FILED, Clerk of the Appellate Division, December 13, 2019, **A-003621-18**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003621-18

In the Matter of the Adopted Amendment to N.J.A.C. 14:1-5.12 (Tariff Filings or Petitions Which Propose Increases in Charges to Customers)	APPELLATE DIVISION **Docket No. A-003621-18** Civil Action On Appeal from the Rule Adopted by the New Jersey Board of Public Utilities in BPU Docket Nos. AX1750469, AX17050468, AX17111144

REPLY BRIEF OF APPELLANT NEW JERSEY DIVISION OF RATE COUNSEL

STEFANIE A. BRAND, DIRECTOR
New Jersey Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, N.J. 08625
T(609)984-1460 F(609)292-2923

On the Brief:
Stefanie A. Brand, Director
Atty. ID No. 032331986, sbrand@rpa.nj.gov
Brian O. Lipman, Litigation Manager
Atty. ID No. 026711995, blipman@rpa.nj.gov
Christine M. Juarez, Assistant Deputy Rate Counsel
Atty.ID No. 026602003, cjuarez@rpa.nj.gov
Maura Caroselli, Assistant Deputy Rate Counsel
Atty. ID No. 028192007, mcaroselli@rpa.nj.gov

Dated: December 11, 2019

TABLE OF CONTENTS

Page No.

Table of Contents i

Table of Authorities.................................ii

Preliminary Statement................................ 1

Procedural History & Statement of Facts.............. 2

Argument... 2

POINT I 2

NEW JERSEY CASE LAW CLEARLY PROHIBITS ANY RATEMAKING TREATMENT THAT REQUIRES RATEPAYERS TO PAY HYPOTHETICAL INCOME TAX EXPENSES IN RATES. 2

POINT II 5

THE APPELLATE DIVISION SHOULD VOID THE CTA RULE ON THE GROUNDS THAT IT VIOLATES THE BOARD'S OBLIGATION TO SET JUST AND REASONABLE RATES. CONTRARY TO RESPONDENTS' ASSERTIONS, THE ISSUE IS RIPE FOR REVIEW. 5

POINT III 9

THE CTA RULE LACKED SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT ITS ADOPTION, AND SHOULD BE VOIDED BY THIS COURT. 9

POINT IV 14

THE BOARD DID NOT PROVIDE ADEQUATE NOTICE OF THE ECONOMIC IMPACT OF THE CTA RULE UNDER THE APA AND CONSEQUENTLY THE BOARD DISREGARDED ONE OF THE APPELLATE DIVISION'S PRIMARY REASONS FOR REVERSAL OF THE CTA IN 2017. 14

POINT V 16

N.J.S.A. 52:14B-5 DOES NOT CREATE A REBUTTABLE PRESUMPTION THAT THE CTA RULE SUBSTANTIVELY COMPLIES WITH THE APA. 16

POINT VI 17

THE BOARD DID NOT MEET THE LEGAL STANDARD FOR ADEQUATELY RESPONDING TO RATE COUNSEL'S COMMENTS ON THE CTA RULE. 17

CONCLUSION... 20

TABLE OF AUTHORITIES

Page No.

Cases

Animal Protection League of New Jersey v. N.J. Dep't. of Envtl. Prot., 423, N.J. Super. at 549, 572 (App Div. 2011) .. 17,18

Chicago, Milwaukee & St. Paul Railway v. Minnesota, 134 U.S. 418, 458 (1890) 7

Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602(1943) 4,5

I/M/O the Board's Review of the Applicability & Calculation of a Consolidated Tax Adjustment, Docket No. A-1153-14T1, 2017 N.J. Super. Unpub. LEXIS 2315 (September 18, 2017) 4

In re N.J. Power & Light Co., 9 N.J. 498(1952) 3,5,9

In re Petition for Rulemaking, 117 N.J. 311 (1989) 9

In re Proposed Increased Intrastate Indus. Sand Rates, 66 N.J. 12 (1974) 7

In re Readoption of N.J.A.C. 14:2, 2017 N.J. Super. Unpub. LEXIS 2095 17

N.J. Soc. for Prevention of Cruelty to Animals v. N.J. Dept. of Agriculture, 196 N.J. 366, 385 (2008) 9

Smyth v. Ames, 169 U.S. 466, 522 (1898) 6,7

Toms River Water Co. v. N.J. Bd. of Pub. Util. Comm'rs., 158 N.J. Super. 57, 61(1978) 4

Statutes

N.J.S.A. 48:2-21 6,8

N.J.S.A. 48:2-21.32 8

N.J.S.A. 52:14B-4(a)(2) 16

N.J.S.A. 52:14B-4(a)(3)-(4) 17

Preliminary Statement

The briefs submitted by Respondent New Jersey Board of Public Utilities ("Board"), and particularly those by Utility Respondents, go to great lengths to fashion justifications for the Board's actions in adopting the consolidated tax adjustment rule ("CTA Rule") that is the subject of this appeal. However, the post hoc rationalizations advanced in those briefs were never advanced by the Board in any document, order, or response document in this rulemaking. A review of the record evidence illuminates that the Board's actions were arbitrary and capricious.

Moreover, no respondent can overcome the fact that the CTA Rule does not adhere to the New Jersey Supreme Court's prohibition of ratepayers paying hypothetical income taxes in rates. The case law is irrefutable, and indeed, the Board acknowledges it. Many holding companies of New Jersey utilities are paying no income taxes to the Internal Revenue Service, despite collecting hundreds of millions of dollars a year for income taxes from the State's ratepayers. The case law, intended to protect captive ratepayers who pay a utility's rates, requires that the benefits of these consolidated tax filings be shared with ratepayers. The Board's revised rule, on the other hand, results in little or no sharing and allows utilities to

retain most of the benefit of consolidated tax filings for their shareholders. The rule is arbitrary and capricious and contrary to law. It should be overturned.

Procedural History & Statement of Facts

Rate Counsel relies on the procedural history and statement of facts set forth in our Initial Brief.

Argument

POINT I

NEW JERSEY CASE LAW CLEARLY PROHIBITS ANY RATEMAKING TREATMENT THAT REQUIRES RATEPAYERS TO PAY HYPOTHETICAL INCOME TAX EXPENSES IN RATES.

New Jersey case law has long mandated that the benefits derived from the use of consolidated tax returns by utility holding companies must be shared with the captive ratepayers who pay a utility's Federal income taxes in rates. (RCa61).[1] The case law is clear, as the Board acknowledges in its brief that utilities are required to share such consolidated tax savings with ratepayers. (BPUb at 1) ("It is well-settled law and the policy of the New Jersey Board of Public Utilities [internal

[1] Rate Counsel's appendix is labeled RCa, the Board of Public Utilities'("BPU") Initial Brief is labeled BPUb, Jersey Central Power & Light Company's ("JCP&L") brief is JCP&Lb, New Jersey American Water Company's ("NJAWC") brief is NJAWCb, New Jersey Utilities Association's ("NJUA") brief is NJUAb, Suez Water Company, Inc.'s ("Suez") brief is SUEZb, and Atlantic City Electric's ("ACE") brief is ACEb.

citations omitted] that savings produced from a consolidated federal tax filing are to be shared with customers.")

Since the New Jersey Supreme Court issued its decision in In re N.J. Power & Light Co., 9 N.J. 498, 528 (1952), New Jersey case law has prohibited the Board from setting rates that require ratepayers to pay "hypothetical" income tax expenses in rates. In that matter, appellant New Jersey Power & Light Company appealed an order of the Board that allocated to ratepayers 50% of the savings derived from appellant's filing of a consolidated tax return. Ibid. While appellant protested the Board's decision to share 50% of such savings with ratepayers, the New Jersey Supreme Court actually held that such a 50% sharing was too little, since it still required ratepayers to pay some hypothetical income taxes in rates. Ibid While the Supreme Court rejected the appellant's argument that the allowed income tax expense was too low, it did not *sua sponte* rule that the expense was too high, instead affirming the Board's income tax expense allowance. Ibid.

The Supreme Court's decision in In re N.J. Power & Light Co. has been repeatedly acknowledged and implemented by lower courts and the Board itself. While the Board is not bound by any particular methodology in calculating how to share benefits with customers, the Board is obligated to ensure that the method it

chooses adequately shares tax benefits with customers. The Board affirmed this principle in Toms River Water Co. v. N.J. Bd. of Pub. Util. Comm'rs., 158 N.J. Super. 57, 61 (1978), holding that:

> We do not undertake to direct the Board to utilize any particular method in arriving at a just conclusion, except to note that the method to be utilized must have a rational relationship with the requisite objective – namely, the determination of the actual tax liability....The customers of Toms River Water Company should not be required, in the computation of the rate structure, to assume more than a proportionate share of the actual tax liability of that company.

In its 2017 decision that preceded the current appeal, the Appellate Division once again affirmed the Board's obligation to ensure that ratepayers do not pay hypothetical income taxes in rates. I/M/O the Board's Review of the Applicability & Calculation of a Consolidated Tax Adjustment, Docket No. A-1153-14T1, 2017 N.J. Super. Unpub. LEXIS 2315 (September 18, 2017) (RCa23).

In attempting to justify the Board's adoption of the CTA Rule, many Utility Respondents[2] argue for the application of the "end-result" standard of review set forth in Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1943) ("Hope"). This standard allows courts to affirm a rate order as long as

[2] "Utility Respondents" filing briefs in this matter include JCP&L, NJUA, Suez, ACE, and NJAWC.

FILED, Clerk of the Appellate Division, December 13, 2019, **A-003621-18**, AMENDED

the total effect of the order is not unjust and unreasonable. Thus, Utility Respondents argue, the individual components of a rate, such as a consoldiated tax savings calculation, are less important than the "end result" of the final calculated rates. Utility Respondents, however, misapply that holding. The Board's responsibility to ensure that ratepayers do not pay hypothetical income taxes in rates cannot be abdicated simply by application of the Hope standard of review. Otherwise, the Board could use the Hope decision to render the Supreme Court's holding in In re N.J. Power & Light Co. meaningless. Instead, the Hope decision must be read to give effect to the numerous New Jersey Supreme Court and Appellate Division decisions on this issue over the past several decades, all decided after Hope and all of which have determined that the Board must set rates in a way that avoids payment of hypothetical income taxes by the State's ratepayers. While the "end result" of a utility's rate is relevant, that rate must not require the payment of hypothetical income taxes by the State's ratepayers.

POINT II

THE APPELLATE DIVISION SHOULD VOID THE CTA RULE ON THE GROUNDS THAT IT VIOLATES THE BOARD'S OBLIGATION TO SET JUST AND REASONABLE RATES. CONTRARY TO RESPONDENTS' ASSERTIONS, THE ISSUE IS RIPE FOR REVIEW.

Two Utility Respondents, and the Board itself, argue that the CTA Rule does not violate the Board's obligation to set just

and reasonable rates because such a violation could only occur during the setting of base rates in a rate case. See, e.g., BPUb at 38. In arguing that the mandate that rates be just and reasonable only applies during the rate case process, the Respondents advocate for an impermissably narrow interpretation of the Board's responsibility that is not consistent with the statute or the case law.

It is undisputed that the Board's powers are limited by its obligation to ensure that the rates paid by ratepayers are just and reasonable. The Board itself acknowledges this mandate. (BPUb at 38) The requirement that rates be just and reasonable is derived not only by statute, N.J.S.A. 48:2-21, but also from the Constitutional underpinnings of utility regulation. The Fourteenth Amendment to the United States Constitution prohibits a State from depriving any person of property without due process of law. It is well settled that corporations such as public utilities are persons within the meaning of the Fourteenth Amendment. Smyth v. Ames, 169 U.S. 466, 522 (1898). Accordingly, public utilities must be sufficiently compensated for the use of their property under the Fourteenth Amendment. Id. at 523. Public utilities are compensated for the use of their property by being allowed to charge reasonable rates. Specifically, if a public utility is "deprived of the power of

charging reasonable rates for the use of its property…it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States.'" Id. at 523 (quoting Chicago, Milwaukee & St. Paul Railway v. Minnesota, 134 U.S. 418, 458 (1890)). While public utilities are entitled to just compensation under the Fourteenth Amendment, the *Smyth* court was equally concerned with the rights of the ratepaying public. While shareholders were entitled to reasonable rates in return for devoting their property to public use, the case law required ratepayers be protected against "unreasonable exactions" solely in order to pay dividends to shareholders. Smyth, supra, 169 U.S. at 544-45.

New Jersey has long followed the Federal jurisprudence in requiring that utility rates be reasonable. See, e.g., In re Proposed Increased Intrastate Indus. Sand Rates, 66 N.J. 12 (1974). In *Industrial Sands*, the Supreme Court specifically discussed the Constitutional principles underlying the just and reasonable rates requirement:

> The law has thus developed, no doubt, because the system of rate regulation and the fixing of rates thereunder are related to constitutional principles which no legislative or judicial body may overlook. For if the rate for the service supplied be

> unreasonably low it is confiscatory of the utility's right of property, and if unjustly and unreasonably high…it cannot be permitted to inflict extortionate and arbitrary charges upon the public. And this is so even where the rate or limitation on the rate is established by the Legislature itself.
>
> In re Proposed Increased Intrastate Indus. Sand Rates, supra, 66 N.J. at 23-24.

As the *Industrial Sands* court noted, because of its Constitutional nature, the requirement that rates be just and reasonable cannot be overridden by legislation. Nor can it be overridden by judicial decisions, or regulatory actions such as the Board's adoption of the CTA Rule.

There is nothing in the case law or statutes that limits the obligation to ensure just and reasonable rates to the base rate process. In fact, all actions taken by the Board are constrained by its obligation to ensure that rates be just and reasonable, including the promulgation of rules. (See N.J.S.A. 48:2-21 and N.J.S.A. 48:2-21.32). This obligation is particularly applicable to the promulgation of rules, such as the CTA Rule, that prescribe a particular ratemaking treatment applicable to all base rate cases. In fact the Board admits that the CTA Rule implicates the Board's ratemaking authority in its brief, noting that:

> The CTA is inextricably related to the Board's ratemaking authority because the CTA amount established in a rate case affects a utility's rate base and the latter is a major focus for the Board's comprehensive and detailed examination into the

FILED, Clerk of the Appellate Division, December 13, 2019, **A-003621-18**, AMENDED

> justness and reasonableness of a utility's request for a rate increase. (BPUb at 28)

The CTA Rule, which requires the setting of unjust and unreasonable rates is ripe for review and should be voided for the reasons set forth in Rate Counsel's brief.

POINT III

THE CTA RULE LACKED SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT ITS ADOPTION, AND SHOULD BE VOIDED BY THIS COURT.

Courts will set aside a promulgated regulation when there is a lack of substantial evidence in the record to support the findings on which the agency based the regulation. N.J. Soc. for Prevention of Cruelty to Animals v. N.J. Dept. of Agriculture, 196 N.J. 366, 385 (2008); see also In re Petition for Rulemaking, 117 N.J. 311, 325 (1989). While Utility Respondents argue that the weight of the evidence should be measured in the pounds of unsupported, conclusory comments submitted by them throughout this proceeding, this is not the applicable standard, which requires evidence to be reasonable and credible. Although agency action is entitled to presumptive validity, our courts have held that "this is not a… 'conclusive' presumption. The [Board's] determination must find *reasonable* support in the evidence." In re N.J. Power & Light Co., supra, 9 N.J. at 509 (emphasis in original). Because the

record evidence lacked a reasonable basis to support the Board's adoption of the CTA Rule, it should be voided by this Court.

The record evidence lacked any reasonable basis for either the five year lookback contained in the rule, or the additional 75% sharing of benefits in favor of shareholders. In defense of the five year lookback, the Board and many Utility Respondents argue that the Board was not obligated to accept Rate Counsel's recommendation of a twenty year lookback period. (BPUb at 34). This is true that the Board was not obliged to adopt a twenty year lookback period, however, the Board was required to adopt a rule based on record evidence that conformed to the Board's legal obligation to avoid payment of hypothetical taxes by ratepayers. There is no evidence in the record that the five year lookback satisfies either of these legal obligations.

In fact, the only substantial evidence in the record concerning the five year lookback period was the unrefuted evidence submitted by Rate Counsel. This evidence was in the form of specific calculations in Rate Counsel's rulemaking comments that showed that the proposed five year lookback did not conform to the Board's acknowledged legal mandate against payment of hypothetical taxes by ratepayers. Rate Counsel's calculations demonstrated that a five year lookback period <u>would result in no consolidated tax adjustment</u> for most of the largest

gas and electric companies in the State, including PSE&G, JCP&L, Atlantic City Electric Co. and South Jersey Gas Co. (RCA478).[3] As Rate Counsel noted, given that ratepayers are paying hundreds of millions of dollars in income tax expense in rates, a $0 consolidated tax adjustment is an obvious, concrete violation of the legal mandate against the payment of hypothetical taxes ordered by the courts. Yet Rate Counsel's evidence was entirely ignored by the Board. The Board never responded to Rate Counsel's calculations in its rule response document, in direct violation of the APA. The Board never explained how a five year lookback period, which would result in many $0 consolidated tax adjustments, complies with the Board's legal obligation to ensure ratepayers do not pay hypothetical taxes.

[3] The complaint by Utility Respondents such as JCP&L that the five year lookback period used in Rate Counsel's calculations was an anomaly has no basis in the record. (JCP&Lb at 33). Rate Counsel's calculations were based on actual tax information provided by the utilities in the generic proceeding that preceded the formal rulemaking in this matter. The Board never requested the utilities to update this information, nor did the utilities ever do so.

Nor was there any evidence in the record to support giving shareholders an additional 75% of calculated CTA benefits.[4] In fact Rate Counsel was again the only party to the rulemaking to submit actual evidence concerning the impact of such a sharing, and that evidence demonstrated that the CTA Rule's proposed sharing failed to prevent ratepayers from paying hypothetical taxes in rates.

Rate Counsel submitted calculations showing that New Jersey ratepayers would receive only a portion of the overall tax benefit enjoyed by utility holding companies under the existing CTA methodology. (RCa478). Using the proposed twenty year lookback without any additional sharing, Rate Counsel calculated that ACE's ratepayers would receive 26.64% of calculated tax benefits, RECO's ratepayers would receive 2.90%, and JCP&L's ratepayers would receive 14.91% of benefits. (RCa478). Rate Counsel offered these calculations to illustrate that no

[4] Respondents assert that the 75% additional sharing of tax benefits with shareholders is somehow justified based on an allegation that Rate Counsel recommended a 50/50 sharing of benefits. (BPUB 37). This is a misrepresentation of Rate Counsel's longstanding position. In fact Rate Counsel never recommended such an allocation. While Rate Counsel noted in response to the Board's 75/25 proposal that there was no rational basis for any sharing other than an equal split, Rate Counsel has consistently urged the Board not to decrease ratepayers' limited share of tax savings at all. (RCa251) Furthermore, up to and including the response document published on March 18, 2019, the Board has never claimed that the 75/25 allocation was based on this alleged input from Rate Counsel.

additional sharing, much less a 75%/25% split, was appropriate. Once again, in further violation of the APA, the Board never responded to Rate Counsel's calculations and comments.

Up to and including the filing of its brief in this appeal, the Board has never explained the record upon which it based the CTA Rule. While Utility Respondents' briefs, for their part, are replete with post hoc rationalizations intended to prop up the Board's position, in fact those fail as well, as they consist of unsupported, conclusory assertions. For example, while Utility Respondents attempt to justify the Board's changes to the CTA as mitigating the alleged degradation of their rate base caused by the CTA, there is no evidence in the record that the CTA was discouraging investment in New Jersey.[5] Moreover, though they complain about the reduction to rate base caused by the CTA, Utility Respondents are notably silent about the hundreds of millions of dollars they are collecting from ratepayers every year that never gets paid to the IRS. The Board appears to

[5] Among the claims advanced by the utilities throughout this rulemaking is the fiction that the CTA mechanism discourages investment in the State, despite the fact that for years these same utilities have been investing huge sums of money in New Jersey, with almost continuous regulatory filings seeking special rate recovery for investments in energy efficiency, infrastructure, storm hardening, and clean energy. The Board made no determination of how the CTA deters investment, provided no instances of a utility not investing in infrastructure because of the CTA, nor explained how its changes to the CTA will address this alleged "problem."

simply accept Utility Respondents' unsupported statements at face value, with no consideration of the credibility of their claims. The Board had the obligation to ensure its decision was based on sufficient, credible evidence. In fact it was not, and the Board adopted a rule that is arbitrary and capricious.

POINT IV

THE BOARD DID NOT PROVIDE ADEQUATE NOTICE OF THE ECONOMIC IMPACT OF THE CTA RULE UNDER THE APA AND CONSEQUENTLY THE BOARD DISREGARDED ONE OF THE APPELLATE DIVISION'S PRIMARY REASONS FOR REVERSAL OF THE CTA IN 2017.

The Utility Respondents argue that the Board's Economic Impact statement should focus on the CTA Rule's economic impact on utilities only and that the economic impact on ratepayers is not salient.[6] That argument should be rejected because it disregards the applicable controlling statute which requires "a description of the expected socio-economic impact of the rule."[7] This language clearly suggests that the rulemaking agency must specify the general economic impact of the rule on the entire state, which would include ratepayers. In the 2017 Appellate Division CTA Decision, the Court was laser-focused on the economic impact of the CTA on ratepayers. It found that the

---

[6] The regulation they rely upon is N.J.A.C. 1:30-5.1(c)(3) which provides that: "An 'Economic Impact' statement, which describes the expected costs, revenues and other impact upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated."

[7] N.J.S.A. 52:14B-4(a)(2).

Board's "failures [to comply with the APA] are of particular significance here because of the conflicting evidence presented concerning the modified CTA's potential **economic impact on ratepayers**." (RCa48). [emphasis added].

In its brief, the Board stated that "it may be difficult to predict rule impacts" but it does not even attempt to explain how its revisions to the CTA calculation will impact ratemaking. (BPUb at 43). Although the Board stated that there were "contrary predictions of the Rule's effect," it made no effort to sort through those predictions to determine what the impact may be. Ibid. As noted above, Rate Counsel is the only commenter to provide actual calculations of the proposed changes to the CTA in its 2014 and 2018 rule comments. (RCa257 and RCa478). Despite their many resources, the Utility Respondents have not presented any data to refute Rate Counsel's data.

Arguments regarding New Jersey's treatment of the CTA in comparison to other states' treatment of the CTA do not really answer the question. The Board's point "that many utility rate cases are settled with black-box settlements" is also not relevant. (BPUb at 42). Nor is it acceptable to fail to analyze the economic impact of a rule because it is "difficult." The purpose of the Economic Impact statement is to provide notice to the public of the new rule's impact in comparison to current economic conditions. The Board has simply not done that here.

The prior Appellate Division decision that reversed the CTA in 2017 stated that the Board failed to analyze the CTA's economic impact on **ratepayers**. The Board's current rulemaking also disregards the basic requirements that it provide, not just a statement, but "a **description** of the expected socio-economic impact of the rule." N.J.S.A. 52:14B-4(a)(2). [emphasis added]. As the Board has failed to meet these requirements, the rule fails to meet the requirements of the APA and should be overturned.

POINT V

N.J.S.A. 52:14B-5 DOES NOT CREATE A REBUTTABLE PRESUMPTION THAT THE CTA RULE SUBSTANTIVELY COMPLIES WITH THE APA.

The Board and the Utility Respondents suggest that there is a rebuttable presumption that the CTA Rule complies with the substantive requirements of the APA because it was published by the Office of Administrative Law ("OAL") in the New Jersey Register. This must be rejected. It is the Appellate Division, and not the OAL that hears substantive legal challenges to the promulgation of rules. N.J.R. 2:2-3(a)(2).

The OAL simply cannot and therefore does not review whether an Economic Impact Statement, or any part of the rule, is substantively accurate since it does not have the agency expertise to fully understand the economic implications of something like a CTA Rule calculation. Additionally, New Jersey

case law is clear that the decision of whether the record lacks substantial evidence to support agency rulemakings lies with the courts and not the OAL.[8]

POINT VI

THE BOARD DID NOT MEET THE LEGAL STANDARD FOR ADEQUATELY RESPONDING TO RATE COUNSEL'S COMMENTS ON THE CTA RULE.

The standard for evaluating whether an agency adequately responded to rule comments is whether the comments were "fully considered," whether there was a "response to the data, views, comments and arguments" and whether the comments were "given a meaningful role" in the Board's decision. N.J.S.A. 52:14B-4(a)(3)-(4) and Animal Protection League of New Jersey v. N.J. Dep't. of Envtl. Prot., 423, N.J. Super. at 549, 572 (App Div. 2011).

In response to Rate Counsel's brief, the Board merely repeated its same deficient responses from the rule adoption regarding the five-year lookback period. (BPUb at 45). With reference to the Board's responses on the 75%/25% sharing allocation, the Board only stated that that its responses were a

[8] This point is evident from a 2017 decision where the Appellate Division remanded the BPU's rulemaking for it to "amplify its responses" in the rule comments despite that the rule was published in the New Jersey Register and adopted. In re Readoption of N.J.A.C. 14:2, 2017 N.J. Super. Unpub. LEXIS 2095, docket No. A-3913-14T2, p. 13-14 (Aug. 18, 2017). RCa522.

"policy determination" that were "fair" and "reflect[ed] the Board's consideration of the voluminous record." Ibid

First, merely stating that the Board made a "fair" "policy determination" is not a **response** explaining how the Board "considered fully" Rate Counsel's position but chose another. On its face, the Board's policy determination cannot be found to be "fair" since the ratio of 75%/25% in favor of the utilities is so obviously skewed. Further explanation of how the Board determined a 75%/25% sharing allocation is "fair" is needed and is not satisfied simply because there is "voluminous record."

Second, the Utility Respondents' arguments stating that there is support in the record for the Board's position on the lookback period and the sharing allocation are completely irrelevant to whether the Board **considered fully** and **responded** to Rate Counsel's rule comments. Whether there is support in the record for the Board's position and whether the Board provided adequate responses to Rate Counsel's rule comments are two separate issues that cannot be conflated.

For example, Suez Water Company ("Suez") argued that "in responding to Rate Counsel's comments concerning the five-year lookback period, the Board pointed to the voluminous record on this issue – including its prior findings and rationale" and "[t]he record reflects various reasons supporting the use of a

five-year look-back period. (See, e.g., RCa111, 204, 209)." (SUEZb at 61). It is important to note that Suez's three citations to the record at RCa111, RCa204 and RCa209 are each response letters from Atlantic City Electric and JCP&L to the Board where they made arguments in favor of a five-year lookback period. (See Rca111, 204, 209). Suez does not cite to any place in the record where the Board analyzed the evidence and provided a rationale as to why it chose a five year lookback period. Furthermore, the Board's responses to Rate Counsel's rule comments in the CTA Rule adoption are entirely conclusory, lacking any evidence that Rate Counsel's comments were given a meaningful role, and therefore cannot be substituted for a fully considered response to rule comments.

Suez also argued with regard to the 75%/25% share allocation that "[t]he Board did not engage in a dismissive rejection of Rate Counsel's comments…[t]he Board's rationale in this respect is ably supported by the record. (Rca199, 204-205, 498)." (Suezb at 64). Notably, the cites relied on by Suez are again letters from Utility Respondents to the Board rather than documents in which the Board explained its rationale. Suez did not cite anywhere in the record where the Board explained the rationale for its own position on sharing or the lookback period because it is remarkably absent. Hypothetically, even if the Board's reasoning could find support in the record, that

FILED, Clerk of the Appellate Division, December 13, 2019, **A-003621-18**, AMENDED

support cannot stand in for adequate responses to Rate Counsel's rule comments in the rule adoption as published in the New Jersey Register.

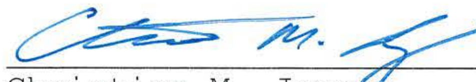
To be clear, at issue is whether the Board met the legal standards established by the APA and case law when it responded to Rate Counsel's comments as part of the rule adoption. The Utility Respondents' argument that there is support in the record for the Board's position is a red herring and a failed attempt to bolster the Board's position despite that the Board's inadequate responses to rule comments must stand alone.

CONCLUSION

For all of the reasons set forth above and in Rate Counsel's initial brief, the CTA Rule should be voided.

Respectfully submitted,

STEFANIE A. BRAND
DIRECTOR, Division of RATE COUNSEL

BY: 

Christine M. Juarez
Assistant Deputy Rate Counsel
On Behalf of Appellant,
New Jersey Division of Rate Counsel