SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-1153-14T1

IN THE MATTER OF THE BOARD'S REVIEW OF THE APPLICABILITY AND CALCULATION OF A CONSOLIDATED TAX ADJUSTMENT	) On Appeal from the) October 22, 2014, November 3,) 2014 and December 17, 2014) Orders of the New Jersey Board) of Public Utilities)) BPU DKT. NO. EO12121072) Civil Action

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REPLY BRIEF AND APPENDIX OF APPELLANT DIVISION OF RATE COUNSEL

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Dated: October 1, 2015

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PRELIMINARY STATEMENT

The number of briefs filed in this case, and the spectrum of arguments advanced in those briefs, is perhaps the best evidence of why this matter should be remanded. The parties have a wide variety of views on the legal effect of the Board's Order, whether it is binding new policy or merely guidance on future filing requirements. Some parties, including the Board itself, seem to be arguing that it is both. The factual disputes between the parties also underscore the need for a better record to support the Board's findings. While the Respondents try mightily to find evidence to support the new formula advanced by the Board, their efforts provide nothing of substance to support the imposition of a five-year look back period or a 25%/75% split of the Consolidated Income Tax rate base adjustment ("CTA"). As a result, these findings appear completely arbitrary, with numbers plucked from the air in the absence of an evidentiary record to support the resolution of the factual disputes between the parties.

The result is that no one knows exactly what the rules are. What we do know is that both the existing CTA and the changes announced by the Board will have impacts on ratepayers in the hundreds of millions of dollars. We also know that ratepayers will continue to pay for taxes as if the utility did not file a

consolidated return with its parent holding company. However, how the new formula was derived, how it will be applied, and whether it will be applied in all instances appears to still be in question. This is unfair to both the ratepayers and the regulated companies that are affected. The reasons behind both the evidentiary and rulemaking requirements of the Administrative Procedure Act ("APA") are not mere formalities. They are carefully designed to ensure that administrative decisions are based on sound and competent evidence, and that when new rules are announced by administrative agencies everyone knows what those rules are and why they were enacted. While administrative agencies are afforded deference regarding matters within their expertise, and have some leeway to select the appropriate method of developing a record before them, they are not free to abandon the requirement of having a record to support their decisions and allowing parties an opportunity to be heard and to challenge the arguments made by their opponents.

Prior iterations of the CTA were developed in rate cases where there was a full evidentiary record before the Board. New rules regarding the CTA may certainly be adopted through rulemaking consistent with the APA and Metromedia v. Div. of Taxation, 97 N.J. 313 (1984). However, in this case the Board did neither. Its Order is not supported by an evidentiary record. Nor has it been subjected to the rigors of the

rulemaking process. This is likely why the parties have varying interpretations of what the rules are going forward. The Supreme Court has long held that government must "turn square corners" when dealing with the public. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985). Here, the corners were cut, and in the process the public was not afforded the process that is due. For this reason, this matter should be remanded for the Board to either proceed with a rulemaking or determine that the appropriate CTA calculation on a case-by-case basis in future utility base rate cases.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Rate Counsel relies on the Statement of Facts and Procedural History in its Initial Brief.

ARGUMENT

A. The Board's Order is Procedurally Deficient as it Fails to Provide a Well-reasoned Decision Supported by Sufficient, Credible Evidence in The Record.

1. The Court Has an Obligation to Ensure That The Board's Decision is Based on Sufficient, Credible Evidence in The Record.

While a decision of the Board of Public Utilities may be entitled to presumptive validity, it is not immune from judicial review. I/M/O Petition of New Jersey American Water Company, 169 N.J. 181, 188 (2001)(citation omitted). The presumption in favor of an agency's decision depends "upon the strength of the reasoning by which it is supported." I/M/O Public Serv. Coor. Transport, 5 N.J. 196, 216 (1950) (citation omitted). The Board's failure here to explain the reasoning behind the proposed modifications to the CTA calculation is arbitrary and capricious and thwarts any meaningful review of the Board's decision. Plainfield-Union Water v. Mountainside, 11 N.J. 382,396 (1953) (quoting Sec. and Exch. Comm'n v. Chenery Corp. 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943))("The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be 'clearly disclosed and adequately sustained.'")

Utility Respondents in this matter rely on the admittedly broad language of N.J.S.A. 48:2-46, which precludes a reviewing court from setting aside a BPU order unless it "clearly appears

that there was no evidence before the board to support the same reasonably," or unless procedural irregularities or the informality of the proceedings "tends to defeat or impair the substantial right or interest of appellant." Yet these are precisely the arguments being raised by Rate Counsel, and while Respondents brush aside the lack of evidence and the impairment of ratepayers' interests, the language of this statute does not require this Court to excuse the Board's inadequate findings.

Indeed, both the U.S Supreme Court and the New Jersey Supreme Court, interpreting the language of N.J.S.A. 48:2-46, found that it should not be interpreted as Respondents have argued in this case. In Lehigh Valley R.R. Co. v. Bd. of Pub. Util. Comm'rs., 278 U.S. 24 (1928) (quoting Pub. Serv. Gas Co. v. Bd. of Comm'rs, 84 N.J.L. 463, s.c. 87 N.J.L. 581) the Supreme Court stated:

> If this language is taken literally, we should be powerless in any case within the jurisdiction of the Board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be. . . . . It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature can not limit us in the exercise of our ancient prerogative. That the legislature did not intend to do so is made clear by a consideration of the whole act.
> [278 U.S. at 37].

See also, Atlantic City Sewerage Co. v. BPU, 128 N.J.L. 359 (1942) (Noting that while there are differences of opinion on the scope of judicial review, reading N.J.S.A. 48:2-46 in pari

materia with the rest of the statute requires the reviewing court to weigh the evidence and resolve issues of fact).

Here, the very next statutory provision, N.J.S.A. 48:2-47, provides that the Appellate Division may order a remand for a rehearing when doing so is deemed "equitable and just" and that the rehearing should then proceed "on the evidence upon which the order under review was based, and upon such additional evidence, if any, as may be produced." Read in pari materia, these two sections certainly permit a reviewing court to assess whether there is sufficient evidence in the record to support a decision by the Board, even where policy issues are involved.

2. The Procedure Followed To Develop Board Staff's Proposed Modifications, Adopted By The Board Without Change, Did Not Include The Most Basic Due Process Protections.

In an effort to validate the procedure used in setting the Board's new CTA policy, Utility Respondents cite to a "21 month-long process"[1] (NJUA p.15, 25. ACE p.27, E'Town p.1, NJAW p.2), with numerous parties filing numerous rounds of comment. (NJUA 16). Utility Respondents cite to the number of pages filed (JCP&L pp7-9) and the number of paragraphs in the Board Order.

[1] Respondents' briefs will be referenced as follows: Board of Public Utilities (BPU), Aqua New Jersey/United Water (Aqua/United), Atlantic City Electric Company (ACE), Elizabethtown Gas Company (E'Town), Jersey Central Power & Light Company (JCP&L), New Jersey American Water Company (NJAW), New Jersey Utilities Association (NJUA).

(NJUA p.26 “the Board dedicated 40 single-spaced paragraphs to summarizing the parties’ comments.”) These facts, according to Utility Respondents, demonstrate that Rate Counsel received adequate due process in this CTA modification process.

The weight of the evidence is not measured in pounds and due process is not determined by the number of pages filed, the number of times comments were filed or the number of parties to a proceeding. Rather, a due process analysis looks at the quality of the procedural process. It requires meaningful participation by all parties, with an opportunity for rebuttal and cross examination of witnesses providing evidence. This CTA proceeding did not provide any of those fundamental procedural protections. The process, while long in duration and number of pages, was devoid of meaningful evidentiary protections.

Prior to issuance of the CTA Order, the CTA formula was developed in a series of litigated rate cases between 1991 and 2004. I/M/O New Jersey Natural Gas Co., (1991) (Aa17); I/M/O Atlantic City Electric Co., (1992) (Aa23); I/M/O Jersey Central Power & Light Co., (1993) (Aa32); I/M/O Rockland Electric Co., (2004) (Aa40). In each of those cases, the Board made its decision after conclusion of a formal adjudication of a rate case, where all parties including Rate Counsel had the opportunity to submit testimony, cross-examine witnesses, and submit briefs both advancing their positions and responding to

other parties' positions. In each of those cases, the Board's decision was based on the facts as developed through the adjudicatory process, where all parties received equal opportunity to advocate positions and refute opposing positions.

The process that the Board followed in the present case was very different.

The matter began with the Board directing Board Staff to open a generic proceeding to review the Board's current CTA policy and methodology and to address the need for a formal rulemaking. I/M/O the Board's Review of the Applicability and Calculation of a Consolidated Tax Adjustment, BPU Docket No. EO12121072, Order Opening a Generic Proceeding, January 23, 2013 (Aa49). On March 6, 2013 Board Staff issued a formal "Notice of Opportunity to Comment." (Aa65). That Notice, characterized by Board Staff as "the appropriate initial step" was limited to four specific requests for information, two of which were targeted only to the interested utilities. (Aa65-66). The Notice also promised that after review of the information provided, "Board Staff will announce a schedule for hearings to provide all interested parties with the opportunity to provide testimony on the CTA issues." (Aa66). Comments were filed by the state's utilities and by Rate Counsel on May 3, 2013. However, the parties were never given the opportunity to respond to the arguments set forth by other stakeholders in this initial

round of comments, and the promised hearing and opportunity to provide testimony never occurred.

There were then two more rounds of financial information gathering, open only to utility stakeholders. In a Notice issued on July 25, 2013, Board Staff requested that the utility participants provide additional specific tax information. (Aa68). Again the promise was made that hearings would be scheduled and all interested parties would be given the opportunity "to provide testimony on the CTA issues." (Aa69). On November 1, 2013, the Chief Counsel for the Board sent out "two informal data requests" to the state's utilities, including a request for a statement on the impact, if any, of the recent decision in Consol. Edison Co. of N.Y. v. United States, 703 F.3d 1367 (Fed.Cir. 2013). (Aa72). Rate Counsel was not included on the service list for this request.

Responses to the additional requests for information were submitted by the utilities on September 4, 2013 and November 15, 2013. The utilities submitted and/or referenced numerous documents in their responses that other parties were never given the opportunity to rebut. For example, NJUA provided comments which attached a "white paper" with no attribution, and cited comments from "one analyst" copied from a "Topical Special Report" which was not provided. (NJUAa 22-23). JCP&L provided the requested information and "Supplemental Documents" in the

form of the testimony of James Warren produced in a different proceeding. This testimony, which had been subject to cross examination and rebuttal in the previous proceeding, was submitted in this proceeding without including the cross examination and rebuttal that had been admitted into the record in the prior proceeding.

Eight months of inactivity then followed. At the conclusion of that period, on July 7, 2014, Board Staff published its "Straw Proposal" proposing modifications to the Board's CTA methodology. Board Staff provided no explanation for the proposed modifications and cited to no evidence that it relied upon. After that, one round of informal comments on the proposed modified CTA was allowed. Again, no opportunity for cross-examination or rebuttal was provided.

Many of the statements made by the utilities in these comments included no legal or factual support. For example, counsel for Atlantic City Electric advised in its cover letter that "imposition of a CTA is inconsistent with encouraging investment." (Aa143). This conclusory statement has been echoed repeatedly in this proceeding – eventually being adopted in the CTA Order as one of the Board's "findings" – with no evidentiary support and no opportunity to provide expert testimony to rebut it. (Aa114). If given the opportunity to respond, Rate Counsel could have easily refuted these claims

with actual, factual examples of accelerated capital investment in recent years by these same utilities, thus contradicting the assertion that the existing CTA discouraged investment.

While Rate Counsel did submit comments on the "Straw Proposal," the failure to allow for a hearing or an opportunity to respond to comments is significant because the arguments advanced by the utility stakeholders in their comments eventually became the "facts" used by the Board to support the CTA Order. These unsupported written comments submitted by the Utilities' attorneys were relied upon by the Board as the "factual" basis for its decision. This was completely improper.[2] If the Board wished to develop new policy it needed to either do so by creating precedent in an adjudicated rate case where there would be an evidentiary record developed, or through a rulemaking. The Board is not free to announce new policies that will cost ratepayers millions of dollars based only on the shaky foundation of unsupported assertions raised in comments. This

[2] While some Utility Respondents try to rely on the N.J. Supreme Court's decision in In re Provision of Basic Generation Serv., 205 N.J. 339 (2011), that case, unlike here, involved a proceeding before the Board where there were no issues of material fact in dispute. Id. at 353. The Supreme Court's decision in that matter supports Rate Counsel's argument that, since there are factual issues in dispute in the CTA proceeding that is the subject of this appeal, the Board did not afford the parties adequate due process. The Supreme Court specifically noted that the Board can bypass evidentiary hearings only "[i]n cases such as this, in which there are no material facts in dispute…." Id.

matter should be remanded, as the procedure followed by the Board failed to satisfy a minimum amount of due process.

3. The Board's Failure to Conduct a Rulemaking is Inconsistent with Due Process and the Administrative Procedure Act and Has Created Confusion Among the Parties as to the Rules Going Forward.

While an administrative agency has latitude in choosing the means of fulfilling its statutory duties, that discretion is circumscribed by the requirements of the APA and due process. In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 519 (1987); accord, In re Provision of Basic Generation Serv., supra, 205 N.J. at 347. The New Jersey Supreme Court has stated "[i]f an agency determination or action constitutes an 'administrative rule,' then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules." Airwork Serv. Div. v. Dir., Div. of Taxation, 97 N.J. 290, 300 (1984). As the Board itself noted in its brief, the rulemaking process is designed to provide notice of a proposed agency action and an opportunity for affected parties to be heard. Woodland Private Study Group v. State, 109 N.J. 62, 73 (1987).

A careful review of the Metromedia factors shows that a new CTA policy should be adopted by rule. See Metromedia, supra, 97 N.J. at 331. The Board argues otherwise, asserting that its

decision will not have “wide coverage encompassing a large segment of the regulated or general public,” because the reach of its CTA Order “is limited to regulated utilities that belong to a holding company that files a consolidated income tax return, a very small group.” (BPU p.40). It is hard to figure by what measure this can be considered “a very small group.” Every investor owned electric utility in this state, Rockland Electric, Atlantic City Electric, and JCP&L, participate in a consolidated tax filing. PSE&G, the state’s largest utility, providing both gas and electric service, also participates in a consolidated tax filing. Every gas utility and the four largest water utilities in this state file as members of a consolidated group. Thus, the impact of this decision will be felt by just about every ratepayer in this state in their electric rates, in their gas rates and in their water rates. This certainly cannot be considered “a very small group.”

Moreover, the financial impact of this Order on ratepayers is huge. For example, in a recent JCP&L rate case, the CTA proposed by Rate Counsel based on the prior formula resulted in a rate base deduction of $511,030,428, which translates into a reduction in the Company’s annual revenue requirement of approximately $58 million. (BPUa123). After the Board’s adoption of Board Staff’s proposal, the revenue requirement associated with the CTA was approximately one-tenth of that

amount - $5.36 million. (BPUa123). As a result of this change in formula, JCP&L alone will collect an additional $53 million per year from ratepayers for theoretical taxes that may not in fact be paid by the consolidated group to the IRS.[3] Therefore, not only does the Board's action affect a large segment of ratepayers, it affects them substantially.

It is also clear, despite several contradictory arguments by the Utility Respondents, that this formula is a statement of new Board policy that is intended to be generally and uniformly applied. See Metromedia, supra, 97 N.J. at 331. The Board Order did not simply set forth a filing requirement for future rate cases, but also set forth specific requirements for rate cases that were currently pending before either the Office of Administrative Law or the Board. (Aa115). This fact is significant, as it illustrates the Board's intention to apply the new CTA policy as broadly and uniformly as possible. Indeed, for base rate cases where the evidentiary record was closed, the Board even allowed the record to be re-opened, after receipt of an Initial Decision by the OAL, for "the limited purpose of adding the calculation of the CTA as modified by this

[3] Counsel for JCP&L claims there is no record to support this contention. (JCP&L letter brief, Sept. 14, 2015 p.5). However, in response to Board Staff's request for additional information dated July 25, 2013 several New Jersey utilities, including JCP&L, indicated years in which the consolidated groups either paid no federal income taxes or received a refund. See, Rate Counsel's Reply Appendix, pp. Ara1-Ara15 (confidential).

Order…." Id. In a recent JCP&L rate case, the Board re-opened the evidentiary record after the receipt of the Initial Decision from the OAL to modify the calculation of the CTA.[4] While parties were allowed to submit "comments" on the new CTA calculation, the Board adopted a consolidated tax adjustment calculated exactly as set forth in the CTA Order that is the subject of this appeal. I/M/O Jersey Central Power & Light Co. For Review & Approval of Increases In & Other Adjustments to its Rates, BPU Docket No. ER12111052, Order Adopting Initial Decision With Modification and Clarifications, (3/26/15) ("JCP&L Order"). In the JCP&L Order, the Board noted that "on December 17, 2014, the Board issued its final order in the Generic CTA Proceeding setting its revised and updated CTA policy, and the Board REAFFIRMS that policy here." (JCa188.) This indicates that the Board intends to apply the new CTA policy on a uniform basis moving forward. While the CTA Order does impose a procedural filing requirement for future rate cases, that requirement is ancillary to the CTA Order's core substantive policy change which the Board intends to follow in future base rate cases.

[4] As discussed below, prior to the re-opening of the record, Board Staff, in their Initial Brief, recommended a CTA based on the 2004 Rockland methodology, exactly the same adjustment recommended by Rate Counsel in that proceeding.

In fact, the Briefs of Respondents demonstrate precisely why a rulemaking should be required here. Respondents argue simultaneously that the new CTA formula is binding precedent and that it is a mere filing guideline that may or may not be followed in future rate cases. It cannot be both, and the confusion that now exists regarding the CTA formula demonstrates the important policies behind the APA's rulemaking requirements and the Metromedia factors. If the Board had initiated a rulemaking to adopt a new CTA policy, as it was required to do, then all parties would understand exactly what the rules are moving forward. See Crema v. Dep't of Envtl. Prot., 94 N.J. 286, 303 (1983) (concluding that the DEP's use of adjudication rather than rulemaking was an abuse of discretion, in part because "the absence of established standards has contributed materially to a confusing result.")

When a rule is first proposed, the proposal must contain "a clear and concise explanation of the purpose and effect of the rule, the specific legal authority under which its adoption is authorized, [and] a description of the expected socio-economic impact of the rule…." N.J.S.A. 52:14B-4(a)(2). Prior to adoption of a rule, the APA requires an agency to prepare for public distribution and place on their website "a report listing all parties offering written or oral submissions concerning the rule, summarizing the content of the submissions and providing

the agency's response to the data, views, comments, and arguments contained in the submissions." N.J.S.A. 52:14B-4(a)(4). The OAL has interpreted this statute to require a notice of rule adoption to contain a summary of comments, the reasons for adopting the public comments accepted, and the reasons for rejecting the public comments rejected. N.J.A.C. 1:30-6.1(b)(13).

As a result of the Board's failure to conduct a rulemaking, the Board's CTA policy is now in disarray. Great differences of opinion exist as to the meaning of the CTA Order. Certain parties, such as Respondent New Jersey American Water Company, assert that the Order is exclusively procedural in nature, and simply "imposes a new procedural filing requirement upon New Jersey public utilities in future base rate case petitions…." (NJAW p. 12.) According to New Jersey American, the Board Order only offers a "suggested policy for calculating CTAs, to be implemented in individual future base rate cases." Id. (emphasis added). New Jersey American believes the Board Order "does not alter the substantive rights or obligations of any party….Nor does the Order implement a new CTA policy." Id. at 27.

In contrast, other Utility Respondents such as Aqua New Jersey/United Water and Atlantic City Electric Company steadfastly assert that the Board Order substantively modifies

the Board's CTA policy. (Aqua/United pp. 23-24; ACE pp. 17-20) Finally, a third camp of Respondents appear confused as to whether the Board Order is solely procedural, or whether it substantively alters the Board's CTA policy, alternately arguing both positions in the same brief. Most notable of this group is the Board itself. On one hand, the Board takes ownership of its "modifications to the Rockland methodology," arguing such modifications are not arbitrary and capricious. (BPU p. 21). Yet at the same time, in trying to justify its failure to conduct a rulemaking, the Board claims that "the December Order is not intended to be applied generally and uniformly, nor could it be." (BPU p. 39). Similarly, Respondent JCP&L devotes numerous pages in its brief to its belief that "the Board's modification to its CTA methodology" is based on record evidence – yet alternately asserts that "the BPU merely specified a new calculation that it will require a utility filing a base rate [sic] to perform and include in its petition." (JCP&L pp. 25, 31). The NJUA is similarly confused, arguing both that "[t]he Board's Order merely required utilities to include CTA calculations in their next base rate petitions, for consideration in future cases" and that "the Board reasonably found that its CTA policy should be modified." (NJUA pp. 2, 43).

If the Board had followed required rulemaking procedures, this regulatory confusion could have been avoided. A rulemaking would provide clarity to all parties moving forward. Absent a rulemaking, the Board has failed to satisfy the due process rights of affected parties.

B. The Board's Order is Substantively Deficient as The Modified CTA Formula is Not Supported by Credible Evidence.

In reviewing an agency decision, the Appellate Division must determine, *inter alia*, "whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies." Public Service Electric and Gas Company v. New Jersey Dept. of Envtl. Protection, 101 N.J. 95, 103 (1985) (citations omitted).

> Application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings. The administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached.
>
> Riverside Gen. Hosp. v. New Jersey Hosp. Rate Setting Comm'n, 98 N.J. 458,487 (1985)(citations omitted).

Sufficient credible evidence in support of an agency decision is necessary for meaningful appellate review. Without sufficient credible evidence in the record, "the right of an

interested party to a review of the Board's determinations would be a meaningless formality, for the decision of the appellate tribunal under such circumstance would be the result of but guesswork or caprice." Pub. Serv. Coor. Transport, supra, 5 N.J. at 223. The decision of the Board to adopt Board Staff's proposed modification to the CTA is unsupported by the evidence and therefore is unreasonable and unlawful.

Rate Counsel's Initial Brief detailed at length the failure of the Board to provide a basis, grounded in credible evidence in the record, for the modification of the CTA. That discussion will not be repeated here. Instead, Rate Counsel will focus on the arguments made by the Board and the Utility Respondents in a post hoc attempt to rationalize the Board's modifications to the CTA.

1. The Five Year Look Back Period.

The Board, in arguing that there is "ample evidence in record" to support the five year look back period, cites to its own Order and to the comments of JCP&L filed in response to Board Staff's Straw Proposal. (Board Brief p. 29). It is telling that despite "a lengthy period spent reviewing all of the data submitted in the generic proceeding and crafting a proposal grounded in that record evidence" (Aqua/United p. 21),

the Board does not cite to one piece of credible evidence in support of the Board Staff's proposed five year look back period, which was adopted by the Board with no comment.

In briefs, the Utility Respondents attempt to salvage the Board's Order with their own post hoc arguments. For example, ACE, in attempting to find support for the Board's use of a five year look back period, argues that the use of the five year period mitigates "various problems with the prior iteration of the CTA…." (ACE p.35). ACE then goes on to list several perceived problems that were not cited by the Board and were not supported by sworn testimony. ACE claims, for example, that a five year look back period is reasonable as it "will not include transmission asset income from past years when a utility was still a vertically integrated electric company." Id. This does not support a five year look back period. First, electric restructuring took place almost twenty years ago, so a ten or a fifteen year look back period would also "not include transmission asset income from past years when a utility was still a vertically integrated electric company." Second, the Board's modification excludes electric transmission, so any look back period would not include transmission assets. Thus, ACE's argument does not at all support the Board's use of a five year look back period.

In fact, the only expert testimony on the look back period is the testimony of JCP&L's tax expert, James I. Warren, filed in a previous proceeding and attached to JCP&L's comments in this proceeding.[5] Mr. Warren's testimony also provides no support for a five year look back period. Rather, Mr. Warren discussed the methodology used by the Public Utility Commission of Texas, a rate base methodology with a 15 year look back period. Mr. Warren cites Texas Commissioner Judy Walsh to explain the reasoning behind the Texas methodology.

> Based upon the tax principle that losses can be carried forward for 15 years, we have looked at a period of 15 years. For each company, any income generated by that company was offset against any losses, to reflect that the company had covered its own losses before the test year. (JC124a).

While Mr. Warren argued for no CTA at all, he concluded that "Even under the Board's fundamentally flawed policy, it makes much more sense to follow the former Texas procedure in this regard and eliminate a fictional loss from the calculation when it would have expired." (JC125a). In other words, Mr. Warren's testimony is more supportive of a fifteen year look-back period and provides no support for the five year period adopted by the Board in the JCP&L Order.

[5] As noted above, Mr. Warren's testimony was submitted in this proceeding without including the cross examination and rebuttal that were admitted into the record in the prior proceeding.

Utility Respondents did not cite to Mr. Warren's testimony supporting a 15 year look-back period. Rather Utility Respondents cite to unattributed comments filed by NJUA which cited the use of a 3-5 year look back period used in West Virginia and Pennsylvania. See, e.g., ACE pp. 34-35; JCP&L p. 20. However, unlike the methodology used in Texas and New Jersey which results in a rate base deduction, the 3-5 year look back used in West Virginia and Pennsylvania is based on a "tax expense" methodology where the adjustment is made directly to the amount of income tax expense allowed in a utility's base rates. (Aa161.) This is a very different calculation. No party in this proceeding suggested that the Board should adopt the tax expense methodology and the fact that a shorter period is used under a different methodology does not provide a reasonable basis for the use of a five year look back period in this state using a rate base methodology.

2. 25%/75% Sharing.

In support of its decision to utilize a 25/75% sharing mechanism, the Board points not to record evidence but again cites to its own Order. The Board, in its brief, argues that the 25/75% mechanism is a "midpoint" between the utilities' recommendation of no CTA and Rate Counsel's recommended 50/50 sharing. (BPU p. 33). The Board does not state where or when

Rate Counsel made this "recommendation" of a 50/50 sharing. In fact, no such recommendation was made. The Board's justification is thus insufficient to support its arbitrary decision to choose a "midpoint" between the utilities' position and an inaccurate portrayal of Rate Counsel's position.

Rate Counsel filed two sets of comments in this proceeding. The first set, filed prior to the Board Staff's proposed modifications, made no reference to a 50/50 sharing. (Aa116). After the Board Staff proposed a 25/75 allocation, Rate Counsel urged the Board not to decrease ratepayers' limited share of the tax savings. Rate Counsel then argued "If the Board is determined to reduce ratepayers' share of the consolidated tax benefit, the Board should adopt a sharing that gives ratepayers at least a 50% share of the benefit, as there is no rational basis in the record to do otherwise." (Aa190). Thus, since Rate Counsel's position was that the allocation of tax benefits in the Rockland methodology was appropriate, the "mid-point" is actually a 50/50 sharing, not the 25/75 arbitrarily chosen by the Board.

The Utility Respondents all attempted to argue that there is sufficient credible evidence in the record to support the 25/75% sharing of the CTA. However, the Utility Respondents fail to cite any evidence in the record to support this "sharing."

JCP&L creates the new fiction that "[t]he Board Staff's normal litigation position (since the early 1990s) had been that ratepayers should receive 50% of the calculated CTA adjustment." (JCP&L pp. 21-22). In support of this statement, JCP&L cites to its own comments filed below where this statement is made without citation to the record, without attribution and with no legal support. In reality, Board Staff's "normal" litigation position is the "Rockland methodology" that was adopted by a Board Order in 2004. In fact, this was the position taken by Board Staff in the JCP&L rate case that was pending at the time the Board changed the CTA formula. (JCa187). In Board Staff's Brief filed at the Office of Administrative Law in that JCP&L base rate case, Board Staff's position was exactly the same as Rate Counsel's:

> In this proceeding, JCP&L calculated its pro forma income tax expense on a "stand-alone" basis and made no adjustment for consolidated tax savings. Staff and Rate Counsel proposed a consolidated tax adjustment based on the method approved by the Board in [the 2004 Rockland Decision]. Approval of the consolidated tax savings adjustment proposed by Rate Counsel and Staff would reduce JCP&L's rate base by $511,030,428. Staff and Rate Counsel asserted that this adjustment is consistent with the Board's orders on this issue. (JCa187) (internal citations omitted).

In the end, there is no support in the record for the Board's establishment of a 25%/75% allocation of the CTA. All that is cited by Respondents are unsubstantiated arguments filed

in comments during this proceeding. There is no testimony, no opportunity for cross examination or for rebuttal. This contrasts sharply with the procedure used for previous CTA modifications made in the context of fully litigated base rate cases. The Board's conclusions are arbitrary, capricious and not supported by the record. They should be rejected by this Court.

CONCLUSION

For all the foregoing reasons Rate Counsel respectfully requests that this Court reject the Board's revisions to the CTA calculation and remand this proceeding for a proper rulemaking pursuant to the Administrative Procedure Act or for a determination that the appropriate CTA will be decided on a case-by-case basis in future utility base rate cases.

Respectfully submitted,

s/ Stefanie A. Brand
Stefanie A. Brand
Director, Division of Rate Counsel

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-1153-14T1

IN THE MATTER OF THE BOARD'S REVIEW OF THE APPLICABILITY AND CALCULATION OF A CONSOLIDATED TAX ADJUSTMENT	) On Appeal from the) October 22, 2014; November 3,) 2014 and December 17, 2014) Orders of the New Jersey Board) of Public Utilities)) BPU DKT. NO. EO12121072) Civil Action

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REPLY APPENDIX OF APPELLANT
DIVISION OF RATE COUNSEL

REDACTED VERSION

[redacted]

Response to Staff's Request for additional information "f"

Filed with the Board

September 4, 2013

[redacted]

e. *The amount paid to each loss company by the parent, in each year since 1991;*

A schedule of taxes paid to each loss company from 1991 through 11/6/2001 is provided on Attachment E-1 **(Confidential)** and from 11/7/2001-2011 is provided on Attachment E-2 **(Confidential)**.

f. *The total amount paid by the consolidated entity to the IRS for federal income taxes in each year since 1991;*

Below is a listing of actual federal income taxes paid/(received) by the Consolidated group reflected on a tax return basis for each year since 1991. Please note that this information has been designated as **Confidential.**

[redacted]

g. *The amount of bonus depreciation taken by each member of the consolidated income tax group in each year since 1991;*

Please refer to Attachment G, which has been designated as **Confidential.** Please note that 2001 is the first year in which bonus depreciation was applicable.

[redacted]

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ATTACHMENT A

CTA Generic Proceeding
Docket No. EO12121072

[redacted]

	Request	BPU Docket No.	Data Request	Confidential
a	Copy of Tax Sharing Agreement	[redacted]	[redacted]	NO
b	Year 1st included in consolidated return			NO
c	Total income tax paid to parent since 1991 by NJAWC			YES
d	Total income tax paid to parent since 1991 by all members of consolidated group			YES
e	Amount paid to each loss company by parent since 1991			YES
f	Total FIT paid by consolidated entity to IRS			YES
g	Bonus depreciation taken by each member since 1991			YES
h	AMT taxes paid by the consolidated group each year since 1991			YES
i	Amount of tax loss carryforward available to consolidated group			YES
j	A brief description of each company included in the consolidated group			NO
k	Reason why company is no longer included in consolidated group			NO
l	All workpapers and calculations related to CTA calculation as requested in Notice			YES
m	FIT, both current & deferred, reported by parent in their Annual Report since 1991			YES
n	FIT, both current & deferred, reported by NJAWC in its Annual Report since 1991			YES

* Will be supplied under a Confidentiality Agreement to be entered into with Staff and Rate Counsel

[redacted]

Rate Counsel Requests For Information
Consolidated Income Taxes

CONFIDENTIAL ATTACHMENT

Witness: James I. Warren

[redacted]

Please provide, for each year since 1991, the actual income taxes paid by the consolidated group.

Response: Please see attached confidential schedule.

CONFIDENTIAL [redacted]

Tax Year	Actual Income Taxes Paid to the IRS by the Consolidated Group
1991	Not Available
1992	[redacted]
1993	
1994	
1995	
1996	
1997	
1998	
1999	
2000	
2001	
2002	
2003	
2004	
2005	
2006	
2007	
2008	
2009	
2010	

Note: Reflects impacts of carrybacks and carryforwards

[redacted]

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[redacted]

Consolidated Tax Adjustment Generic Proceeding
Docket No. EO12121072

Year	Tax Paid *
1991	[redacted]
1992	
1993	
1994	
1995	
1996	
1997	
1998	
1999	
2000	
2001	
2002	
2003	
2004	
2005	
2006	
2007	
2008	
2009	
2010	
2011	
2012	

* These amounts represent accrued federal current tax expense from the financial statements that include prior period reconciliations,audit, and other adjustments.

[redacted]

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CONFIDENTIAL

f. The total amount paid by the consolidated entity to the IRS for federal income taxes in each year since 1991.

Response:

[redacted]

[redacted]

DIVISION OF RATE COUNSEL ACCOUNTING DATA REQUESTS

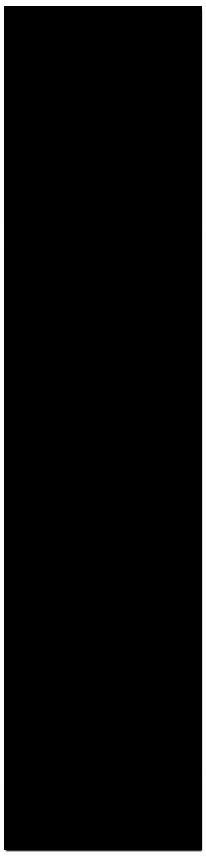
[redacted]

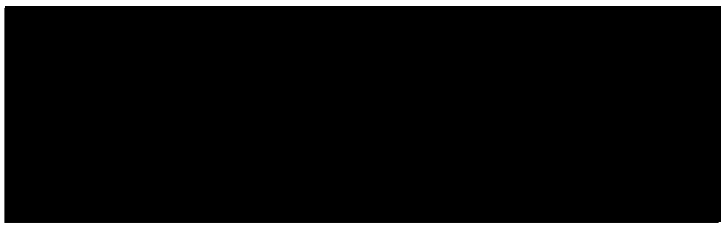
[redacted]

Please provide, for each year since 1991, the actual income taxes paid by the consolidated group to the IRS.

Response: Please see the confidential response attached.

1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011





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Attachment 4

Total Federal Income Taxes Paid By [redacted]

2008 – 2011

Attachment 4 is Confidential

Confidential

[redacted]

Federal Income Tax Payments
2008-2011

2008 - [redacted]
2009 -
2010 -
2011 -