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NEW JERSEY BOARD OF PUBLIC UTILITIES

PUBLIC UTILITY HOLDING COMPANY STANDARDS

Proposed Amendments to N.J.A.C. 14:4-4A.2 to 4A.3
Proposed New Rules: N.J.A.C. 14:4-4A.4 to 4A.7

Proposed March 17, 2008

PUBLIC UTILITIES

BOARD OF PUBLIC UTILITIES

Affiliate Relations, Fair Competition and Accounting Standards, Public Utility Holding Company Standards and Related Reporting Requirements

Proposed Amendments: N.J.A.C. 14:4-4A.2 to 4A.3
Proposed New Rules: N.J.A.C. 14:4-4A.4 to 4A.7

Authorized By:	New Jersey Board of Public Utilities, Jeanne M. Fox, President, Frederick F. Butler, Joseph L. Fiordaliso and Christine V. Bator, Commissioners
Authority:	N.J.S.A. 48:2-1 et seq., 48:2-13; 48:2-16; 48:2-16.1; 48:2-16.2; 48:2-23; 48:2-29.2; 48:2-37; 48:2-51.1; 48:3-7; 48:3-7.1; 48:3-7.2; 48:3-9; 48:3-10; 48:3-49 et seq.

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Calendar Reference:	See Summary below for an explanation of exception to calendar requirement.
BPU Docket Number:	AX07050309
Proposal Number:	PRN 2008-

The Board will hold a public hearing on this proposal at:

April 23, 2008 at 11 AM
Board Hearing Room
New Jersey Board of Public Utilities
2 Gateway Center, 8th Floor
Newark, New Jersey

Comments may be submitted through May 16, 2008 through either of the following methods: Comments may be submitted in Microsoft WORD format, or in a format that can be easily converted to WORD, by e-mailing them to the following e-mail address: rule.comments@bpu.state.nj.us

OR:

Comments may be submitted on paper to:
Kristi Izzo, Secretary
Board of Public Utilities
ATTN: BPU Docket Number AX07050309
Two Gateway Center
Newark, New Jersey 07102

The agency proposal follows:

Summary

The New Jersey Board of Public Utilities ("Board") is proposing amendments to rules at N.J.A.C. 14:4-4A.2 and 4A.3, and new rules at N.J.A.C. 14:4-4A.4 to 4A.7, to supplement existing provisions related to affiliate relations. These rules are intended to compensate for vital regulatory protections that would otherwise be lost by the repeal of the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C. § 79a et seq., and to codify various Board policies that have protected ratepayers of electric and gas public utilities from the types of abuses that led to the enactment of PUHCA in 1935.

The special circumstances of electric and gas public utilities create unique problems that require state and federal regulatory oversight of public utility holding company systems. The utility industry is capital intensive and thus is highly dependent on access to the capital markets. The utility's credit ratings may decline as a result of activities at the parent company or an unregulated subsidiary. Consequently, the compensation demanded by providers of capital can increase, putting ratepayers at risk. In addition, unregulated subsidiaries can affect the incentives of utility management. Management may have priorities other than local utility service and may lack the state-specific experience necessary to ensure reliable service at reasonable rates. Finally, a public utility holding company with unregulated subsidiaries may lead to ratepayer subsidies of nonutility services.

In order to compensate for these unique circumstances, PUHCA was enacted in the 1930's to regulate public utility holding companies. PUHCA was passed during the Great Depression in response to the failure of a number of public utility holding companies. Holding companies were using stable public utility revenues to finance and guarantee other business ventures. The public utility holding company structure disguised unethical practices, such as the bilking of public utility subsidiaries through inflated service contracts, depreciation techniques, and property values. These public utility holding companies were highly leveraged and supported by the stable revenues of the public utilities at the bottom of the corporate pyramid. The crash of 1929 quickly lead to their bankruptcies. The economic consequences for the country were severe.

PUHCA was enacted to simplify these complex public utility holding companies and provide other measures that would allow regulators to better monitor their activities. The statute established two broad categories of utility holding companies: registered holding companies and exempt holding companies. Under PUHCA, a corporation which owned 10% or more of an electric or gas utility had to "register" as a utility holding company with the Securities and Exchange Commission ("SEC") unless an exemption was claimed. "Exempted" companies, generally, were those whose utility's operations were predominately in a single state. For registered companies, the SEC had to approve, among other things, the issuance of securities and debt, the acquisition of certain assets, and transferring money between the holding company and its subsidiaries. In New Jersey, the parent companies of Jersey Central Power and Light, Atlantic City Electric Company, and Elizabethtown Gas were registered holding companies. As discussed more fully below, generally the restrictions imposed on registered companies did not apply to exempted companies, and thus states were the primary regulatory overseer of their operations. In New Jersey, exempted companies included Public Service Electric and Gas Company, South Jersey Gas Company, New Jersey Natural Gas Company, and Rockland Electric Company.

The absence of PUHCA's oversight of registered companies, and its limited—but significant—oversight of exempted companies, could pose unnecessary risks to the State of New Jersey and its electric and gas public utility ratepayers. Consequently, the proposed rules further the Board's statutory mandate to ensure the provision of safe, adequate and proper service at just and reasonable rates, N.J.S.A. 48:2-1 et seq. It is important to recognize that the Board's decision to propose new rules at this time is not merely based upon PUHCA repeal, but is also predicated upon recent actual experiences both nationally, where holding company abuses in the utility sector have been well-chronicled as a result of the Enron and WorldCom corporate scandals, and locally in New Jersey, where the Board was called on to address concerns regarding business practices of a holding company and affiliated nonregulated subsidiaries in order to protect the customers of a New Jersey public utility. In the Matter of the Focused Audit of Elizabethtown Gas Company, NUI Utilities, Inc. and NUI Corporation, BPU Docket Nos. GA03030213, GA02020099, GR03050423, GR02120945, GR02040245 and GR01110771, Board Order dated April 26, 2004 (adopting a stipulation providing, among other things, for the return plus interest of $28 million to Elizabethtown Gas ratepayers). The Board also believes the proposed regulations provide a necessary and appropriate level of standardization and clarity to the Board, its Staff and the regulated community. This clarity will ensure that customers and the State of New Jersey as a whole are not harmed by electric and gas public utility membership in a holding company structure.

The rules are intended to address concerns about protecting the viability and integrity of New Jersey's public utilities from potential abuses by its public utility holding company system. Consequently, the new rules address utility corporate structure, utility relationships with its public utility holding company system, dividends, access to books and records, and diversification. Although the proposed rules are broader than the existing Affiliate relations standards, N.J.A.C. 14:4-5, they augment but do not replace any of those rules or other existing rules. Also, the proposed rules only apply to New Jersey electric and gas public utilities which are owned by a public utility holding company.

The proposed new rules would preserve and further codify the Board's access to public utility and public utility holding company system books and records; establish ring-fencing protections to protect ratepayers as well as the State of New Jersey from public utility capital impairment; ensure that the Board retains appropriate supervision over service agreements entered into between an electric or gas public utility and its public utility holding company system; and establish protections against cross-subsidization by potentially separating the corporate boards of directors of the public utility and the public utility holding company system by requiring the independence of certain utility directors.

N.J.A.C. 14:4A.2 proposes to add definitions for the terms "Aggregate Investment," "Board of Directors New Jersey Qualification," "Board of Directors Independence Qualification," "Board Staff," "Money Pool," "Preexisting Director," and "Service Agreements." These terms are referenced throughout the proposed new provisions of this subchapter and thus require appropriate definition. Also proposed are modifications to the existing language in N.J.A.C. 14:4A.2(a) and (b) in order to provide greater clarity and to indicate that definitions used in the proposed rules that are not defined in the subchapter reside in other parts of Chapter 14. With regard to the proposed board of directors independence qualification, the proposed definition incorporates by reference the New York Stock Exchange (NYSE) Listed Company Manual and related rules, which delineates the board of directors independence requirements for companies that list on the NYSE.

N.J.A.C. 14:4A.3 has been amended to apply the diversification limit to "investments" rather than "assets." Under PUHCA, the SEC reasoned that the harm, if any, that could befall a utility's operations by reason of non-utility investment depended on the amount the holding company had "at risk," i.e., the amount of its investment. The SEC recognized that the size, per se, of non-utility investments was not predictive of possible harm to the utility.

Indeed, the level of assets could vary greatly from year to year depending on the success of the business. A minimal "investment" in a company that turns out to be very successful, and has its assets grow through borrowings and net income reinvested in the business, could as a result cause the 25% cap in the extant N.J.A.C. 14:4A.3(a) to be exceeded.

The Board has determined that the existing rules have the unintended potential to harm holding companies that make successful investments. If an investment initially passed the 25% asset test, the holding company could be in non-compliance later if that investment turned out to be successful. In the Board's response to comments with respect to this issue, published at 38 N.J.R. 4241 on October 2, 2006, the Board agreed that there would be "certain benefits from using aggregate investments for calculation purposes, but such a clarification would be considered an improper substantive change upon adoption." At that time, the Board indicated that it would "propose amending the basis for calculating the 25 percent cap and replacing the term 'aggregate assets' with 'aggregate investments' as part of its future rulemaking process." It is doing so herein.

Proposed new N.J.A.C. 14:4-4A.4 sets forth the scope of the Board's authority to have full and timely access to the books and records of an electric or gas public utility relating to its interactions with its public utility holding company system. Additionally, it establishes filing requirements for information that must be filed with the Board.

Proposed new N.J.A.C. 14:4-4A.5 codifies Board policy and establishes substantive requirements concerning the Board's review and ratemaking treatment of service agreements between an electric or gas public utility and its public utility holding company system. This subsection is not intended to create rights for third parties in any way. Rather, the intent of this subsection is to ensure that service agreements between an electric or gas public utility and an affiliate in its public utility holding company system fairly allocate costs to ratepayers.

Proposed new N.J.A.C. 14:4-4A.6 establishes structural separation requirements to protect ratepayers and the State of New Jersey as a whole from potential abuses which could result when the interests of the electric or gas public utility are not entirely aligned with the interests of its public utility holding company system. This section also establishes a requirement that each public utility maintain a distinct corporate identity, and requires independence requirements on certain utility directors. As outlined in proposed N.J.A.C. 14:4-4A.6 with respect to the composition of utility boards of directors, this subsection applies prospectively. The Board in no way intends for existing boards of directors to be disturbed by this subsection, unless an existing board member is reelected to the board of directors after the effective date of the proposed rules, in which case the requirements in N.J.A.C. 14:4-4A.6 would apply. This section would also require various information from an electric or gas public utility that would facilitate more effective Board oversight.

Proposed new N.J.A.C. 14:4-4A.7 establishes operational separation requirements to protect ratepayers and the State of New Jersey as a whole from cross-subsidization between an electric or gas public utility and its public utility holding company system. It allows the Board to implement restrictions if it finds that the capital of an electric or gas public utility may be impaired. This includes the authority to limit or cease the payment of a dividend or a distribution of any kind to shareholders or the public utility holding company system, and to adopt adjustments to the cost of service of an electric or gas public utility to offset adverse effects from its inclusion within a public utility holding company system. This adjustment could include, among other things, changes to the cost of service as a result of increased credit costs as a result of activities at the holding company or affiliate level. Additionally, it establishes a notice requirement before the transfer of more than five percent of the electric or gas public utility's retained earnings to its public utility holding company or the declaration of a special or un-regular cash dividend. The provision would also standardize preexisting Board policy on money pools.

As the Board has provided a 60-day comment period on these proposed new rules, they are exempted from the rulemaking calendar requirements set forth at N.J.A.C. 1:30-3.1 and 3.2, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

These proposed new rules will have a positive social impact. There is a potential for economic harm to an electric or gas public utility when it is acquired by a public utility holding company, as described below in the Economic Impact statement. These rules will protect the integrity of such electric or gas public utilities, and will thus ensure that investors and ratepayers can rely on and have continued confidence in New Jersey electric or gas public utilities.

Economic Impact

The proposed new rules may reduce operating costs for New Jersey electric and gas public utilities. The ownership of New Jersey electric or gas public utilities by public utility holding company systems creates unique problems that require specific regulatory oversight. First, public utility holding company system investments in non-utility businesses may lead to utility ratepayer subsidies of non-utility services. Second, the acquisition of a utility by a public utility holding company system can affect the incentives of utility managers, as new managers may have priorities other than local utility service and may lack the state-specific and utility experience necessary to ensure the provision of safe, adequate and proper service at just and reasonable rates as required in N.J.S.A. 48:2-1 et seq. Third, if the electric or gas public utility's credit ratings decline as a result of activities by the public utility holding company system, the compensation demanded by providers of capital can increase. Consequently, to the extent that any New Jersey electric or gas public utility is or may be harmed in these ways by its public utility holding company system, the proposed new rules will reduce the operating costs of the New Jersey gas or electric public utility.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt or amend rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. These proposed new rules are necessary to replace the protections lost by the repeal of PUHCA, 15 U.S.C. §79a et seq., and to protect New Jersey ratepayers and the State of New Jersey as a whole from potential harm. PUHCA was enacted by Congress in the 1930's to regulate holding companies owning electric or gas utilities. On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005, which repealed PUHCA effective in February 2006. PUHCA provided significant protections for the ratepayers of New Jersey. The Board believes that such protections should be continued at the State level. These proposed new rules, however, are not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, Federal standards or Federal requirements. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal standards analysis for this proposal.

Jobs Impact

The Board does not anticipate that these proposed new rules will result in the loss of existing jobs in New Jersey because the rules will strengthen New Jersey electric or gas public utilities. For that very same reason, the prospect of additional new jobs in New Jersey being created is increased. The proposed new rules are unlikely to have an impact on any other sector of the economy of the State.

Agriculture Industry Impact

The Board does not anticipate that the proposed new rules will have any impact on the agriculture industry in New Jersey, because they apply solely to the relationship between utilities and their affiliates or parent holding companies. Thus, the rules will affect all ratepayers and citizens equally.

Regulatory Flexibility Analysis

The proposed new rules will impose no recordkeeping, reporting or other compliance requirements on small businesses. A small business, as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., is a business that has fewer than 100 full-time employees. The proposed new rules apply to New Jersey electric and gas public utilities and their public utility holding companies. None of these companies have fewer than 100 full-time employees.

Smart Growth Impact

The Board anticipates that the proposed rules will have no impact on either the achievement of smart growth or the implementation of the State Development and Redevelopment Plan. The State Plan is intended to "provide a coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State and its regions" and to "identify areas for growth, agriculture, open space conservation and other appropriate designations." N.J.S.A. 52:18A-199a. Smart growth is based on the concepts of focusing new growth into redevelopment of older urban and suburban areas, protecting existing open space, conserving natural resources, increasing transportation

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options and transit availability, reducing automobile traffic and dependency, stabilizing property taxes, and providing affordable housing." These proposed rules will apply uniformly Statewide and the Board does not expect that they will affect the location of future development. Therefore, the proposed new rules will not impact smart growth or the State Plan.

Full text of the proposed new rules follows (addition indicated in boldface thus; deletion indicated with brackets [thus]):

SUBCHAPTER 4. PUBLIC UTILITY HOLDING COMPANY STANDARDS

14:4-4A.1 Scope

This subchapter sets forth requirements that apply to electric and/or gas public utilities that operate in New Jersey and are owned by a public utility holding company. The subchapter is intended to protect New Jersey utility ratepayers from the risks presented by the ownership of a New Jersey electric or gas public utility by a public utility holding company.

14:4-4A.2 Definitions

(a) As used in this subchapter, "Board," "electric public utility," "electricity related services," "existing products and/or services," "gas public utility," "gas related services," "person," "public utility holding company," and "shared services" have the same meaning as [used] in N.J.A.C. 14:4-1.2.

(b) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions that apply to this subchapter can be found at N.J.A.C. 14:3-1.1 and 14:4-1.2.

"Aggregate Investment" means all amounts invested, or committed to be invested, in nonutility associates for which there is recourse, directly or indirectly, to the public utility holding company, excluding:

(1) The portion of the public utility holding company's book investment that is attributable to increases in retained earnings or to indebtedness issued by any subsidiary with respect to which there is no recourse directly or indirectly to the public utility holding company; and

(2) The amount invested in one nonutility associate by another nonutility associate.

"Board of Directors New Jersey Qualification" means residency, employment and/or other significant ties with the State of New Jersey, as determined by the Board.

"Board of Directors Independence Qualification" means the New York Stock Exchange listing requirements pertaining to the independence of directors, as set forth in Section 303A.02(b) of the NYSE Listed Company Manual (www.nyse.com/regulation) and related NYSE rules (www.nyse.com/regulation/rules/1098571481177.html), as may be amended and supplemented from time to time, which are incorporated by reference herein.

“Board Staff” means the staff of the New Jersey Board of Public Utilities, or successor agency. Except as otherwise provided for, any information required to be provided to the Board Staff under this subchapter shall be provided at a time, location, and in a manner as determined by Board Staff. In addition, if immediate notification to Board Staff is required, electronic mail notification shall be submitted to the Board Secretary, the Division of Audits, the Office of the Chief Economist, and the Division of Energy, or any successors.

“Money pool” means an inter-company lending arrangement whereby depository, surplus cash funds are loaned or borrowed by an electric or gas public utility or other utility within the public utility holding company system to meet short-term (under 365 days) operating cash requirements.

“Nonutility associate” means a subsidiary company, in a public utility holding company system, that is not an electric or gas public utility or utility associate. Examples of entities excluded from this definition include, but are not limited to:

1. Entities that are developing facilities that will engage in public utility or utility associate activities; and
2. Entities that are directly related and subordinate to, or that directly support, public utility or utility associate activities, including, but not limited to:
    a. Entities that provide fuel to generating plants;
    b. Entities created to facilitate tax advantages;
    c. Entities created to facilitate financing transactions;
    d. Captive insurance and other risk management entities; or
    e Entities that hold or manage emission allowances or other environmental allowances or credits.

“Preexisting Director” means a director on the board of directors whose term commenced before {the effective date of this subchapter}. A Preexisting Director shall be considered in compliance with the Board of Directors Independence Qualification and the Board of Directors New Jersey Qualification for purposes of determining the requirements of N.J.A.C. 14:4-4A.6(a). A Preexisting Director’s reelection to, or extension of term on, the board of directors after {the effective date of this subchapter} terminates the Preexisting Director designation for that director.

“Public utility holding company system’” means a public utility holding company, together with its subsidiary companies.

“Service agreement” means a contract or agreement whereby a public utility holding company or a subsidiary undertakes to sell, lease, or furnish any managerial, financial, legal, engineering, purchasing, marketing, auditing, statistical, advertising, publicity, tax, research, or any other service, information or data, or any goods, equipment, materials, supplies, appliances, or similar property, to an electric or gas public utility in the same public utility holding company system. Nothing herein shall be deemed to expand the Board’s jurisdiction over service agreements beyond its existing jurisdiction under N.J.S.A. 48:3-7.1

"Subsidiary" or "subsidiary company" of a public utility holding company means:

1. Any company for which 10 percent or more of the outstanding voting securities of the company are directly or indirectly owned, controlled, or held with power to vote, by the public utility holding company; and
2. Any person over whose management or policies the public utility holding company has a controlling influence that is sufficient to make it necessary for the rate protection of utility customers that such person be subject to the obligations, duties, and liabilities imposed by this subchapter upon subsidiary companies of public utility holding companies. This shall apply regardless of whether the public utility holding company exercises its influence directly or indirectly, either alone or pursuant to an arrangement or understanding with one or more other persons. The Board shall make this determination after notice and opportunity for hearing.

"Voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.

"Utility associate" means a subsidiary company, in a public utility holding company system, that directly or indirectly derives or will derive substantially all of its revenues (greater than 70%) from:

1. Producing, generating, transmitting, delivering, distributing, storing, selling, marketing, and/or furnishing natural gas, heating oil, electricity**,** propane, thermal energy and/or steam energy to wholesale and/or retail customers;
2. Gas and/or electricity related services including, but not limited to:
   i. Energy management services and demand side management activities;
   ii. Development and commercialization of electrotechnologies related to energy conservation, storage and conversion, energy efficiency, waste treatment, greenhouse gas reduction, clean coal technologies, and similar innovations;
   iii. Ownership, repair, maintenance, replacement, operation, sale, installation and servicing of refueling, recharging and conversion equipment and facilities relating to electric and compressed natural gas powered vehicles;
   iv. Sale of electric and gas appliances including equipment to promote new technologies, or new applications for existing technologies, that use gas or electricity and equipment that enables the use of gas or electricity as an alternate fuel and the installation and servicing thereof;
   v. Production, conversion, servicing, sale and distribution of
   (1) Thermal energy products and resources, such as process team, heat, hot water, chilled water, air conditioning, compressed air and similar products;
   (2) alternative fuels such as coal gasification facilities and other synthetic fuels technologies, hydrogen fuel, landfill gas recovery, refuse derived fuels, biomass derived fuels, ethanol, methanol, and other alternative fuels technologies; and
   (3) Renewable energy resources;
   vi. Sale of technical, operational, management and other similar kinds of services and expertise relating to distribution, transmission, and generation including engineering, development, design and rehabilitation, construction, maintenance

and operation, fuel procurement, delivery and management and environmental licensing, testing and remediation;

vii. Ownership, operation and servicing of fuel procurement, transportation, handling and storage facilities, scrubbers, and resource recovery and waste water treatment facilities, including activities related to nuclear fuels;

viii. Development and commercialization of technologies or processes that utilize coal waste or by-products as an integral component of such technology or process;

ix. Nuclear decommissioning trust activities;

x. Securitization activities, financing activities and tax advantaged transactions related to electric or gas public utility and utility associate activities;

xi. Development activities relating to other authorized electric or gas related activities or utility associate activities;

xii. Local community development investments relating to other authorized electric or gas related activities;

xiii. Revenues from sales of assets that were related to other authorized electric or gas related activities;

xiv. Captive insurance and other risk management activities;

xv. Holding and managing emission allowances or other environmental allowances or credits; or

xvi. Other utility related activities as determined on a case-by-case basis by the Board [and/or Board Staff];

3. Existing products and/or services and similar services provided by a subsidiary that is not a public utility; and/or
4. Shared services.

14:4-4A.3 Asset investments

(a) Each electric or gas public utility and its public utility holding company shall ensure that the aggregate [assets of] <u>investment in</u> all nonutility associates in the public utility holding company system do<u>es</u> not exceed twenty-five percent of the aggregate assets of all public utilities and utility associates in the public utility holding company system.

(b) The Board may adjust the percentage level in (a) above up to an additional 10 percentage points higher, not to exceed 35 percent, upon petition by an electric or gas public utility. The Board shall consider any petitions filed pursuant to this provision on a case by case basis. Any adjustment to the percentage level must not compromise safe, adequate and proper service.

(c) Each electric or gas public utility or its public utility holding company shall file all of the following in their annual report with the Board:

1. A listing of names and [total assets] <u>classification (i.e., utility associate or nonutility associate)</u> for each subsidiary in the public utility holding company system;
2. The [assets of all nonutility associates] <u>aggregate investment</u> as a percentage of total assets of all public utilities and utility associates in the public utility holding company system;

3. An annual certification as authorized by the board of directors of the public utility holding company and electric or gas public utility, by the chief executive officer[, as authorized by the board of directors,] of the public utility holding company and electric or gas public utility[, if applicable], that the percentage of [assets in nonutility associates] aggregate investments does not contravene this subchapter; and
4. All information required in the annual report pursuant to (c)1-3 above, shall be as of the end of the previous fiscal year.

14:4-4A.4 Access to information

(a) An electric or gas public utility or its public utility holding company system shall, upon request, provide the Board and/or Board Staff with full and timely access to any books and records, correspondence, memoranda, contracts, or documents containing information relating to the electric or gas public utility's interaction with:

1. Its public utility holding company system; or
2. Any other company.

(b) An electric or gas public utility and its public utility holding company system shall, upon request, make available to the Board and/or Board Staff all information that the electric or gas public utility or its public utility holding company system files with the Federal Energy Regulatory Commission (FERC) with regard to merger reviews, service agreements, cost allocations, or any other subject matter that the Board and/or Board Staff determines is necessary to evaluate an electric or gas public utility's ability to provide safe, adequate and proper service at just and reasonable rates.

(c) Notice shall be given to the Board within ten business days if an electric or gas public utility or its public utility holding company system receives notice of a decision by FERC or another Federal or state agency to perform any investigation or audit of:

1. The electric or gas public utility;
2. Any part of its public utility holding company system; or
3. A party with which the electric or gas public utility has a material transactional relationship.

(d) An electric or gas public utility or its public utility holding company system shall provide copies to the Board of any report and/or document that results from the investigation or audit described at (c) above, that could reasonably be expected to have a material impact on the financial condition or operations of the electric or gas public utility or its public utility holding company system.

(e) The public utility or public utility holding company system shall provide the report and/or document described in (d) above to the Board no later than ten business days after the issuance of the report and/or document, and shall include an executive summary that highlights the findings and recommendations. A description of the investigation and/or final audit report appearing in a transactional, current or periodic filing with the Securities and Exchange Commission ("SEC") under the Securities Act of 1933 or the Securities Exchange Act of 1934, will satisfy the requirement of an executive summary. If the Board and/or Board Staff request additional material, the electric or gas public utility or public utility holding company system shall supply the additional material within ten days after such a request.

(f) Upon reasonable notice, an electric or gas public utility shall provide the Board and/or Board Staff with access to its Federal income tax returns, including access in its New Jersey office to complete copies of any consolidated Federal income tax filings that include the electric or gas public utility.

(g) In cases where the electric or gas public utility is included in a consolidated federal income tax filing, the electric or gas public utility may elect to comply with (f) above by providing a summary schedule in lieu of providing the complete consolidated federal income tax filings. However, if the electric or gas public utility elects to provide the summary schedule, the electric or gas public utility shall also provide the pages from the consolidated federal income tax return from which the data on this schedule is derived. The electric or gas public utility shall provide this information within ten business days after a Board and/or Board Staff request, or within such other period of time as may be agreed to by the Board and/or Board Staff .

(h) Any summary schedule submitted under (g) above shall include all of the following:

1. A summary of the actual consolidated income tax filings of the public utility holding company for each of the past ten years (including estimates for the most recent tax year if it has not yet been filed);
2. All of the following information by year:
    a. The name of the public utility holding company that filed the consolidated tax filing and the name of each subsidiary included in the consolidated tax return (indicate by each name whether or not the entity is an electric or gas public utility or a utility certified as such in another state;
    b. The taxable income / (loss) shown separately for the public utility holding company and for each subsidiary;
    c. The taxable income / (loss) for the electric or gas public utility in total and broken down by electric operations and gas operations if the electric or gas public utility has combined electric and gas operations;
    d. The total consolidated taxable income;
    e. The federal income tax rate;
    f. The consolidated federal income tax liability; and
    g. The alternative minimum tax payment, if any.

(i) Any electric or gas public utility or its public utility holding company system required to file a Form 60 with FERC shall provide to the Board a copy of such form simultaneously with its filing with FERC.

(j) If an electric or gas public utility has a Service Agreement with a subsidiary of its public utility holding company and is exempt from filing a Form 60 with FERC, the electric or gas public utility or public utility holding company system shall make an annual filing with the Board no later than May 1 of each year. The filing shall include:

1. A comparative income statement and balance sheet for the subsidiary;
2. A schedule and analysis of billings to the public utility and all other subsidiaries (similar to FERC Form 60, Schedules XVI, XVII and XVIII);
3. Allocation methodologies;
4. Current year plan factors compared with previous year plan factors and variances; and
5. An organizational chart for the subsidiary.

(k) If an electric or gas public utility or its public utility holding company system does not have a Service Agreement with a subsidiary, but has an agreement to share services with another entity, the public utility or public utility holding company system shall make an annual filing with the Board no later than May 1 of each year. The filing shall include:

1. An analysis of billings for each shared service; and
2. An analysis comparing the direct and indirect charges for subsidiaries and non-subsidiaries.

(l) The Board and/or Board Staff may require any public utility or public utility holding company system to keep any record or document that the Board and/or Board Staff determines is necessary to enable the Board and/or Board Staff to evaluate a public utility's compliance with this subchapter or the Board's orders, policies, and rules.

14:4-4A.5 Service agreements

(a) An electric or gas public utility shall obtain Board approval prior to entering into a service agreement.

(b) An electric or gas public utility shall notify the Board in writing of all modifications to any approved service agreement, including the provision of services to a non-affiliate, and additions or deletions to the categories of services provided under the service agreement.

(c) An electric or gas public utility shall obtain Board approval for any modification to cost allocation methodologies and formulae which would result in a five (5) percent or greater change in allocation factors. The filing should be submitted at least sixty calendar days prior to the proposed effective date of the modification. The filing shall include the following:

1. All allocation formulas, supporting work papers, and a complete list and description of the services and operations covered by the service agreement; and
2. A comparison of the budget under the existing service agreement and a pro-forma budget under the new service agreement, showing service company costs and charges that will apply to the electric or gas public utility.

(d) Subject to such approvals as required in (c) above, if a public utility holding company system adds or removes a party to a service agreement, the electric or gas public utility shall ensure that the following occurs within sixty (60) business days after such addition or removal:

1. Cost allocation factors are adjusted to reflect the addition or removal of participants at the time service commences or ends, as applicable;

2. Payment by the new participant begins; and
3. Adjustments are made for the electric or gas public utility's share of service company costs to reflect contributions from the new participant.

(e) An electric or gas public utility or its public utility holding company shall notify the Board no later than ten business days after it receives notice that FERC or any other Federal or state agency has rendered a decision having an impact on a service agreement that the Board has approved or that is pending before the Board.

(f) For ratemaking purposes, an electric or gas public utility shall:

1. Apply to any assets not acquired by the electric or gas public utility, but intended for its use, the same capitalization, expense and depreciation policies that the Board has determined apply to assets acquired directly by the electric or gas public utility; and
2. Apply to assets acquired on behalf of the electric or gas public utility for its use the rate of return authorized in the electric or gas public utility's most recent base rate case, unless the company acquiring the assets on behalf of the electric or gas public utility finances, or otherwise obtains the assets at a lower cost than the electric or gas public utility could otherwise obtain them. In such a case, the lower cost shall be reflected in service agreement billings to the electric or gas public utility, and the electric or gas public utility shall pass the resulting benefit on to its ratepayers.

(g) An electric or gas public utility shall not purchase or contract for any product or service otherwise covered under a service agreement that the electric or gas public utility can provide for itself or can procure from another company on more advantageous terms. The determination as to whether to refuse to purchase or contract for any product or service covered under the service agreement shall take into account all relevant factors, including, but not limited to, price, qualifications of the alternative provider, contract terms, quality of the product or service provided, and the efficiency, timeliness, and convenience of delivery or provision of the product or service. The determination above as to whether to refuse to purchase or contract for any product or service covered under the service agreement shall in no way limit the Board and/or Board Staff from independently reviewing those activities. An electric or gas public utility shall not be required to take action that would result in a conflict of interest, violation of applicable law, or breach of any pre-existing contractual arrangements.

(h) An electric or gas public utility or its designee shall review its purchases and contracts of any service under a service agreement beginning every three years after {effective date of this subsection] for compliance with (g) above. All reviews shall be documented and shall be provided to the Board and/or Board Staff upon request.

(i) Nothing in (g) above shall apply to corporate governance or other activities such as senior management services, treasury/finance functions, legal, system security and shareholder and external relations. These services shall continue to be subject to the review by Board and/or Board Staff to ensure just and reasonable rates.

(j) A public utility holding company system shall not penalize an electric or gas public utility for any refusal of services under (g) above.

14:4-4A.6 Structural separation

(a) Commencing six months after {effective date of this subchapter}, an electric or gas public utility, having a board of directors comprised of more than one director, shall file all of the following in its annual report with the Board:

1. An annual certification stating that at least forty percent of the electric or gas public utility's board of directors satisfy separately the Board of Directors New Jersey Qualification and Board of Directors Independence Qualification;
2. The name of each director that satisfies the Board of Directors Independence Qualification and/or the Board of Directors New Jersey Qualification, and a description of how the director so satisfies the Board of Directors New Jersey Qualification; and
3. A certification, if the Board of Directors Independence Qualification and/or Board of Directors New Jersey Qualification is not satisfied, stating that it was unable to comply with such requirements in good faith and an explanation for the inability to comply with such requirement(s).

(b) An electric or gas public utility shall maintain a distinct corporate identity, as evidenced by a separate corporate credit rating or a separate credit rating for its outstanding securities with a nationally recognized statistical rating organization (NRSRO).

(c) If an electric or gas public utility or its public utility holding company regularly subscribes to the publications of an NRSRO, corporate governance rating agency, or investment banking firm, and the NRSRO, corporate governance rating agency, or investment banking firm releases a report or article that addresses the electric or gas public utility or its public utility holding company, the electric or gas public utility shall submit the report to the Board and/or Board Staff. The report or article shall be provided electronically to the Office of the Chief Economist within five business days after the electric or gas public utility or its holding company receives or becomes aware of the report.

(d) If the senior secured credit rating for the outstanding publicly-held securities of an electric or gas public utility, or the senior unsecured credit rating for its public utility holding company, is downgraded after the {effective date of this subchapter} to one notch above the speculative grade of any applicable NRSRO (for example, BBB- for Standard & Poor's (S&P) or Baa3 for Moody's Investors Services (Moody's) or lower), the electric or gas public utility shall do both of the following:

1. Within five business days after the downgrade, notify the Office of the Chief Economist and Division of Energy; and
2. Within thirty calendar days after the downgrade, analyze the cost impact of the downgrade on the electric or gas public utility, and if there is a cost impact, submit to the Office of the Chief Economist and Division of Energy a detailed explanation of how the public utility holding company will seek to prevent the credit rating from falling below the then present level.

14:4-4A.7 Operational separation

(a) No public utility holding company system shall be operated in any way that materially impairs or could reasonably be expected to materially impair the electric or gas public utility's credit, ability to acquire capital on reasonable terms, or ability to provide safe, adequate and proper utility service at just and reasonable rates.

(b) The Board may adopt an appropriate adjustment to the cost of service of an electric or gas public utility if necessary to offset any material adverse effects from its inclusion within a public utility holding company system, including, but not limited to, any adverse effects on the electric or gas public utility's credit ratings.

(c) If an electric or gas public utility's equity to total capitalization ratio, as determined for ratemaking purposes and excluding securitization debt, falls below thirty percent, the electric or gas public utility shall notify the Office of the Chief Economist and Division of Energy. The notice required in this subsection shall be provided within ten business days after the end of the calendar quarter in which the ratio fell below the required percentage. The Board may adjust the percentage requirement under this subsection if, after notice and hearing, the Board determines an adjustment is necessary to restore the financial integrity of the electric or gas public utility.

(d) If an electric or gas public utility is required to notify the Board under (c) above, the public utility shall not declare a distribution, whether by dividend or by another method, to the public utility holding company system, without prior Board approval, until the public utility's equity to total capitalization ratio increases sufficiently to exceed the applicable percentage level.

(e) An electric or gas public utility shall notify the Board in writing at least thirty days in advance if it intends to do either of the following:

1. Transfer, other than by way of dividend, more than five percent of the electric or gas public utility's retained earnings to the public utility holding company; or
2. Declare a special cash dividend, the effect of which would be to result in an equity to total capitalization ratio below thirty percent.

(f) On or after {the effective date of this subchapter}, an electric or gas public utility shall not participate in any money pool unless the Board prior to the effective date of this subchapter has approved the money pool participation, or unless all of the following requirements are met:

1. The Board has approved the money pool participation in accordance with N.J.S.A. 48:3-7.1 and 48:3-7.2.
2. Participation in the money pool is restricted to the public utility holding company, other electric or gas public utilities within the public utility holding company system, subsidiary companies providing electric or gas utility service outside of New Jersey and certified or classified as electric or gas utilities by the public utility commission of the state where service is provided, or any other subsidiary in the public utility holding company system;

3. A subsidiary company in the public utility holding company system that is not a public utility or an out-of-state utility is prohibited from borrowing from the money pool;
4. All borrowers in the money pool have, at a minimum, investment grade credit ratings from all applicable NRSROs;
5. Borrowings from the money pool by any participant are restricted to the limitation on unsecured indebtedness contained in its certificate of incorporation, if applicable;
6. The fees for administering the money pool, if any, are cost-based and subject to review by the Board for ratemaking purposes; and
7. Loan terms are 364 days or less.

(g) If an electric or gas public utility is authorized under (f) above to participate in a money pool, the electric or gas public utility shall:

1. Record all money pool transactions in a separate general ledger account within the electric or gas public utility's books of account, on an aggregate monthly basis;
2. Not borrow funds for the specific purpose of lending to the money pool;
3. Not borrow from the money pool if funds are available at lower costs, either through bank borrowings or through issuance of commercial paper;
4. File with the Board and/or Board Staff quarterly statements comparing the money pool interest rates with the prevailing market interest rates for similarly situated public utilities;
5. Deposit cash in the money pool only if the cash is otherwise available for investment in short-term money markets or other short-term investments; and
6. Ensure that the participating public utility's chief financial officer or designee render money pool-related decisions based on the best interests of the electric or gas public utility's ratepayers.

(h) If a money pool participant's senior secured credit rating for its outstanding publicly-held securities falls below any applicable NRSROs investment grade (for example, BBB- for S&P or Baa3 for Moody's), an electric or gas public utility shall by no later than the third business day thereafter demand repayment of any outstanding loans made through the money pool to such participant, and make no further loans to such participant through the money pool until further notice by the Board or until such participant's senior secured credit rating for the outstanding publicly-held securities is again investment grade.