rockland decision cited to by Rate Counsel is not directly relevant to the petition.

SUEZ further opposed the motion stating that the Company should be permitted to amortize the costs of performing non-Company owned LSLs replacements through a Pilot Program that addresses a public concern and reiterates that the Company is not seeking rate base treatment for the costs associated with non-Company side LSL replacements. Rather, asserted the Company, there is no requirement that an expenditure to be recovered by a utility must be incurred on property owned by the utility. To this point, SUEZ referred to several scenarios such as when a utility must spend dollars to pave streets (not owned by the utility) or pay for repair work to a customer's yard or landscaping inside the public rights-of-way that were disturbed by a utility work crew.

Contrary to Rate Counsel's arguments, SUEZ asserted that the Board is not bound by a rigid and inflexible formula in setting rates. To the contrary, rate base is only one component of the ratemaking formula, and expenses, revenues and rate of return, for example, also need to be considered. SUEZ stated that Rate Counsel focuses on only one aspect of the ratemaking formula, and emphasized that rate base is not at issue in this matter.

As a case in point, SUEZ cited to Atlantic City Sewerage, where the Court explained that "[t]here is no formula making for certainty in the exercise of [the Board's] authority. The estimation of the fair value base is not controlled by arbitrary rules. It is not 'a matter of formulas,' but rather of 'a reasonable judgment' grounded 'in a proper consideration of all relevant facts," citing 128 N.J.L. at *365 (citing Simpson v. Shepherd, 230 U.S. 352 (1913). SUEZ pointed out that the Atlantic City Sewage Court also noted that "[e]ach case is governed … by its own circumstances. The Board is empowered to determine what in the particular situation is a just and reasonable return; and it must have broad discretion in the exercise of that authority, controlled by the statutory

standard. Since rate making is a legislative process, its exercise involves a range of legislative discretion." Id.

SUEZ added that Rate Counsel also relies upon In re Public Serv. Coordinated Transp., 5 N.J. 196, 217 (1950), where the Court cited Atlantic City Sewerage and explained that "[t]here are a number of formulae useful in the determination of fair value; depreciated original cost, depreciated prudent investment, reproduction cost of the property less depreciation, cost of reproducing the service as distinct from the property formula or combination of formulae in arriving at a proper rate base for the determination of fair value is not controlled by arbitrary rules of formulae, but should reflect the reasonable judgment of the Board based upon all the relevant facts." Therefore, argued SUEZ, the Board has flexibility to assess each particular case in light of the unique facts and circumstances it presents, citing A.A. Mastrangelo, Inc. v. Envtl. Prot. Dep't., 90 N.J. 666, 685 (1982).

SUEZ pointed out that should the proposed pilot surcharge program remain unchanged, and assuming that same 10-year program to replace and install the replacement non-Company side LSLs, the maximum number of years' rates could be impacted would be about 17 years. The earlier replacements should be amortized before the replacement program would even be completed.

Moreover, SUEZ claimed that persuasive authority demonstrates that the proposal is constitutional. SUEZ stated that other regulatory bodies have permitted water utilities to replace non-Company side LSLs and fully recover those expenditures including carrying costs, citing to Joint Petition for Settlement and Request for Certification, Pa. Pub. Util. Comm'n., Docket No. P-2016-2577404 (Jan. 23, 2017), and Order of the Pa. Pub. Util. Comm'n, Docket No. P-2016-2577404 (Mar. 2, 2017).

Other examples, according to SUEZ, that undermine Rate Counsel's argument that there is a categorical prohibition against utility recovery for expenditures on property it does not own involve proposals that allow utilities to treat contracts for cloud-computing services as if they were utility property. SUEZ indicated that this enables the utilities to place the upfront costs associated with the contracts into rate base and then the cost is amortized over the life of the contract.

SUEZ emphasized that there is no prohibition whatsoever against expensing costs associated with non-company owned property and amortizing these costs over time with an appropriate return. SUEZ distinguished the Board's decision in Rockland from this proposal based on the fact that the Board only prohibited Rockland from recovering costs for "the work not related to the AMI Program roll out" which would "continue to be the responsibility of the customer," citing In re Petition of Rockland Elec. Co. for Approval of an Advanced Metering Program, BPU Docket No. ER16060524, (Aug. 23, 2017) at *12. SUEZ indicated that this decision in Rockland reveals that the utility was able to recover the costs of any customer-side work related to the AMI rollout.

In conclusion, SUEZ reiterated that Rate Counsel had not met its burden under N.J.A.C. 1:1-12.5 because the motion is based on issues not presented by the petition and offers a slew of inapplicable or inapposite legal arguments. Accordingly, SUEZ stated that Rate Counsel is not entitled to summary disposition as to those unrelated issues.

Rate Counsel's Reply to SUEZ's Opposition

Rate Counsel explained that it did not claim that SUEZ was seeking recovery through rate base. Rather, the issue is that SUEZ is attempting to earn a return on property that it does not own. Rate Counsel stated that in fact, the regulatory treatment sought by SUEZ is undisputed, and SUEZ is attempting to create a factual dispute when none exists.

Rate Counsel disputed SUEZ's contention that certain issues such as the proper priority for customer-owned replacements, whether customers who have already replaced their lines are entitled to compensation, and whether the customer or property owner has to pay the $1,000 contribution. Rate Counsel argued that all of the factual issues raised by SUEZ involve policy issues that are relevant only after a determination has been made on whether such a Pilot Program can be implemented by law.

Rate Counsel also claimed that SUEZ misinterpreted the Rockland decision, in that the Board did not deny cost recovery of the customer-owned property to Rockland solely on the basis that Rockland proposed to "rate base" the investment. Instead, in holding that "[c]osts related to this work shall not be recovered from the Company's ratepayers," the Board denied cost recovery in any form, citing In re the Petition of Rockland Elec. Co. for Approval of an Advanced Metering Program: and for Other Relief, BPU Docket No. EM16060524 (August 23, 2017) at *22. Rate Counsel stated that the property at issue in Rockland is similar to customer-owned LSLs in this case, because the property was located on the customer's side of the meter and therefore customer-owned. Rockland proposed to capitalize such costs in rate base and would earn a return of and a return on customer-owned property. The Board, according to Rate Counsel, correctly found Rockland's proposal to be contrary to New Jersey law.

Rate Counsel further argued that the Company failed to cite to a single case or Board order in support of its position that it is entitled to earn a rate of return on its investment in customer-owned property. Instead, stated Rate Counsel, the Company relies on Board orders that are inapplicable to this case. Rate Counsel pointed out that SUEZ cited to the cost recovery authorized by the Board pertaining to abandoned floating nuclear power plants, a situation that was entirely inapposite to what SUEZ proposes, since that matter involved expenditures on utility property (albeit never used and useful), not customer-owned property, and the Board authorized recovery of actual costs with no rate of return, citing to In re the Petition of Pub. Serv. Elec. & Gas Co. for Approval of an Increase in Elec. & Gas Rate & for Changes in the Tariffs for Elect. & Gas Servs. P.U.C. N.J. No. 7 Elec. & P.U.C. N.J. No. 6 Gas Pursuant to R.S. 48:2-21, BPU Docket No. 794-310 (February 9, 1980).

Rate Counsel added that, while SUEZ compares this proposal to the recovery of expenditures associated with Superstorm Sandy by JCP&L, that matter involved expenditures on utility property that was damaged as a result of Superstorm Sandy, not customer-owned property, and the Board authorized recovery of actual costs with no rate of return. Rate Counsel reiterated that the case law and Board orders limit rate recovery to utility-owned assets that are used and useful in the public service.

Rate Counsel also reiterated that it is undisputed that customer-owned LSLs are not and never will be owned by the Company, and a customer-owned service line does not affect the public interest. The customer, and not the Company, is responsible for maintaining the privately-owned line, and this will continue to be true following any replacement. Nonetheless, SUEZ attempted to argue that, because restoration of non-utility property is recoverable in rates, the replacement of customer-owned lead lines are also recoverable according to Rate Counsel. The work to

restore is clearly different and to complete the project, and Rate Counsel argued that the Company must restore the property to its original state.

Rate Counsel further argued that privately-owned service lines are not utility property and have never been employed for the public convenience. Rate Counsel added that there is no overall benefit to ratepayers from replacing customer-owned lead lines. The only one to benefit is the individual homeowner, and therefore SUEZ's proposal to replace customer-owned service lines, . and earn a return of and on its investment in the process, is contrary to law. The constitutional and judicial limitations on what can be collected in rates exist to avoid "unreasonable exactions" from ratepayers such as the one SUEZ requests in this matter. Accordingly, Rate Counsel argued that the Company's request to fund the replacement of customer-owned service lines in rates should be denied as a matter of law.

Initial Decision Summary Decision

On June 15, 2020, ALJ Gertsman issued his Initial Decision Summary Decision ("Initial Decision"), which granted Rate Counsel's motion. In the Initial Decision, ALJ Gertsman accepted the Parties' Stipulated Facts.

In performing his legal analysis, ALJ Gertsman first noted that the Parties agreed that "[t]he issues in dispute in this matter are limited to whether a Pilot Program should be adopted by the Board ordering other Suez water customers to pay for replacement of noncompany side LSL through a surcharge mechanism." Initial Decision at *13 citing to Findings of Fact at ¶24. He then applied the standard for motions for summary decision or judgment set forth in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995), and stated that it is undisputed that the Pilot Program involves the replacement of customer-side LSLs; SUEZ does not own, nor is it in control of, the non-Company owned portion of the lead service line; and this will not change under the proposed Pilot Program. Additionally, the costs (plus administrative and carrying costs on the unamortized balance) would be amortized and recovered from ratepayers over a period of seven years. The Company proposes to identify and recover the dollars within that account as an identified surcharge on customers' bills. The proposal seeks to recover carrying costs at its authorized overall rate of return on the unamortized balance of the separately tracked account. The regulatory mechanism proposed in order to obtain rate recovery on this account is the establishment of a regulatory asset for the unamortized costs to be recovered over time from all of SUEZ's water customers. Initial Decision at *21, citing to Findings of Fact at ¶¶ 16, 21, 22, 25.

Citing to In re N.J. Power & Light Co., 9 N.J. 498, 509 (1952), ALJ Gertsman stated that the long-settled case law is clear that rate recovery is limited to the fair value of the property owned by the utility and used and useful in the public service. He added that it is not in dispute that the customer-owned LSLs in the Pilot Program are not an asset of the Company nor will they be in the future. Further, ALJ Gertsman stated that the LSLs are not dedicated to the public service since they are owned by SUEZ's customers. Id. at *21.

ALJ Gertsman adopted Rate Counsel's argument which compared SUEZ's proposal in this matter to that in Rockland, where the utility sought to perform work on property that was customer owned and the Board found that Rockland's proposal was 'contrary to settled New Jersey case law' and denied the company's request to capitalize such costs. Id., citing to In re the Petition of Rockland Elec. Co. for Approval of an Advanced Metering Program; and for Other Relief, BPU Docket No. ER16060524 (August 23, 2017) at *22. Additionally, he indicated that the cost recovery mechanism proposed here by SUEZ "is substantially similar to that proposed by Rockland" and, accordingly, "the Company's argument that it 'can be permitted to amortize the costs of performing

non-company owned LSL replacements through a Pilot Program that addresses a public health concern' fails as this remedy is in direct conflict with the Board's Rockland order." Id. at *21-22.

While ALJ Gertsman commended the Company for its efforts to address a significant public health issue, he emphasized that his role was limited to determining whether or not the proposed Pilot Program is permissible by law. He found that "it is clear" that it was not permissible and that rather it "is contrary to settled New Jersey case law." Id. at *23.

Exceptions

SUEZ

On June 29, 2020, SUEZ filed written exceptions ("SUEZ Exceptions") to the Initial Decision pursuant to N.J.A.C. 1:1-18.4. The Company took exception to ALJ Gertsman's conclusion of law that the proposed program is "contrary to settled New Jersey case law[s]," citing the Initial Decision at 13, and "implicit finding as to the factual basis" of the program. SUEZ Exceptions at 6. The Company requested that the Board reverse the Initial Decision and either retain jurisdiction to fully evaluate the merits of the proposed Pilot Program, develop a factual record, and explore the multiple ratemaking options available to accomplish the goal of reducing lead in tap water or, in the alternative, remand the matter to the OAL with specific clarifying instructions.

With regard to ALJ Gertsman's conclusions of law, the Company argued that the "used and useful" principle does not comport with basic ratemaking principles of the Board's longstanding approach in permitting flexible and innovative ratemaking. The Company claims it did not request rate base treatment, and, accordingly, the application of the "used and useful" principle was in error.

SUEZ pointed out that the "used and useful" principle is but one of many tools used to set utility rates, and is the tool generally used to determine "the value of utility property[.]" SUEZ Exceptions at 6, citing to In re the Petition of Jersey Cent. Power & Light Co., 85 N.J. 520, 529 (1981). SUEZ stated that the proposal sought to defer the net costs associated with the replacement of non-company owned LSLs via a regulatory asset through the term of the Pilot Program and amortize those costs over a seven-year period, with carrying costs applied to the unamortized balances. According to the Company, this misapplication was the direct result of Rate Counsel's argument that the Company effectively sought rate base treatment. Rather, SUEZ states it proposed to replace non-company owned LSLs and amortize those expenses over a seven-year period by creating and amortizing a regulatory asset including carrying costs.

SUEZ asserted that the "used and useful" standard does not prohibit a utility from recovering its expenses for or investment in non-utility owned property. Citing to Atl. City Sewerage Co. v. Bd. of Public Util. Comm'rs, 128 N.J.L. 359, 365 (1942), SUEZ stated that New Jersey courts have held that ratemaking "is not a matter of formulas, but rather of a reasonable judgment grounded in a proper consideration of all relevant facts," and therefore Board has the flexibility to assess each particular case in light of the unique facts and circumstances it presents.

In addressing Rate Counsel's assertion that the "used and useful" principle is a constitutional one that cannot be overridden by either legislation or regulatory or judicial decision, SUEZ argued that it does not apply in the manner suggested by the Initial Decision, nor does it act as a constitutional or legal prohibition to prevent a utility from recovering prudent expenditures on non-utility owned property. SUEZ refered to several examples for this proposition, including the Regional

Greenhouse Gas Initiative Act ("RGGI"), N.J.S.A.48:3-98.1, and energy efficiency programs and pre-statutory promotional payments.

SUEZ also argued that there are many alternatives to providing recovery of expenditures made (with carrying costs) in the public interest, whether they be for public health concerns as in this matter, or to meet public interest demands in other cases, that do not require inclusion in rate base, citing In re Atl. City Elec. Co., 1983 WL 913534, BPU Docket No. 822-116 (Jan.13, 1983) and In re Pub. Serv. Elec. and Gas Co. Electric and Gas Base Rate Proceedings, BPU Docket No. 7711-1107 (May, 1978). Also, SUEZ referenced In re the Verified Petition of Jersey Central Power & Light Co. for Review and Approval of Increases in and Other Adjustments to its Rates and Charges for Electric Service, BPU Docket No. ER12111052 (March 18, 2015) at *61, the JCP&L base rate case wherein Superstorm Sandy expenses were amortized over several years with a rate of return.

SUEZ further asserted that the Initial Decision adopted Rate Counsel's misinterpretation of the Board's Order in In re the Petition of Rockland Elec. Co. For Approval of an Advanced Metering Program; and for Other Relief, BPU Docket No. ER16060524 (August 23, 2017), as evidence that the used and useful principle prohibits utility cost recovery for any expenditures or investment in non-utility owned property. According to the Company, the Rockland matter involved a request to recover AMI installation costs through customer rates, including the costs of two types of work performed on the customer-side of the meter (i.e., customer – not utility – property), specifically: (1) work necessary to install the AMI meter; and (2) incidental work to correct irregularities (e.g., faulty electrical cables) that were unrelated to the AMI installation. SUEZ stated the Board ultimately concluded that the AMI meters would not be "used and useful" without certain customer-side work and permitted RECO to seek recovery of the costs necessary for AMI installation. Therefore, argued SUEZ, how could the Board have even considered that same recovery in the Rockland Order if it were barred by law?

In addition, SUEZ indicated that the "used and useful" principle is not a constitutional Bar to LSL Replacement in other states. The Company stated as an example, in 2017 the Pennsylvania Public Utility Commission ("PUC") approved a settlement by York Water Company to replace non-company owned LSLs when it replaced company-owned service lines, as well as when customer-side LSLs were discovered in the normal course of business. It also stated that numerous other state regulatory bodies and legislatures have permitted a privately-owned utility to recover costs associated with customer-side LSL replacement, including Missouri, Michigan, Indiana and Wisconsin.

SUEZ argued that the Initial Decision failed to consider the comparable jurisdictions addressing these LSL issues as set forth in its brief opposing Rate Counsel's motion for summary decision. Instead, the Initial Decision merely cited the handful of cases concerning rate base cited by Rate Counsel, and concluded the Company's proposal was contrary to New Jersey case law. SUEZ claimed that because the Initial Decision failed to consider or weigh the cited precedent and authorities, the ALJ incorrectly applied the "used and useful" principle. Accordingly, SUEZ urged the Board to reverse the Initial Decision to prevent it from serving as false precedent.

The Company added that the Board has an opportunity to follow the Governor's and Legislature's direction to confront the problem of lead in tap water, given New Jersey's historic leadership on water quality and regulatory issues, and if the lead Pilot Program was permitted to proceed it, would be a model that could be studied nationally to remedy the LSL issue.

Rate Counsel

On July 7, 2020, Rate Counsel filed its reply exceptions ("Rate Counsel Reply Exceptions"). Rate Counsel argued that the relevant facts in this matter are undisputed, and the body of case law used to decide its motion is clear. Despite this, the Company's exceptions advance an incorrect interpretation of the relevant case law that should be rejected by the Board. Rate Counsel stated the Company only cited to one case in support of an unorthodox, extremely narrow interpretation of the "used and useful" principle, which it unsuccessfully advanced in briefs on the motion.

Rate Counsel also argued that SUEZ's assertion that it does not seek rate base treatment is akin to a game of "three card monte." Rate Counsel Reply Exceptions at *4. While not calling its recovery rate base treatment, the Company nonetheless seeks the equivalent of rate base treatment. Rate Counsel indicated that there are other sources of funds that could be used to assist homeowners who cannot afford to replace their lines, Suez only seeks the "solution" that will enhance its profits.

Moreover, argued Rate Counsel, the Company's attempt to distinguish its proposal from extensive contrary legal precedent is unavailing. Both the Courts and the Board have long required investments to be both owned by the utility and used and useful in the public service in order to be recoverable in rates, citing to Munn v. Illinois, 94 U.S. 113, 125-26 (1877); St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 51 (1936); Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989); and Smyth v. Ames, 69 U.S. 466, 547 (1898), rev'd on other grounds, Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944).

Rate Counsel asserted that none of these early cases use the term "rate base." They simply prohibit a utility from earning a "return" on anything other than utility property that is used and useful in the public service. The same is true of New Jersey case law, according to Rate Counsel. Citing to Atl. City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365-66 (1942), Rate Counsel stated that the New Jersey Supreme Court held that "[a] rate based upon an excessive valuation or upon property not used or useful in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied." Rate Counsel further asserted that New Jersey has long recognized that utilities can only recover a return on investment in utility assets, noting that "investors may expect a utility to earn a reasonable rate of return on its assets." In re Valley Rd. Sewerage Co., 154 N.J. 224, 240 (1998).

Rate Counsel once again cited to In re the Petition of Rockland Elec. Co. for Approval of an Advanced Metering Program; and for Other Relief, BPU Docket No. ER16060524 (August 23, 2017) as Board precedent that prohibits utilities from earning a return on non-utility property that is not used and useful in the provision of service. As part of its installation plan of AMI, Rockland proposed to perform work on the customer side of the electric meter in order to facilitate installation of the new meters. This is similar to customer-owned LSLs according to Rate Counsel, because the property was located on the customer's side of the meter, and the property was customer-owned. Rockland proposed to capitalize such costs in rate base, where, similar to SUEZ's petition, Rockland would earn a return of and a return on customer-owned property. Rate Counsel averred that the Board found this proposal to be contrary to state law.

Rate Counsel argued that in the Initial Decision, the ALJ also correctly applied the undisputed facts of this case to the case law and Board orders. The ALJ specifically held that in order to be included in rates, assets must be owned by a utility, and be used and useful in the public service.

Rate Counsel claimed that it is undisputed that Suez's Petition proposes replacement of lead service lines that are not, and never will be, owned or controlled by Suez. Furthermore, as the ALJ concluded, these privately-owned lines will never be dedicated to the public service. Ratepayers can only be asked to compensate a utility for the value of its property that is used and useful in the public service, citing, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). According to Rate Counsel, because privately owned lead service lines are not utility assets and are not dedicated to the public service, the ALJ properly found that ratepayers cannot be required to pay their costs in rates.

Rate Counsel added that the Board Orders Cited in the Company's brief are inapposite and should be disregarded. Rate Counsel stated that the Company offers a convoluted interpretation of the Rockland decision that it claims supports its position. As to the RGGI Act, Rate Counsel pointed out that there was a statute that permitted efficiency investments and rate recovery on the customer side of the meter, and this lack of explicit authority is a critical distinction. Furthermore, the case involving the floating nuclear plants is entirely inapposite to what SUEZ proposes here, as that matter involved expenditures on utility property, not customer-owned property. Likewise, Rate Counsel argued that the JCP&L Order involved replacement of utility property, and is not instructive on the issues that are disputed between the parties in this case.

In conclusion, Rate Counsel emphasized that the Company failed to point to a single case or Board order where a New Jersey utility was permitted to do what it proposes, namely to collect costs plus earn its fully authorized rate of return for investing in non-utility property. Accordingly, Rate Counsel asserted that ALJ Gertsman properly granted Rate Counsel's motion to dismiss the petition, and the Board must also follow precedent and should adopt the Initial Decision in full.

DISCUSSION AND FINDINGS:

The Board is empowered to ensure that regulated public utilities provide safe, adequate and proper service to the citizens of New Jersey. N.J.S.A. 48:2-23. Pursuant to N.J.S.A. 48:2-13, the Board has been vested by the Legislature with the general supervision and regulation of, and jurisdiction and control over, all public utilities "so far as may be necessary for the purpose of carrying out the provisions of [Title 48]." The courts of this State have held that the grant of power by the Legislature to the Board is to be read broadly, and that the provisions of the statute governing public utilities are to be construed liberally. See e.g., In re Pub. Serv. Elec. and Gas Company, 35 N.J. 358, 371 (1961); Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 424 (1969); Bergen County v. Dep't. of Public Utilities, 117 N.J. Super. 304 (App. Div. 1971).

The Board has reviewed the record developed before ALJ Gertsman as well as the analysis provided in his Initial Decision. For the reasons that follow, the Board **HEREBY ADOPTS** in part his factual discussion and findings and legal analysis, except as noted below.

As ALJ Gertsman correctly stated, a motion for summary decision may be made upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The procedure is aimed at the swift

uncovering of the merits and their effective disposition or advancement towards a prompt resolution, Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954), as an evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

In determining whether a genuine issue with respect to a material fact exists requires consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995). Where a motion for summary decision not decided by an agency head fully disposes of the case, it is treated as an initial decision under N.J.A.C. 1:1-18 et seq. and N.J.A.C. 1:1-12.5(c).

However, the entry of summary disposition is not appropriate in a case where material facts remain unresolved. In re Robros Recycling Corp., 226 N.J. Super 343 (App. Div. 1988), certif. denied, 113 N.J. 638 (1988). Here, while the record reflects that it is undisputed as to what type of program SUEZ has proposed, SUEZ has specifically indicated that it is not seeking rate-base treatment for the proposed regulatory asset, while Rate Counsel appears to assert that SUEZ's request is to treat it as a rate-based asset. The Board is vested with the discretion to determine whether or not a utility may be compensated for expenditures made on non-company owned assets and to carry them on its books as a deferred expense. The BPU has exercised this discretion by permitting deferred accounting treatment on a case-by-case basis. Then, at a later date, the Board can make a determination about that asset, including the appropriate accounting treatment to be afforded to the regulatory asset.

For example, the creation of a regulatory asset and deferred accounting for a regulatory asset have been permitted by the Board for a number of health and safety, as well as environmental reasons, where the utility will suffer significant financial harm. See, e.g. In re the Petition of Suez Water Princeton Meadows, Inc. for Deferred Accounting Authority for the Financial Impact of Waste Removal from the Sludge Lagoons, BPU Docket No. WF17030186 (July 26, 2017); In re the Petition of Aqua, New Jersey, Inc., for Approval of Deferred Accounting Treatment for Certain Costs Related to Water Quality Treatment for Radio Nuclides, BPU Docket No. WR06120897 (January 17, 2007); In re New Jersey Natural Gas Company's Request for Deferral Accounting Authority for Storm Damage Restoration costs Related to Hurricane Sandy, BPU Docket No. GR12111036 (May 29, 2013); In re the Board's Review of the Prudency of the Costs Incurred by the New Jersey Utility Companies in Response to Major Storm Events in 2011 and 2012, BPU Docket No. AX13030196 (March 20, 2013); In re the Board's Establishment of a Generic Proceeding to Review the Prudency of the Costs Incurred by New Jersey Natural Gas Company in Response to Major Storm Events in 2011 and 2012, BPU Docket No. GO13070610 (October 22, 2014).

In addition, New Jersey Legislature has empowered the Board to order the utilities to collect ratepayer funds to accomplish clean energy goals that benefit individuals, but also all ratepayers, by reducing the impact of climate change. As a result of the Electric Distribution and Energy Competition Act, N.J.S.A. 48:3-49 et seq., the utilities were allowed to bill all ratepayers for societal benefits to individuals such as low income programs and funding for energy efficiency and renewable energy programs. As SUEZ points out in its Exceptions, at page 14, N.J.S.A. 48:3-98.1 requires the electric and gas utilities invest in energy efficiency and conservation programs and that the attendant costs be eligible for rate recovery approved by the Board.

Clearly, the Energy Star and Energy Efficiency rebate programs are not used and useful property of the utilities, yet they are legislatively mandated initiatives.

According to the EPA's website, no level of lead in water is safe, because of the toxicity of lead, which causes a range of problems when consumed, including brain damage in adults and cardiovascular and kidney damage in adults.[6] Because of the impact on human health, the Lead and Copper Rule, 40 C.F.R. 141 et seq., which the State of New Jersey has adopted by reference at N.J.A.C. 7:10-5.1, requires action by the utilities when the levels are in excess of 15 parts per billion, to replace the LSLs on the company side and offer to replace the LSLs on the customer side, at the same time to ensure that the lead levels on the customer side do not become elevated as a result of the disturbance created from the replacement of only the company side. In recognition of the damage lead in drinking water poses to the health of infants and young children, the State of New Jersey enacted N.J.S.A. 58:12A-38 on January 9, 2020, declaring that LSLs pose a serious health risk to the public and allowing municipalities to enact ordinance to enter properties to replace LSLs, in order to protect the welfare of their residents. Moreover, two separate bills, S-253 and A1372, were introduced in the New Jersey Legislature on January 14, 2020, to deal with the funding of customer-side LSLs, served by investor owned utilities.

New Jersey is not unique in confronting problems with LSLs. The City of Flint, Michigan confronted a LSL problem when it changed its water supply from Lake Huron to a corrosive supply from the Flint River; thousands of people and businesses were impacted, but the damage was especially severe for infants and children. In recognition of this, the Michigan Legislature passed The Safe Drinking Water Act of 2018, MCLS § 325.1001 et seq., which provides for the reduction of actionable parts per billion for 15 ppb to 12 ppb and requires the replacement of the customer side of LSLs, when the utility side is replaced.

Other states have also reacted to the problem of LSLs. For example, Wisconsin Statute 196.372(2)(2018) provides: "A water public utility may provide financial assistance to the owner of a property to which water utility service is provided for the purpose of assisting the owner in replacing customer-side water service lines containing lead." Also, the Public Service Commission of Wisconsin must approve an application if it finds that the actions described in the application are not unjust, unreasonable, or unfairly discriminatory. Wis. Stat. § 196.372(3)(e)1.

In recognition of the dangers of lead in water, the Pennsylvania PUC approved a settlement with York Water Company ("York"), its Office of Consumer Advocate and Bureau of Investigation and Enforcement, in which York was granted waivers of its tariff provisions in order to allow the company to replace customer side LSLs, at the time the company side was replaced. Petition of York Water Company for an Expedited Order Authorizing Limited Waivers of Certain Tariff Provisions and Granting Accounting Approval to Record Cost of Certain Customer-Owned Service Line Replacements to the Company's Services Account, Docket No. P-2016-2577404 at *4 and *5 (March 2, 2017). The PUC noted at page 6, "York Water shall be permitted to record cost of all customer-owned service line replacements to a regulatory asset account and that they would be able to seek recovery in a rate base proceeding." On December 24, 2018, Pennsylvania also enacted 66 Pa. C.S. section 1311, Valuation of and Return on the Property of a Public Utility, at (b) (2) authorizing public utilities to recover "the original cost incurred by the public utility for the replacement of a customer-owned lead water service line or a customer-owned damaged waste water lateral, performed concurrent with a scheduled utility main replacement project or under a

[6] https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water, retrieved August 23, 2020.

commission-approved program notwithstanding that the customer will hold legal title to the replacement water service line or wastewater lateral."

In recognition of the perils to human health of lead in drinking water, there are currently at least 32 bills pending in the New Jersey Legislature that have to do with curtailing lead in homes and removing the threat of lead in drinking water, including: A814, A842, A1252, A1544, A1253, A1262, A1340, A1342, A1372, A1342, A1372, A1922, A1977, A2072, A2100, A2135, A2136, A2201, A4311, AR70, S253, S217, S320, S321, S646, S651, S655, S656, S702, S827, S829 and S833; surely New Jersey has the authority to act in the best interest of protecting the public from lead in drinking water, just as the States of Wisconsin, Michigan and Pennsylvania have.

The Board has used the discretionary authority under N.J.S.A. 48:2-21 to defer accounting on a number of occasions where the health of the public, or the ability of the utility to continue to provide service, were in peril. In 2007, the Board allowed deferred accounting to Aqua New Jersey, in order to allow for costs related to the treatment of wells that contained radium levels in excel of the maximum contaminant level allowed by State and Federal environmental regulations. In re the Petition of Aqua, New Jersey, Inc., for Approval of Deferred Accounting Treatment for Certain Costs Related to Water Quality Treatment for Radio Nuclides, Docket No. WR06120897 (January 17, 2007). In re the Petition of Suez Water Princeton Meadows, Inc. for Deferred Accounting Authority for the Financial Impact of Waste Removal From Sludge Lagoons, Docket No. WF170300186 (July 26, 2017), the Board allowed Suez to create a regulatory asset as a result of an approved deferral, arrived at between Suez, Staff and Rate Counsel, in order to ensure safe discharge of effluent and prepare for the abandonment of the detention lagoon. Similarly, in 2014, the Board allowed United Water West Milford, Inc., to defer accounting for the financial impact of litigation with Bald Eagle Commons Building Association regarding a dispute over a failing retaining wall between the two properties. In re the Petition of United Water West Milford Inc. for Deferral Accounting Authority for the Financial Impact of the Settlement of Litigation with Bald Eagle Commons Building Association, Docket No. WF14070804 (December 17, 2004). In 1981, the New Jersey Supreme Court upheld the Board's actions allowing accelerated amortization of the deferred energy balances that JCP&L incurred as a result of its 25 percent (25%) share of the energy produced by the Nuclear Plant at Three Mile Island, and its subsequent obligation to procure alternate sources of energy generation and maintain the failed nuclear plant on its books, in order to keep JCP&L from failure, which would have left its customers without electric service. In re the Petition of Jersey Central Power & Light Co., 85 N.J. 520, 528.

Most recently, the Board authorized the establishment of a regulatory asset for incremental expenses related to the coronavirus disease of 2019 ("COVID-19"). See In re New Jersey Board of Public Utilities' Response the COVID-19 Pandemic, Docket No. AO20060471 (July 2, 2020). Similar to the health crisis posed by lead in drinking water, the Board stated that COVID-19 had been identified as a "public health emergency" and acknowledged that the regulated utilities' response to the COVID-19 pandemic, including but not limited to, complying with the Governor's COVID-19-related Executive Orders, could cause the State's regulated utilities to incur significant and extraordinary COVID-19-related expenditures that could have a negative financial impact on the State's regulated utilities. Id. at *2-4. In light of these extraordinary circumstances and in an effort to minimize the financial impact of COVID-19 on the State's regulated utilities, the Board authorized, *inter alia*, each of the State's regulated utilities to create a COVID-19-related regulatory asset by deferring on their books and records the prudently incurred incremental costs related to COVID-19. Id. at *3-4.

The Board notes that allowing a utility to establish a regulatory asset is not a finding by the Board with regard to the prudency of incurring the expenses. The Board further notes that allowing a utility to establish a regulatory asset for expenditures does not guarantee future rate recovery of the deferred expenses included in the regulatory asset. The prudency of incurring the expenses associated with such expenditures and the possible future rate recovery of the deferred expenses of the same that are included in the regulatory asset would be addressed in detail by the Board in a future proceeding. See, i.e., In re the New Jersey Board of Public Utilities' Response the COVID-19 Pandemic, Docket No. AO20060471 (July 2, 2020) at *4 and In re the Petition of Suez Water Princeton Meadows, Inc. for Deferred Accounting Authority for the Financial Impact of Waste Removal from the Sludge Lagoons, BPU Docket No. WF17030186 (July 26, 2017) at *3.

As set forth in Stipulated Fact No. 24 above, the Parties agreed that the Board adjudicate "whether a Pilot Program should be adopted by the BPU ordering all SWNJ water customers to pay for replacement of non-company side LSLs through a surcharge mechanism." Despite the "used and useful" principle, a factual record needs to be made accordingly on other issues pertaining to the Company's proposal.

Therefore, upon careful review and consideration of the record, and based on the foregoing, the Board the Board accepts ALJ Gertsman's factual discussion and findings, as well as his legal analysis as it pertains to the applicable standard for a motion for summary decision. However, the Board **REJECTS** his legal conclusion and accompanying decision to grant Rate Counsel's motion for summary decision and **REMANDS** the matter for further findings of fact, regarding the allowance of deferred accounting for a regulatory asset among other issues as proposed by the Company.

Because these facts remain unresolved, the factual conclusions reached by ALJ Gertsman are necessarily unsupported by credible evidence. There is no factual record supporting his conclusion that SUEZ should not be allowed to launch the Pilot Program and incur the attendant expenses as a regulatory asset.

The Board **ORDERS** that the matter be **REMANDED** for a hearing to establish a factual record to determine the issues set forth in Stipulated Fact No. 24, including whether the proposed Pilot Program would result in just and reasonable rates to SUEZ's customers and whether special circumstances exist that warrant consideration of the merits of the petition, as well as other relevant factual issues and options for the Board to consider in making its determination whether as a matter of policy SUEZ can be permitted to incur the expenses associated with the replacement of non-company owned LSLs.

This Order shall become effective on September 13, 2020.

DATED: September 9, 2020

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

IN THE MATTER OF THE PETITION OF SUEZ WATER NEW JERSEY INC. FOR APPROVAL OF A PILOT PROGRAM TO FACILITATE THE REPLACEMENT OF LEAD SERVICE LINES AND A RELATED COST RECOVERY MECHANISM
BPU DOCKET NO. WO19030381
OAL DOCKET NO. PUC 07138-19

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