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August 2. 2024

Via Electronic Mail
Honorable Sherri Golden, Secretary
Board of Public Utilities
44 South Clinton Avenue, 1th Floor
P.O. Box 350
Trenton, NJ 08625-0350
board.secretary@bpu.nj.govJ

Re: In the Matter of the New Jersey Modernization Interconnection Process New Jersey Board of Public Utilities DER Interconnection Final Rule Making
BPU Docket No. QO21010085

Dear Secretary Golden:

Please accept for filing these comments being submitted on behalf of the New Jersey Division of Rate Counsel ("Rate Counsel") in accordance with the Notice issued by the Board of Public Utilities ("Board") in this matter on June 4, 2024. Copies of these comments are being provided to the intended recipients by electronic mail only and are being filed electronically with the Board Secretary at board.secretary@bpu.nj.gov. **Please acknowledge receipt of these comments.**

Thank you for your consideration and attention to this matter

Respectfully submitted,

BRIAN O. LIPMAN, ESQ.
DIRECTOR, DIVISION OF RATE COUNSEL

By: /s/ Maura Caroselli
Maura Caroselli, Esq.
Deputy Rate Counsel

DW/dl
Enclosure
cc: Robert Brabston, Board of Public Utilities
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I/M/O New Jersey Grid Modernization Interconnection Process

BPU Docket No. QO21010085

New Jersey Board of Public Utilities: DER Interconnection Final Rulemaking

Comments of the Division of Rate Counsel

August 2, 2024

Summary

In the summary section of the proposed regulation, the Board sets forth the underlying reasons for proposing the rule change which is to "to remove stakeholder-identified sources of confusion or delay in the process of customer-generators applying for interconnection authorization from their respective electric distribution company (EDC), and to prepare for a broader grid modernization effort that will enable the grid to host more DERs."[1] The Board claims that the proposed regulations will "better align the financial interests of the EDCs with project developers and ratepayers by discouraging inefficient and overly broad rate-based system upgrades in favor of more data-driven investments tailored to optimize DER integration."[2] The Board asserts that the effects of this rule change will be "immediately felt by project developers."[3] The Board provides as its authority to make these significant changes N.J.S.A. 48:2-13 and 48:3-87.[4] As previously stated in Rate Counsel's April 24, 2023 straw proposal comments, Rate Counsel remains concerned about the proposed rules lack of cost transparency, cost allocation, and cost recovery.[5] With this rulemaking, Rate Counsel anticipates that DER interconnections will increase greatly and there will be significant costs for the EDCs to support these interconnections. An appropriate cost allocation and recovery framework is necessary to

[1] 56 N.J.R. 993
[2] Ibid.
[3] Ibid.
[4] It is well established that an "administrative agency only has the powers that have been expressly granted by the Legislature and such incidental powers [as] are reasonably necessary or appropriate to effectuate those expressly granted powers." In re Centex Homes, LLC, 411 N.J. Super. 244, 251 (App. Div. 2009)(quoting Avalon v. N.J. Dep't of Envtl. Prot., 403 N.J. Super. 590, 607, 959 A.2d 1215 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009))(internal quotation marks omitted).
[5] See Attachment A

support DER implementation at the lowest possible cost and ensure developers and participating customers are charged appropriately, based on ratemaking principles such as cost causation. Substantiation of the proposed DER interconnection fees is missing entirely from this rulemaking. Also, there is no transparency around the allocation of DER interconnection costs among the utility and its ratepayers, developers, and participants in DER programs. A likely outcome of limiting the cost of private investors' investments is to enhance the value of those investments by increasing profits and imposing costs onto captive ratepayers. This is contrary to both cost causation principles and a competitive energy market. The electric system exists to serve customers, not pad the profits of privately owned, unregulated project developers.

Shifting the cost of DER development from the project developers to utility customers is inappropriate and is an additional subsidy for an already heavily subsidized and unregulated industry. Any discussion of additional subsidies paid by ratepayers should include a holistic re-evaluation of the current subsidies being provided. The current rule proposal does not accomplish this, yet nonetheless, proposes levying additional costs and risks of DER programs onto ratepayers.

Regarding cost transparency:

- The rule proposal provides no data on the actual costs to interconnect Level 1, Level 2, and Level 3 DER projects to the grid. There is no confirmation that the proposed DER interconnection fees for Level 1, Level 2, and Level 3 installations cover the actual costs. If the proposed DER interconnection fees for Level 1, Level 2, and Level 3 installations do not cover the actual costs, there is no description of the extent these installations are being subsidized by ratepayers and what the potential impact of this cost shifting may be for ratepayers.

- The publication of this rulemaking includes sections on Social, Economic, Jobs, Agriculture Industry, and Housing Affordability Impact and Impact Analysis with scant text about the extent to which cost shifting occurs and its effects. It is completely inaccurate to say that there is no cost shifting and the cost shifting that is likely to occur will have no impact on ratepayers in these sections if Level 1 fees are purposefully set lower than actual costs to remedy a barrier to entry for residential and small commercial customers. If it is true that there will be some subsidy for Level 1 participants, these sections of the rulemaking proposal should acknowledge forthright that the flat Level 1 fees do not adhere to cost causation principles, there is a subsidy for investors in these DER projects, and that subsidy will be paid for by other customers. These sections should also include data and analysis resulting from studies of these impacts and need to be completely rewritten to address the intended purpose.

- There are many types of DER interconnection fees discussed in the rulemaking ("application fee", "initial application fee", "impact/facility study fee", "normal fee for PAVE report", "enhanced PAVE process fee", "electric distribution system modification fee", "additional review fee", etc.). The rule proposal does not include a consistent or well-defined naming convention for these fees. The result is that it is difficult to determine which EDC costs may be considered properly allocated to these fees.

- The Common Interconnection Agreement Process (CIAP), a potentially large investment, is allowed to be recovered from ratepayers on an accelerated schedule, with no cost estimates, standards, or process for review provided in the proposed rulemaking. This is a significant change in how utilities recover these types of investments and removes the burden of prudency, which violates the basic foundations of utility ratemaking established in the State.

Regarding cost allocation, the cost of the CIAP is proposed to be allocated 100 percent to ratepayers. It is not appropriate to allocate any of these costs to ratepayers. These costs should be shared and captured in the DER interconnection fees charged to developers and participating customers, along with all the other DER interconnection costs. Additionally, it is not clear whether the costs of Pre-Application Verification/Evaluation (PAVE) processes and reports and hosting capacity maps are intended to be included in and covered by DER interconnection fees.

Regarding cost recovery, the cost of the CIAP is proposed to be recovered on an accelerated schedule. We do not see any reason why any portion of the CIAP cost that is to be borne by ratepayers needs to be collected quickly. Prudently incurred costs associated with system improvements or development are commonly collected by utilities in base rate cases. We see no difference between other types of system improvement and development and this cost which would substantiate the need for accelerated recovery.

SPECIFIC COMMENTS
SOCIAL IMPACT

The rulemaking proposal provides the following language regarding the Board's assessment of social impact:

> *The proposed rulemaking also provides avenues to transition away from ratepayer and taxpayer-funded incentives towards self-*

> *scaling, market-driven mechanisms for DER adoption. Much of this work will be accomplished through structured working groups pursuant to a formal Grid Modernization Forum that will recommend further reforms that build on the current proposed rule amendments and new rules.*

This rulemaking proposal does not provide estimated costs for DER interconnection, nor does it discuss whether cost shifting for Level 1, Level 2, and Level 3 interconnections to ratepayers is likely to occur and the potential extent of this cost shift. It cannot be disputed that this rule will increase rates for New Jersey's electric ratepayers. There is, however, no analysis of the impact of that increase. Moreover, this cost shifting is a form of ratepayer-funded incentive; therefore, the rulemaking cannot claim that it *transition[s] away from ratepayer-funded incentives*. Indeed, it is clearly the opposite and this social impact statement is simply wrong. The rulemaking must be transparent about the extent and costs of ratepayer-funded incentives that remain.

ECONOMIC IMPACT

The rulemaking proposal provides the following language regarding the Board's analysis of economic impact:

> *The proposed rulemaking will have minimal economic impacts and does not impose any additional direct costs on New Jersey residents. Specifically, this rulemaking may result in de minimis additional costs for EDCs related to data acquisition, reporting requirements, and the development of a common interconnection agreement process. Much of the data to be reported is already collected by the EDCs.*

This impact statement is patently incorrect. It fails to provide an accurate economic impact of the proposed rule. In proposing a draft rule, an agency is required to "make available for public viewing through publication…a description of the expected socio-economic impact of the rule…."[6] Further, N.J.A.C. 1:30-2.1 requires a proposed rule to "be sufficiently complete and informative as to permit the public to understand accurately and plainly the legal authority, purposes and expected consequences of the adoption…." The economic impact statement in the draft rule fails to account for the millions of dollars of ratepayer-funded subsidies provided for

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

throughout the rule proposal. The Board has not (and cannot) substantiate that this rulemaking proposal will have *minimal economic impacts*, will *not impose any additional direct costs on New Jersey residents*, and that any additional costs for EDCs related to data acquisition, reporting requirements, and the development of a CIAP will be *de minimis*. Moreover, this statement blatantly ignores the fact that under this rule ratepayers will now be paying—through increased rates—some portion of private investors' interconnection costs. Any cost shifting from developers and DER investors to all ratepayers is an *additional direct cost on New Jersey residents*. In addition, by mischaracterizing the actual economic impact of the draft rule, the Board's decision is inconsistent with a recent Appellate Division decision addressing the allocation costs (i.e. taxes) between EDCs and ratepayers. The court stated that:

> Compliance with the requirements [of the socio[economic impact disclosure requirements of the Administrative Procedure Act[7]] provides the stakeholders with the Board's analysis and assessment of the economic impact of a proposed rule and the Board's response to a stakeholder's data, comments and arguments before a rule is adopted. Moreover, compliance provides the stakeholders with the opportunity to present evidence and address the Board's economic impact assessment and response to the stakeholder's data, comments and argument. In other words, the statutory requirements guarantee that Rate Counsel and the stakeholders are fully informed of the Board's position concerning a rule's economic impact and the Board's response to the submitted data, comments and arguments, thus permitting Rate Counsel and the stakeholders an opportunity to present further evidence and argument. When the requirements are ignored, the Board gathers information and comment, but Rate Counsel and the stakeholders are deprived of the right granted by the APA to consider and contest the Board's assessment of economic impact and responses to the submissions prior to the adoption of a rule.[8]

The Appellate Division specifically held that the Board must afford Rate Counsel and other stakeholders the opportunity to review the Board's position concerning a rule's economic impact in order to be able to present evidence and arguments concerning it. Here, by failing to describe the Board's position on the draft rule's full economic impact, the draft rule deprives Rate Counsel of the ability to review the expected economic impact and present evidence in

[7] N.J.S.A. 52:14B-4(a).
[8] In re Board's Review of the Applicability & Calculation of a Consol. Tax Adjustment, 2017 N.J. Super. Unpub. LEXIS 2315, *25-26 (Sept. 18, 2017) (attached hereto as Attachment B).

agreement or in opposition to it on behalf of the State's ratepayers. By failing to explain the anticipated economic impact, the draft rule deprives ratepayers of their substantive rights under the Administrative Procedures Act, and is contrary to the Appellate Division's decision.

Most importantly, the economic impact claimed in the rule proposal is simply incorrect. There is no doubt that, by limiting costs for system upgrades, application verification and evaluation, the interconnection agreement process and other costs for interconnection applicants, and imposing the unlimited balance of those costs on ratepayers, the Board proposes to subsidize interconnection applicants at the substantial expense of ratepayers. The rule proposal does not offer even an estimate of the amount of those shifted costs or their economic impact on ratepayers. The economic impact statement ignores this economic reality.

That economic reality includes the fact that nearly 3 million New Jersey residents live below the Poverty Research Institute standard for New Jersey's cost-of-living-sensitive threshold. Affordability of utility rates is imperative and is not discussed or apparently considered in this rule proposal.[9] Moreover, when considering affordability, the Board cannot look at this one rule in isolation. Not only is the Board providing further subsidies for private investment in DER, but the Board is also requiring ratepayers to pay for offshore wind development, energy efficiency programs, electric vehicles and other infrastructure, all of which will result in substantial increases in ratepayers' bills. The Board must look at the overall bill impact of all its actions to truly consider affordability.

Shifting costs from private, for-profit entities onto ratepayers who are captive customers of the EDC's monopoly is socializing the risk of these investments while enhancing the private entity's profit. This allows the private investment entity to use the EDC's State-granted monopoly power to limit its costs while imposing them on the captive ratepayers. Under the Board's rule proposal, the private investor would keep the profit while the public would pay a portion of the investor's costs. This is contrary to the deregulation of the energy industry, which sought to introduce price competition into the energy market.[10] The deregulation of electric generation under Electric Discount and Energy Competition Act ("EDECA") unbundled the

[9] Legal Services of New Jersey Poverty Research Institute, True Poverty What It Takes to Avoid Poverty and Deprivation in the Garden State (July 2021) (available at https://proxy.lsnj.org/rcenter/GetPublicDocument/00b5ccde-9b51-48de-abe3-55dd767a685a)

[10] Electric Discount and Energy Competition Act, ("EDECA"), N.J.S.A. 48:3-49 et seq.

functions and costs of generation from the regulated utility industry, and ratepayers were relieved of the responsibility to guarantee recovery of the costs of generation investors. The cost-shifting in this rule proposal is clearly contrary to that principle.

The Board's rule proposal is also contrary to cost causation principles. Under those well-established ratemaking principles, the party causing a cost, such as the cost of interconnecting the investor's equipment to the electric grid, must pay those costs. The Board's rule proposal would break with its traditional ratemaking and establish a new regime where ratepayers pay unspecified subsidies to DER investors. The factual and legal bases for this radical change in the Board's ratemaking are not presented in the rule proposal.

JOBS IMPACT

The rulemaking proposal provides the following language regarding the Board's evaluation of jobs impact:

> *This rulemaking is not anticipated to immediately have a significant impact on employment in New Jersey.*

Higher electric rates can cause numerous effects on the economy: households overall will have less discretionary income, and employers will have higher overhead costs, which may lead to hard financial decisions such as choosing to relocate out-of-state or reductions in their New Jersey workforces. These are among the reasonably foreseeable adverse impacts on employment of increasing ratepayer subsidies to DER investors. It is immaterial whether this adverse impact (that is likely not considered in this statement) is immediate. The rule proposal appears to have entirely disregarded the adverse effects of these proposed increased subsidies on jobs, while asserting reliance upon unspecified numbers of anticipated new jobs installing DER-related equipment.

AGRICULTURE INDUSTRY IMPACT

The rulemaking proposal provides the following language regarding the Board's estimation of impacts to the agriculture industry:

The proposed amendments and new rules will have no impact on the agricultural industry.

This language completely ignores the potential benefits and drawbacks of DER interconnections for small and large farms. Farmers who install solar generation equipment on their land may benefit from this rulemaking under certain conditions. Farmers whose electricity rates increase to subsidize solar on other farms may be at a competitive disadvantage. The rule proposal also does not mention other potential effects on the Garden State's agricultural industry of covering more farmland with solar panels or losing access to farmland tax assessments. Language (or at least some consideration) detailing these types of potential impacts is necessary.

HOUSING AFFORDABILITY IMPACT ANALYSIS

The rulemaking proposal provides the following language regarding the Board's characterization of its analysis of housing affordability impacts:

> *This rulemaking will not impact the affordability of housing in New Jersey, nor is it likely to have an impact on the average cost associated with housing, as the rules pertain to DERs and interconnectivity.*

The Housing Affordability Impact Analysis is flawed. Again, this language disregards the substantial costs associated with DER interconnection. The proposed rules will result in higher utility rates for electric customers throughout the State of New Jersey compared to current rates. Higher utility rates result in higher housing costs. In the cases where energy costs are paid by a landlord, such as for many low and moderate-income residents, renters can expect to pay increased rent in order to subsidize DER interconnection investments as proposed in this rulemaking. Furthermore, under N.J.S.A. 52:14B-4.1b(a), the Board is required to provide an estimated increase or decrease in the average cost of housing resulting from a proposed rule. The proposed rule attempts to satisfy this requirement by claiming there will be no impact on the cost of housing, which is simply incorrect.

Utility bills are a fundamental part of any housing affordability analysis.[11] Since the draft rule will result in higher electric rates throughout the State, it follows that most of the

[11] See The U.S. Department of Housing and Urban Development's interpretation of federal law and states: In interpreting the federal housing law, HUD has defined the Total Resident Payment for "rent" to include both shelter and the costs for reasonable amounts of utilities.48u0 See https://www.hud.gov/program_offices/public_indian_housing/programs/ph/phecc/allowances#:~:text=In%20interpreting%20the%20federal%20housing,costs%20is%20the%20utility%20allowance.

State's ratepayers will experience higher housing costs and a decrease in housing affordability as a result of this proposed rule. The draft rule has no analysis of whether rents or home ownership costs in New Jersey will increase because of higher electric bills. In failing to acknowledge or properly analyze the proposed rule's effect on housing affordability, the proposed rule appears to not comply with N.J.S.A. 52:14B-4.1b(a). The lack of analysis or any basis whatsoever for the Board's statement makes it insufficient to satisfy the statutory requirement for the proposed rules.

SUBCHAPTER 5. INTERCONNECTION OF CLASS I RENEWABLE ENERGY SYSTEMS

14:8-5.1 Interconnection definitions

Rate Counsel's concern about potentially inappropriate cost-shifting arises in the definition of EDC grid flexibility services that follows:

"EDC grid flexibility services" are control capabilities procured from a customer-generator, which may be compensated by the EDC that help to maintain distribution system reliability and safety, whether separately or as part of a DER aggregation.

This definition characterizes such services as potentially "compensated by the EDC." The rule proposal provides no description of these services; no information on their technical functioning, necessity, advisability, or alternatives; and no data on costs, benefits, who will pay, who will benefit, or in what amount. Without such guidance, it is likely that the costs will fall on ratepayers, with no way to ensure that they receive commensurate benefits, and no cap on how high those costs could go.

14:8-5.2 General interconnection provisions

14:8-5.2(m):

Rate Counsel strongly objects to proposed new N.J.A.C. 14:8-5.2(m), which mandates that the entire cost of establishing, operating and maintaining the common interconnection agreement process ("CIAP"), portal and software will be imposed upon ratepayers.

The cost of implementing the CIAP portal and related costs shall be recovered by each EDC as part of its base rates or through an approved Infrastructure Investment Program [IIP], pursuant

to N.J.A.C. 14:3-2A.2.

First, this proposal violates well-established ratemaking principles. Utility costs sought to be recovered in rates must be reasonable, prudently incurred,[12] and result in just and reasonable rates.[13] This proposed new rule does not include any of the review standards that are legally required before allowing any utility investment to be included in its rate base and to ensure that the resulting rates are just and reasonable. Such standards include, without limitation, determining whether the investment is prudent, used and useful, and necessary to provide safe, adequate and proper service.[14] The Board may not abdicate its duty to review utility investments, and may not delegate to the EDCs or to private investors, the Board's authority to determine which investments may be included in the EDC's rate base. Utility investments must be reviewed for prudency and other traditional ratemaking criteria, before being placed into rates.[15] Additionally, this proposed language is inconsistent with the stated purpose of the IIP rules, which are to accelerate investment in "certain non-revenue producing utility plant and facilities that enhance safety, reliability, and/or resiliency."[16] The IIP regulations were never intended to subsidize DER adoption.

Additionally, imposing the CIAP portal costs *entirely upon* ratepayers would be inappropriate and would represent an additional subsidy paid by ratepayers to investors in DER projects. Access to the electric grid is a valuable benefit for which DER projects should pay their fair share as beneficiaries.[17] This proposed new rule would shift the costs and risks of

[12] N.J.S.A. 48:3-57.
[13] See N.J.S.A. 48:2-13 and 48:3-1.
[14] See N.J.S.A. 48:2-21.
[15] See In re Proposed Increased Intrastate Indus. Sand Rates, 66 N.J. 12, 23-24 (1974) (explaining rates "cannot be permitted to inflict extortionate and arbitrary charges upon the public"); In re Board's Investigation of Tel. Cos., 66 N.J. 476, 495 (1975)(stating that "utility expenses, to be allowable, must be justified. Good company management is required; honest stewardship is demanded; diligence is expected; careful, even hard, bargaining in the marketplace and at the negotiation table is prerequisite."); In re Pub. Serv. Coordinated Transp., 5 N.J. 196, 218 (1950)(holding that the Board has "a duty to go behind the figures shown by the companies' books and get at realities."); In re Redi-Flo Corp., 76 N.J. 21, 36 (1978)(noting that there is a "consistent line of authority requiring close scrutiny of a utility's books and records"); Duquesne Light v. Barasch, 488 U.S. 299 (1989) (used and useful law is constitutional even when it excludes from consideration costs that were "prudent and reasonable when made"); Southwestern Bell v. PSC of Missouri, 262 U.S. 276 (1923) (regulators must ensure that all investment s are necessary and prudent, and exclude what is dishonest or obviously wasteful).
[16] N.J.A.C. 14:3-2A.1.
[17] The FERC Order 1000, on transmission planning and cost allocation, establishes that the cost of system facilities must be allocated to those who benefit most directly from those upgrades, and not allocated to those who do not receive benefits. Two out of the six cost allocation principles that FERC prescribed in Order 1000, for guiding fair and reasonable cost allocation, specify that direct beneficiaries must pay for system facilities. *Transmission*

achieving grid access onto ratepayers. However, all profits from the project would still be retained by the investors in the DER project. Well-established ratemaking principles indicate that the costs of connecting to the grid must be borne by the party who requests the grid connection.

Moreover, the costs of installing, maintaining, and updating the CIAP are potentially large and may significantly increase customer rates. Use of the IIP regulations will ensure that ratepayers see those increases immediately and before any prudency review is done. The result will be an open-ended commitment of ratepayer funds to pay for investments in DER projects. The rule proposal does not include any estimate of those costs. Cost causation principles require that ratepayers paying the costs benefit from the investment on a level commensurate with the benefit they receive. Accordingly, the costs of the CIAP and its portal and software should be recovered through the fees charged to the applicants for the benefit of a grid interconnection, and not from ratepayers.

14:8-5.2(m) (3)

Rate Counsel does not support this proposal as written, which would require that the ratepayer-funded CIAP portal must include grid integration software for solar projects that is "selected and implemented jointly by the EDCs and approved by the Board."

By (one year of the effective date of this rulemaking), each EDC shall establish a secure common interconnection agreement process (CIAP) that will provide a structured approach for submitting interconnection applications, tracking key information throughout the interconnection application process, and monitoring the interconnection process electronically. Each EDC's CIAP-compliant portal shall be developed based on the needs of the EDC and its applicants and maintain a consistent customer experience for applicants across EDC service territories. The cost of implementing the CIAP portal and related costs shall be recovered by each EDC as part of its base rates or through an approved Infrastructure Investment Program pursuant to N.J.A.C. 14:3-2A.2. Each CIAP shall, at a minimum:

…
3. Integrate with a solar permitting application software platform, such as SolarAPP+, or other similar solar permitting tool selected and implemented jointly by the EDCs, and approved by the Board.

The rule proposal does not include any procedural requirements for stakeholder input on

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Planning and Cost Allocation by Transmission Owning and Operating Public Utilities. FERC Order 1000, Docket No. RM10-23-000, at 447 and 455 (July 21, 2011).

software selection or implementation. Additionally, to the extent that every EDC will seek recovery of its software costs, Rate Counsel recommends promulgating applicable standards by rule to comply with principles governing rate-setting and administrative law. More importantly, this IT investment will benefit DER developers, not ratepayers. At a time where the Board has seen significant IT costs borne by ratepayers, requiring ratepayers to pay (potentially at an accelerated rate) for IT costs to benefit private investment and further boost profits of those private investors is simply inappropriate.

14:8-5.6: Level 3 Interconnection Review

This rule amends the criteria for Level 3 interconnection review as follows:

(j) An application fee not to exceed $100.00 plus $10.00 per kW of the nameplate rating up to a maximum of $2,000 shall accompany any application and an application shall not be deemed complete until the application fee is received. The application fee shall be in addition to charges for actual time spent on analyzing the proposed interconnection. Costs for EDC studies and facilities necessary to accommodate the applicant's proposed customer-generator facility shall be the responsibility of the applicant.

New N.J.A.C. 14:8-5.6(j) would cap application fees for a Level 3 interconnection application at an amount not to exceed $2,000. We are concerned that ratepayers could be responsible for additional costs. We note that many other jurisdictions with a similar fee structure do not place a cap on the application fee. For example, Maryland[1], Pennsylvania[2], and Illinois[3] also set application fees for the highest interconnection level as a fixed dollar amount plus a dollar-per-kilowatt adder but do not include a cap. As Level 3 interconnections are 2MW and larger, the uncapped charge for processing an application for a Level 3 interconnection under the current equation proposed by Staff would start application fees at $20,100 ($100, plus $10 multiplied by 2,000 kW). This amount far exceeds the $2,000 cap. Importantly, it is strange that this application fee is structured to scale the application costs for different sized projects and the result of the calculations are that all applicants would pay the same capped amount. Also, if the actual cost to process Level 3 interconnections is greater than $2,000 and that incremental cost is not billed in some other form (through some other DER

[1] Md. Code Regs. 20.50.09.05 Small Generator Interconnection Standards (2024).
[2] Database of State Incentives for Renewables & Efficiency (DSIRE). Interconnection Standards – Pennsylvania. https://programs.dsireusa.org/system/program/detail/274/interconnection-standards.
[3] 83 Ill. Adm. Code, Part 467 (Appendix B) (2022).

interconnection fee), this proposal would likely shift onto ratepayers the portion of the actual cost to interconnect the DER that exceeds that $2,000. These costs should be charged to the applicant requesting to connect their DER project to the grid. This violates cost-causation principles of ratemaking and unreasonably shifts the risk of interconnection onto ratepayers. Applicants should cover their costs to the EDC in their DER interconnection application fees. Further, the rule proposal provides no facts on how much a Level 3 interconnection application review is assumed to cost, which could help stakeholders understand whether this fee will cover the EDC's costs to process a Level 3 application. Rate Counsel respectfully recommends revising this proposed new rule to state that: "An Application fee shall be set by the EDC based on its historic, actual costs incurred to process a Level 3 application".

New N.J.A.C. 14:8-5.6(j) sets certain limits on the costs that the interconnection applicant must pay for a System Impact Study and system upgrades required to accommodate the proposed interconnection. These limits apply whether the actual cost of the interconnection is less than $200,000 or the EDC determines the modifications are "not substantial."[18] This proposed language, under N.J.A.C. 14:8-5.6(n), creates a broad and inadequately defined exception that could unreasonably impose costs on ratepayers. The proposed language does not contain any criteria or standards that would limit this exception or the utilities discretion to evoke it, except the utility's own "reasonable judgment." An essential purpose of rulemaking is defining standards for the exercise of an agency's discretion.[19] The exception should include specific criteria and standards, which the utilities should be required to demonstrate in any petition that proposes to costs incurred based on the EDC's "reasonable judgment" that the modifications are not substantial.

N.J.A.C. 14:8-5.6 (q) provides: "*If the EDC commences construction of actual upgrades, the EDC may not charge the applicant for any portion of cost overruns that exceed 50 percent of the total estimated upgrade cost.*" However, under this proposed rule, the Board has not made clear that these costs should also not be recoverable from ratepayers. If private investors are

[18] Proposed N.J.A.C. 14:8-5.6(n).
[19] 613 Corp. v. State, Div. of State Lottery, 210 N.J. Super. 485, 500-01 (App. Div. 1986) (holding that rulemaking is required to establish standards for denying licenses to sell lottery tickets notwithstanding Division of State Lottery's sixteen-year practice of considering applications on an ad hoc basis); See also Metromedia v. Dir., Div. of Taxation, 97 N.J. 313, 333-34 (1984).

insulated from cost overruns, surely captive ratepayers should be afforded the same protection.[20]

Additionally, Rate Counsel objects to this cost-shifting proposal because limiting the applicant's responsibility to pay for the costs it directly causes violates cost-causation principles of rate-making, is contrary to the purpose of the unbundling and deregulation of electric generation in the State, and may result in rates that are not just and reasonable. Interconnection application fees should cover all costs to the EDC to process the application; otherwise, an additional subsidy will result. Moreover, this proposal does not provide any facts about the cumulative cost to ratepayers of paying up to $200,000 toward the cost of grid upgrades needed to accommodate the grid connection for each Customer-generator DER project. Rate Counsel respectfully recommends revising proposed new N.J.A.C. 14:8-5.6(m) to add this sentence: "The Customer-generator will be responsible to pay the costs of any system upgrades needed to connect its proposed DER facility to the EDC's grid."

14:8-5.7: Interconnection Fees

Rate Counsel strongly objects to the proposed amendments to N.J.A.C. 14:8-5.7, which sets limits on the amounts that EDCs may charge for application fees, engineering review of applications, connecting to the grid or operating a customer's grid-connected facility. N.J.A.C. 14:8-5.7(b) proposes to limit the fee to review a Level 2 interconnection application, to an amount of up to $50 plus $1 per kilowatt of the Customer-generator facility's capacity "or such other value established by Board order." Similarly, N.J.A.C. 14:8-5.7(c) proposes to limit the fee to review a Level 3 interconnection application, to an amount not to exceed $100 plus $10 per kilowatt of the facility's nameplate rating. Also, this section is not consistent with other sections of the rulemaking, as it does not include a $2,000 limit for the Level 3 application fees as stated in N.J.A.C. 14:8-6.5(j).

Rate Counsel has several concerns with this amended rule. Primarily, to the extent that the EDCs would be limited to charging fees that are less than the actual cost to the EDC of reviewing, operating and maintaining the grid connection for each DER program participant, this proposed rule would seek to impose these costs upon ratepayers. There is no basis to impose those costs onto ratepayers. Also, the statement "or other value established by Board

[20] See In re Board's Investigation of Tel. Cos., supra. n.18.

order" in N.J.A.C. 14:8- 5.7(a) and N.J.A.C. 14:8-5.7(b) is too vague as to the specific limit on the application fee. Thus, the additional subsidy to be paid by ratepayers is potentially an unlimited amount. Lastly, any proposed limit on the application fee must arise from a rulemaking process that sets forth supporting facts and explains the reasoning for its establishment.[21] None of N.J.A.C. 14:8-5.7(a), (b), or (c), provides facts or explanations to support the amounts proposed. And none of these three proposed rule revisions explain whether the proposed limits would enable the EDCs to charge an application fee sufficient to pay for the costs that the DER interconnection application will impose on the EDC and ratepayers. Without such a foundation, an application fee cap may violate principles of cost causation and rulemaking and may be arbitrary and capricious.

Accordingly, Rate Counsel respectfully recommends revising N.J.A.C. 14:8- 5.4(a), (b) and (c) to remove the application fee cap. Rate Counsel recommends that the language be kept consistent between N.J.A.C. 14:8-5.7(c) and 14:8-6.5(j), and that all references to a $2,000 cap are removed.

14:8-5.9: Interconnection Reporting Requirements for EDCs

It is not clear whether N.J.A.C. 14:8-5.9 requires a standardized reporting format for the data to allow comparison between EDCs. Submittal of interconnection tracking metrics in a standardized spreadsheet file would facilitate tracking and verification of EDC performance. Reporting requirements should include maximum, mean, and median processing times from receipt of request to issuance of report for each level of applications.

14:8-5.9(c)(10) requires reporting on hybrid interconnection projects as shown below.

10. The number and total nameplate capacity of customer-generators of each technology type, broken out by class I renewable energy technologies (for example, solar, wind, or fuel cell technologies), energy storage devices, electric vehicle-to-grid projects, *and hybrid systems involving multiple behind-the-meter technologies*;

Rate Counsel suggests that this reporting should specify whether individual components of such projects are export limited or otherwise constrained to meet Level 1, 2, or 3 approval

[21] See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984) ("A critical aspect of this definition is the general applicability and continuing effect of the pronouncement."); In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011); see also N.J.S.A. 52:14B-3(2).

criteria.

The annual report required by N.J.A.C. 14:8-5.9(d) does not require EDC reporting of fee payments as compared to the actual costs associated with implementation of interconnection applications, CIAP development and operation, PAVE processes, hosting capacity map preparation and updates, engineering studies, and grid upgrades. Rate Counsel respectfully requests reporting of this data. Also, the EDCs should be required to make a statement regarding whether the proposed DER interconnection fees will cover DER interconnection review expenses for each interconnection level. Based on the novelty of the issues presented by these proposed changes to the grid interconnection rules, at this time the EDCs can offer only estimates of their anticipated actual expenses to review DER interconnection applications under the proposed rules.

14:8-5.10: Pre-Application Verification/Evaluation Process

Rate Counsel objects to proposed new N.J.A.C. 14:8-5.10(a), which limits the amounts an EDC may charge interconnection applicants for the PAVE process, for a "qualified" Level 2 or Level 3 project, to a fee of $300 or "such alternative fee as the Board shall establish by Board order." Rate Counsel is concerned that, to the extent that these fees are less than the actual cost to the EDC of the PAVE process, the EDC would seek to impose these costs upon its ratepayers.

14:8-5.11: Hosting Capacity Maps

Proposed new N.J.A.C. 14:8-5.11(a) requires each EDC, within 120 days of the effective date of this rulemaking, to file a tariff that includes "a common hosting capacity mapping process to aid applicants. Hosting capacity maps shall indicate locations on the distribution [grid] with spare capacity and which locations are likely to require additional upgrades."

Proposed new N.J.A.C. 14:8-5.11(b) and (c) require each EDC to:

- Update its hosting maps at least quarterly, with data at the circuit and substation level;
- calculate the hosting capacity values for each circuit using a common methodology;

- present the hosting capacity values in a consistent manner across all EDCs;
- update and summarize and changes to the data and coincidentally post it on the EDC's website and its subscriber e-mail list;
- label maps with a common legend and lexicon;
- integrate the maps with GIS systems;
- present all system data for substations, feeders and related distribution assets;
- allow prospective applicants to easily determine detailed information by entering a street address; and
- specify the detailed information that each EDC must provide with its Hosting capacity maps.

Proposed new N.J.A.C. 14:8-5.11(d) requires each EDC to include a process for validating capacity models, publishing the hosting capacity, and collecting and compiling customer feedback on its hosting capacity mapping process. As noted above, Rate Counsel opposes requiring ratepayers to pay the costs to prepare and update these hosting capacity maps and to upgrade the electric grid or replace equipment to subsidize unregulated DER projects. This is especially true where ratepayers would pay an additional amount in rates, on top of the subsidies ratepayers already pay for DER projects, to supplement the profitability of an investment by an already unregulated and heavily-subsidized industry. The responsibility to pay the costs to prepare and update these hosting capacity maps and to upgrade the grid to accommodate new DER projects should remain with the entity proposing the DER project that benefits from its access to the electric grid. The EDCs should also explore if all of the maps can be hosted on a single site for the entire state. This may reduce costs and be more convenient and economical than multiple websites.

The Board should also require all EDCs to provide timely information on any closed circuits and to set a date by which all EDCs will provide the information required by this proposed rule. Rate Counsel concurs that consistent labeling across the EDCs may facilitate the identification of closed circuits by interested parties.

I. Recommendations

Rate Counsel believes the Grid Modernization docket is, functionally, the venue for

review of actual DER interconnection costs and update of DER interconnection fees to cover those costs. However, the process for reviewing and updating DER interconnection fees with consideration for actual DER interconnection costs has not yet occurred prior to this proposed rulemaking. Additionally, the rulemaking is inaccurate or silent as to the implications of the proposed costs, cost recovery, and cost allocation approach on ratepayers, on cost causation principles, or on the Board's duty to ensure just and reasonable regulated utility rates. As a result, Rate Counsel recommends the following:

- Clarification of the Board's intentions regarding cost recovery and allocation for all DER interconnection costs in the final rulemaking, including CIAP, PAVE, and hosting capacity maps;
- Inclusion of descriptions of the social, economic, job, agriculture industry, and housing affordability impacts on ratepayers in the final rulemaking;
- Estimation of costs for new CIAP, PAVE, and hosting capacity maps by the EDCs;
- Changes to the proposed cost recovery mechanism and cost allocation for CIAP in the final rulemaking;
- Reporting of actual historical DER interconnection costs as compared to cost collection through DER interconnection fees for Level 1, Level 2, and Level 3 installations by EDCs;
- Testaments from each EDC that the proposed DER interconnection fees will cover all costs of DER interconnections and evidence from each EDC demonstrating the veracity of its statement; and
- Updates to the proposed DER interconnection fees in the final rulemaking, if EDCs cannot prove that DER interconnection costs can be fully recovered by the proposed DER interconnection fees.

ATTACHMENT A

Attachment "A"

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.

Argued October 25, 2016 – Decided September 18, 2017

Before Judges Fisher, Ostrer and Vernoia.

On appeal from the New Jersey Board of Public Utilities, Docket No. EO12121072.

Diane Schulze argued the cause for appellant Division of Rate Counsel (Stefanie A. Brand, Director, attorney; Ms. Schulze and Christine M. Juarez, on the briefs).

Carolyn A. McIntosh, Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. McIntosh, on the brief).

Stephen B. Genzer argued the cause for respondent Aqua New Jersey, Inc., and United Water New Jersey, Inc. (Saul Ewing LLP, attorneys; Mr. Genzer, on the brief).

Lawrence S. Lustberg argued the cause for respondent Atlantic City Electric Company (Gibbons PC, attorneys; Mr. Lustberg and Amanda B. Protess, on the briefs).

Gregory Eisenstark argued the cause for respondent Jersey Central Power & Light Company (Windels Marx Lane & Mittendorf, LLP, attorneys; Mr. Eisenstark, on the brief).

Ira Megdal argued the cause for respondent New Jersey-American Water Company, Inc. (Cozen O'Connor, PC, attorneys; Mr. Megdal and Mark Lazaroff, on the brief).

James C. Meyer argued the cause for respondent New Jersey Utilities Association (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; Mr. Meyer, of counsel and on the brief; Diane N. Hickey, on the brief).

Fox Rothschild LLP, attorneys for respondent New Jersey Large Energy Users Coalition (Steven S. Goldenberg, of counsel and on the brief).

Cullen and Dykman LLP, attorneys for respondent Pivotal Utility Holdings, Inc., (Kenneth T. Maloney, on the brief).

Janine G. Bauer argued the cause for amicus curiae AARP (Szaferman, Lakind, Blumstein & Blader, PC, attorneys; Ms. Bauer, on the brief).

PER CURIAM

The Director of the Division of Rate Counsel appeals the Board of Public Utilities' final order revising its policy for calculating the consolidated tax saving adjustment (CTA) the Board utilizes in part to determine just and reasonable utility rates.

Rate Counsel and other interested parties[1] argue the revised CTA is not supported by adequate findings of fact, is not founded on sufficient evidence in the record, and constitutes a rule that was not enacted in accordance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, and due process requirements. The Board, and respondents, the New Jersey Utilities Authority and various utility companies[2] contend the Board's adoption of the revised CTA did not constitute rulemaking requiring compliance with the APA, is supported by the evidentiary record, and constitutes a proper exercise of the Board's discretion. Because we conclude the Board's adoption of the CTA constitutes rulemaking and the Board failed to comply with the APA's requirements, we reverse.

I.

The Board is charged with supervising and regulating public utility companies, N.J.S.A. 48:2-13(a), and setting "just and reasonable" rates for those utilities, N.J.S.A. 48:2-21(b)(1).

[1] Respondent New Jersey Large Energy Users Coalition and amicus American Association of Retired People (AARP) filed briefs supporting Rate Counsel's appeal. The Coalition participated in the proceeding before the Board. We granted AARP leave to participate in the appeal as amicus curiae.

[2] The respondent utility companies are Aqua New Jersey Inc., United Water New Jersey Inc., Atlantic City Electric Company, Jersey Central Power & Light Company, American Water Company, Inc., and Pivotal Utility Holdings, Inc.

The Division of Rate Counsel is a quasi-independent agency authorized by statute to represent the interests of utility ratepayers in rate-setting matters before the Board. N.J.S.A. 52:27EE-48(a); I/M/O Provision of Basic Generation Serv., 205 N.J. 339, 360 (2011).

To obtain an increase in utility rates, a utility company must petition the Board and prove that an increase is just and reasonable. N.J.S.A. 48:2-21(d). To sustain its burden of proof, a utility must establish "(1) the value of its property or the rate base, (2) the amount of its expenses, including operations, income taxes, and depreciation, and (3) a fair rate of return to investors." In re N.J. Am. Water Co., 169 N.J. 181, 188 (2001).

A company's "rate base" is "the fair value of the property of the public utility that is used and useful in [providing the regulated] public service." In re Petition of Pub. Serv. Coordinated Transport, 5 N.J. 196, 217 (1950). Reasonable rates for the service are generally set at an amount meant to "cover the utilities' expenses plus a return on the shareholders' investment," that is, an amount that permits "the public utility to earn a fair return on its rate base." Penpac, Inc. v. Passaic Cty. Utils. Auth., 367 N.J. Super. 487, 506 (App. Div.), certif. denied, 180 N.J. 457 (2004).

In an assessment of a utility's claimed expenses, a reasonable

rate shall be based only on "actual operating expenses . . . , and not for hypothetical expenses which did not and foreseeably will not occur." In re N.J. Power & Light Co., 9 N.J. 498, 528 (1952). The calculation of a utility company's tax expenses for use in the determination of its rate base is controlled "only by [its] real tax" expense, "rather than that which is purely hypothetical." Lambertville Water Co. v. N.J. Bd. of Public Util. Comm'rs, 153 N.J. Super. 24, 28 (App. Div. 1977), rev'd in part on other grounds, 79 N.J. 449, 458 (1979).

The Board has used a CTA to calculate the real tax expenses of utility companies whose federal tax returns are filed as part of the consolidated tax returns of their parent companies. The filing of a consolidated tax return permits the parent to offset the tax liability resulting from the profits of one or more of its affiliates against the losses of other affiliates. This reduces the tax obligations of each member of the group and saves each member a portion of the tax obligation they would have incurred if they filed their returns separately. Our Supreme Court has made clear that ratepayers must share in the resulting benefit to the utility. N.J. Power & Light Co., supra, 9 N.J. at 528. Otherwise, ratepayers would pay a utility's hypothetical and not real tax expenses. Ibid.

The Board has "the power and function to take into

consideration the tax savings flowing from the filing of [a] consolidated return and determin[e] what proportion of the consolidated tax is reasonably attributable to" the utility. Lambertville Water Co., supra, 153 N.J. Super. at 28. The Board is not bound by any particular methodology and may exercise its sound discretion to determine and make appropriate adjustments for a company's actual tax liability and thus ensure the reasonableness of the resultant rates. In re Revision of Rates Filed by Toms River Water Co., 158 N.J. Super. 57, 60-61 (App. Div. 1978), rev'd on other grounds, 82 N.J. 201 (1980). The Board has exercised its authority by using the CTA as the means to share with the company's ratepayers the benefits of the tax savings resulting from the consolidated tax filings.

The CTA Methodology

Prior to the Board's order challenged on appeal, the Board used what has been characterized as "the Rockland methodology"[3] to determine the CTA. Under the Rockland methodology, calculation of the CTA first requires a determination of the net taxable gains

[3] The Rockland methodology was developed in a series of rate cases culminating in I/M/O The Verified Petition Of Rockland Electric Company, BPU Docket No. ER02100724 (Apr. 20, 2004) (slip op. at 62-64); see also In re Petition of Jersey Cent. Power & Light Co., BRC Docket No. ER91121820J (June 15, 1993) (slip op. at 8); In re Petition of Atlantic City Elec. Co., BRC Docket No. ER90091090J (Oct. 20, 1992) (slip op. at 6).

and losses of all of the companies on the consolidated federal tax return for each year during a review period which begins in 1991 and ends in the most recent tax year. The companies that experienced net taxable gains are grouped together and their net taxable gains are aggregated. The companies that experienced net taxable losses are grouped together and their net taxable losses are aggregated. The aggregated losses are then multiplied by the applicable federal income tax rate to determine the group's consolidated tax benefit. The amount of the consolidated tax benefit is then allocated proportionately to the companies that experienced net taxable gains based on their proportionate share of the total aggregated gains.

If application of the Rockland methodology establishes that a New Jersey utility experienced net taxable gains during the review period, its proportionate share of the consolidated tax benefit constitutes its CTA. The amount of the CTA affects the utility's rate base because the larger the tax savings adjustment under the CTA, the greater the reduction in the utility's rate base.[4]

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[4] The CTA does not result in a dollar-for-dollar reduction in the utility's tax expenses that are used to calculate the rate base. The CTA tax savings are treated as a loan from ratepayers, whose payments contributed to the profits that would otherwise have been taxed if not for the consolidated filing. Jersey Cent. Power &

The Board Modifies the Rockland Methodology

In January 2013, the Board approved an order opening a generic proceeding to review the CTA. The Board noted that its current CTA methodology had been used for approximately twenty years and that federal tax laws and many of the companies' corporate structures had changed. The Board sought "input from stakeholders, including the utilities, customers, and . . . Rate Counsel" to determine the Board's use of the CTA, the calculation of tax savings from the filing of consolidated returns, the manner in which the savings should be shared with the utility companies and ratepayers, and if a rulemaking proceeding should be initiated. The order was posted to the Board's website and circulated to those on its generic stakeholder service list.

In March 2013, the Board posted an official Notice of Opportunity to Comment on its website and circulated it to stakeholders on its service list. The notice requested comments concerning the CTA and responses to requests for information about the stakeholders' respective positions on whether a CTA should be

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Light Co., supra, slip op. at 8. The parent company gains use of those profits earlier than it otherwise would have, and the CTA, in turn, compensates ratepayers for the time-value of their money by adjusting the company's rate base in an amount intended to prospectively credit ratepayers for the carrying costs of the loan. Petition of Atlantic City Elec. Co., supra, slip op. at 6.

utilized and what changes should be made to the CTA. The Board requested that the utility companies calculate their current CTA using the Rockland methodology and include, if applicable, the CTA included in the company's last rate base case. The notice advised that following the Board's review of the responses, it would announce a schedule of hearings to provide all interested parties with the opportunity to provide testimony on CTA issues.

The New Jersey Utilities Authority (NJUA) submitted comments on behalf of its members and various utility companies also submitted written comments. They advocated for the abolition of the CTA, arguing that the adjustment had become arbitrary due to an ever-expanding review period that used 1991 as its fixed starting point, and due to the CTA calculation's inclusion of companies that no longer participated in the consolidated income tax filings. They also asserted that application of the CTA adversely affected the utility companies' ability to attract capital and other investments necessary to ensure the safe and efficient provision of their regulated services.

The utility companies and the NJUA further noted that the relatively small CTAs that resulted from application of the methodology when it was first implemented had been replaced by a CTA that in one case was more than forty times higher. They urged the elimination of the CTA and argued that if the Board continued

its use, the review period should be reduced to as few as three years, electric company transmission assets and other operations should be removed from the analysis because they are not regulated by the Board, and companies that have been divested, dissolved, or are otherwise inactive should be excluded from the calculation.

Rate Counsel also submitted comments acknowledging that the length of the review period could result in inappropriately large adjustments and that changes in the tax code during the twenty years since the adoption of the methodology might impact the propriety of the calculation. Rate Counsel recommended that the CTA be reevaluated and adjusted based on utility specific data in fourteen different areas. Rate Counsel also urged that adoption of a revised CTA be completed through formal rulemaking.

In July 2013, the Board issued a Notice of Opportunity to Provide Additional Information, requesting that the utility companies provide data in each of the fourteen areas suggested by Rate Counsel. The notice further advised that following its review of the requested data, the Board would schedule a hearing to provide interested parties with an opportunity to testify concerning the CTA.

In November 2013, the Board issued a letter request for data concerning the taxable gains and losses for the utility companies and their affiliates for each calendar year from 1991 through

2012, and similar information from electric and gas companies broken down into gains and losses attributable to their separate electric and gas operations.

Based on the information and comments received during the process, at the Board's June 2014 meeting its staff recommended the retention of the Rockland methodology for calculation of the CTA with the following three revisions: (a) reduction of the review period to a fixed span of five calendar years; (b) an allocation of the benefits of consolidated tax savings with the utility company receiving seventy-five percent of the savings and the ratepayers receiving twenty-five percent; and (3) the exclusion of electric company transmission assets from the CTA calculation. The Board published notice of the proposed policy on its website and in the New Jersey Register, 46 N.J.R. 1657(a) (July 7, 2014), and distributed the notice to its service list, advising that public comments would be received until August 18, 2014.

The NJUA, the utility companies, Rate Counsel and the New Jersey Large Energy Users Coalition submitted comments. At its October 2014 meeting, the Board considered the recommended revisions and issued a final decision adopting them. The Board ordered that the CTA Rockland methodology would remain in effect with the following modifications:

> 1. The review period for the calculation shall be for five calendar years including any complete year that is included in the test year.
>
> 2. The [CTA] based on that review period shall be allocated so that the revenue requirement of the company is reduced by 25% of the adjustment; and
>
> 3. Transmission assets of the [electric distribution companies] would not be included in the calculation of the CTA.

The Board further ordered that the modified CTA would be utilized in all pending and future rate cases. The Board permitted the reopening of cases to permit recalculation of the CTA where the record was closed but the Board had not yet rendered a final decision. The Board's decision and order was entered on October 22, 2014. Corrective orders were entered on November 3, 2014 and again on December 17, 2014. Rate Counsel appealed.

II.

Rate Counsel, the Coalition and amicus AARP assert that the Board's decision and order must be reversed because the Board was obligated to promulgate the CTA modifications through formal rulemaking in accordance with the APA. N.J.S.A. 52:14B-4. They contend the Board's order establishes a uniform policy defining the CTA methodology and, therefore, it establishes a rule that can only be adopted in accordance with the APA. In its decision, the Board found that rulemaking was not required because it had

"flexibility to determine how to proceed in matters presented to it, and [could] use its discretion to choose the most appropriate manner, including by contested case, rulemaking or informal process, based on the issues raised and the potential effects of the resolution." The Board, the NJUA and the utility companies do not dispute that the Board did not comply with the APA's procedures for rulemaking, but they contend rulemaking was not required because the CTA does not establish the rates, and application of the CTA can be adjusted in rate cases to ensure that the Board fulfills its obligation to set fair and reasonable rates. See N.J.S.A. 48:2-21(b)(1).

"Administrative agencies possess wide latitude in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals." In re Auth. For Freshwater Wetlands Statewide Gen. Permit 6, Special Activity Transition Area Waiver For Stormwater Mgmt., Water Quality Certification, 433 N.J. Super. 385, 413 (App. Div. 2013); accord In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 519 (1987). "[A]gencies enjoy great leeway when selecting among rulemaking procedures, contested hearings, or hybrid informal methods in order to fulfill their statutory mandates." Provision of Basic Generation Serv., supra, 205 N.J. at 347. However, "[a]n agency's ability to select procedures it deems appropriate is limited by 'the strictures of

due process and of the [APA].'" In re Consider Distrib. of Casino Simulcasting Special Fund, 398 N.J. Super. 7, 16 (App. Div. 2008) (quoting Request for Solid Waste Util. Customer Lists, supra, 106 N.J. at 519).

An agency's "discretion to act formally or informally is not absolute." In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 133 (App. Div.), certif. denied, 216 N.J. 8 (2013). "If 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." Auth. For Freshwater Wetlands Statewide Gen. Permit 6, supra, 433 N.J. Super. at 413 (quoting Airwork Serv. Div. v. Div. of Taxation, 97 N.J. 290, 300 (1984), cert. denied, 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985)); accord Provision of Basic Generation Serv., supra, 205 N.J. at 347.

"Agencies should act through rulemaking procedures when the action is intended to have a 'widespread, continuing, and prospective effect,' deals with policy issues, materially changes existing laws, or when the action will benefit from rulemaking's flexible fact-finding procedures." Provision of Basic Generation Serv., supra, 205 N.J. at 349-50 (quoting Metromedia, Inc. v. Div. of Taxation, 97 N.J. 313, 329-31 (1984)). To determine if the APA

rulemaking requirements are implicated, we apply the following analysis:

> [A]n agency determination must be considered an administrative rule . . . if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Metromedia, supra, 97 N.J. at 331-32.]

"The factors need not be given the same weight, and some factors will clearly be more relevant in a given situation than others," Doe v. Poritz, 142 N.J. 1, 97 (1995), and "[n]ot all factors need be present for an agency action to qualify as an administrative rule," Provision of Basic Generation Serv., supra, 205 N.J. at 350. "The pertinent evaluation focuses on the importance and weight of each factor, and is not based on a

quantitative compilation of the number of factors which weigh for or against labeling the agency determination as a rule." Ibid.

Based on our review of the record, we are satisfied that the Board's order satisfies all of the Metromedia factors and thereby constitutes a rule requiring adoption through rulemaking in accordance with the APA. See Auth. For Freshwater Wetlands Statewide Gen. Permit 6, supra, 433 N.J. Super. at 413. With regard to the first Metromedia factor, the modified CTA applies to all of the utility companies whose tax returns are filed as part of the consolidated returns of their respective holding companies. Cf. Deborah Heart & Lung Ctr. v. Howard, 404 N.J. Super. 491, 506 (App. Div.) (finding rulemaking was not required in part because the nine of eighteen cardiac surgery facilities subject to the policy change constituted a "narrow, select group," and not a "large segment of the regulated public"), certif. denied, 199 N.J. 129 (2009). In addition, because the utility company respondents serve a significant portion of the regulated public and the CTA modifications will "impact the general public in its rate-paying capacity, the first Metromedia factor . . . support[s] closer adherence to rulemaking procedures." Provision of Basic Generation Serv., supra, 205 N.J. at 350-51; see also In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," 402 N.J. Super. 118, 134 (App. Div. 2008) (finding first

Metromedia factor supports rulemaking where the agency's order "is intended to affect a large segment of the public"), aff'd in part and modified in part on other grounds, 200 N.J. 283 (2009).

The second Metromedia factor also favors rulemaking because the modified CTA generally and uniformly applies to all regulated utilities whose tax returns are filed as part of consolidated returns. Metromedia, supra, 97 N.J. at 331. Moreover, the Board's order directs that the modified CTA applies prospectively, including in those cases that were not yet decided but where the record remained open at the time the order was entered. Thus, application of the third Metromedia factor supports a finding that the modified CTA constitutes a rule. Ibid.

As set forth in the Board's order, the modified CTA "prescribes a legal standard [and] directive that is not otherwise expressly provided by or clearly and obviously inferable from the [Board's] enabling statutory authorization." Ibid. The Board is required to set "just and reasonable rates," N.J.S.A. 48:2-21, but there is no statutory directive establishing the methodology for calculating a utility's real, as opposed to hypothetical, tax payments to determine its rate base, and no statute directs the use of a CTA. See Airwork, supra, 97 N.J. at 301 (holding rulemaking is not required for an agency order directing the form of a tax assessment where tax statute is specific concerning the

underlying tax obligation). We are therefore satisfied the fourth Metromedia factor favors a finding that rulemaking is required.

Application of the fifth Metromedia factor also favors rulemaking. Although the use of a CTA and the Rockland methodology were previously expressed in the Board's determinations in adjudicated cases, the shortened and finite review period, the allocation of the tax savings, and the elimination of electric transmission assets constitute "material and significant change[s]" to the Board's prior CTA policy. Metromedia, supra, 97 N.J. at 331. The Board never before employed a finite review period or a defined allocation, and never previously excluded a class of a utility company's assets from its CTA calculation. Further, it is not disputed that the modifications constitute material and significant changes to the CTA. Indeed, Rate Counsel, the Coalition, the NJUA and the utility companies argued before the Board that the CTA required material and significant changes, and the Board's order achieved that result.

Last, the modifications reflect the Board's decision on a regulatory policy "in the nature of an interpretation of law or general policy." Id. at 331-32. The Board acknowledges as much in its decision and order, stating that the modifications are required to recognize "the fact that a fundamental tenet of utility regulation is that any methodology used by a regulator must result

in an end result that is just and reasonable for both ratepayers and shareholders." The Board adopted the modifications based on its finding that the prior CTA methodology "may not be the appropriate means of achieving that fundamental principle." See Provision of Basic Generation Serv., supra, 205 N.J. at 352 (finding the Board's decision to "pass through" certain costs to ratepayers could be viewed as a regulatory policy which was to be applied later in individual rate-recovery hearings).

In sum, all of the Metromedia factors favor rulemaking here. The Board's order constitutes a "statement of general applicability and continuing effect that implements [and] interprets" the Board's "policy" concerning the calculation of tax adjustments to a utility company's rate base, N.J.S.A. 52:14B-2(e), and therefore is a rule within the meaning of the APA. See, e.g., Auth. For Freshwater Wetlands Statewide Gen. Permit 6, supra, 433 N.J. Super. at 413 (finding agency's adoption of a computer-based program used to determine the sufficiency of proposed nonstructural stormwater management measures constituted rulemaking); N.J. Animal Rights Alliance v. N.J. Dep't of Envt'l. Prot., 396 N.J. Super. 358, 369-70 (App. Div. 2007) (finding agency's policy detailing requirements for a public bear hunt constituted a rule requiring APA rulemaking).

Rate counsel, the Coalition and amicus AARP argue the Board's failure to comply with the APA requires reversal of the Board's order. They contend the Board's failure to engage in formal rulemaking deprived the stakeholders of APA procedural safeguards and an opportunity to present evidence and testimony at an evidentiary hearing.

For example, Rate Counsel argues the Board failed to comply with the following APA requirements: publish a proposal containing "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), and prepare and distribute "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 record supports Rate Counsel's position. These APA requirements were not satisfied in the generic proceeding.

Rate Counsel also argues, and the record shows, that the Board's March 2013 Notice of Opportunity to Comment and July 2013 Notice of Opportunity to Provide Additional Information each stated that following the collection of the requested data and comments, the Board would "announce a schedule for hearings to

provide all interested parties with the opportunity to provide testimony on the CTA issues." The Board, however, never announced such hearings or conducted any hearings providing interested parties with the opportunity to present testimony.

Although agencies enjoy leeway to choose among rulemaking, adjudicatory hearings, and hybrid informal proceedings to fulfill their statutory mandates, Provision of Basic Generation Serv., supra, 205 N.J. at 347, leeway is not a license to ignore the APA's requirements. The Board has discretion to utilize various procedures to fulfill its statutory mandate, but our Supreme Court has held that "administrative action, and an agency's discretionary choice of the procedural mode of action, are valid only when there is compliance with the provisions of the [APA] and due process." Ibid.; see also Airwork, supra, 97 N.J. at 300 ("If 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."); Consider Distrib. of Casino Simulcasting Special Fund, 398 N.J. Super. 7, 16 (App. Div. 2008) ("An agency's ability to select procedures it deems appropriate is limited by 'the strictures of due process and of the [APA] . . . .'" (quoting In re Request for Solid Waste Util. Customer Lists, supra, 106 N.J. at 519)). Where, as here, the Board promulgates an administrative rule, it is

required to comply with the APA's requirements. Provision of Basic Generation Serv., supra, 205 N.J. at 347. Because the Board failed to do so here, we are constrained to reverse the Board's order.

We are not persuaded that the Court's decision in Provision of Basic Generation Service, requires a different result. There, the Court applied the Metromedia factors to a Board order that in part allowed utility companies to pass through increased energy supplier costs to the ratepayers. Id. at 349-52. The Court found that the first five Metromedia factors supported a finding that the order constituted rulemaking and that the sixth factor "[did] not advance the analysis in any compelling way." Id. at 350-52. In weighing the factors, the Court determined that the preponderance of the "factors favor[ed] treating the [order] as akin to rulemaking" but that in adopting what the Court characterized as a "quasi-rule, the [Board] was entitled to greater flexibility with regard to procedural formalities than if this process could only have been completed by way of a strict rulemaking process." Id. at 352 (emphasis added).

Under those circumstances, the Court found the Board's use of a hybrid proceeding "which had attributes of rulemaking and adjudicative proceedings and included a legislative-type hearing, two opportunity-to-comment periods, discovery periods, and public hearings throughout the state, was sufficient to satisfy the

requirements of the . . . APA." Id. at 353 (emphasis added). But the Court expressly conditioned its conclusion upon the requirement that "evidentiary rate-setting hearings take place which apply to the cases of specific energy providers the principles to be established in" an ongoing contested case before the Board.[5] Ibid. Thus, the court allowed a departure from the APA's rulemaking requirements because the policy was going to be further defined in an ongoing adjudicated case.

Here, all the Metromedia factors clearly favor rulemaking. Therefore, unlike in Provision of Basic Generation Service, we address the requirements for the adoption of an actual, and not a quasi-rule, and the Board did not have the concomitant flexibility to depart from the APA's requirements. See id. at 352. Moreover, in its adoption of the modified CTA, the Board did not utilize the hybrid process the Court found provided the flexibility to abandon the requirements of formal rulemaking in Provision of Basic Generation Service.[6] The Board's order constitutes a general policy

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[5] The ongoing contested case cited by the Court was In re Provision of Basic Generation Service for the Period Beginning June 1, 2008 – BGS SREC Recovery Mechanism Proceeding, BPU Docket No. ER07060379. Ibid.

[6] As an alternative to acting through rulemaking, adjudication or a hybrid proceeding, an agency may act informally. Request for Solid Waste Util. Customer Lists, supra, 106 N.J. at 518. "[I]nformal action constitutes the bulk of the activity of most

that will be applied in future cases without the benefit of any of the adjudicatory proceedings the Court required in Provision of Basic Generation Service. See id. at 353.

"The purpose of APA rulemaking procedures is 'to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated.'" Id. at 349 (quoting In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 43 (App. Div.), certif. denied, 182 N.J. 141 (2004)). We find nothing in the Court's decision in Provision of Basic Generation Service supporting an abandonment of the well-settled principle that where an agency adopts a rule, it must proceed through formal rulemaking in accordance with the APA. Id. at 347; Airwork, supra, 97 N.J. at 300; Auth. For Freshwater Wetlands Statewide Gen. Permit 6, supra, 433 N.J. Super. at 413.

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administrative agencies," "and the line between . . . rulemaking . . . , and informal action, . . . can become blurred." Ibid. However, informal action is defined as "statutorily authorized agency action that is neither adjudication nor rulemaking." Id. at 519. "[I]nformal agency action includes investigating, publicizing, planning, and supervising a regulated industry." Ibid. Here, the Board's order did not constitute informal action because, as noted, it satisfied each of the Metromedia factors and therefore constituted a rule that required rulemaking. Metromedia, supra, 97 N.J. at 332. It is only where "the APA does not require rulemaking [that] an agency may act informally." Ibid.; N.J.A.C. 7:1B-1.1 Et Seq., supra, 431 N.J. Super. at 133.

We are also persuaded that the Board's departure from the APA requirements constituted an "irregularity or informality [that] tends to defeat or impair the substantial right or interest of the appellant." N.J.S.A. 48:2-46. In the first instance, the Board's proceeding violated the ratepayers' right to have the new CTA policy adopted in accordance with the APA.

Second, although the Board's process provided opportunities for the submission of evidence and comment and the Board made certain submissions available on its website, the Board failed to comply with the APA's requirements that it publish "a description of the expected socio-economic impact of the rule," N.J.S.A. 52:14B-4(a)(2), and prepare and distribute a report "summarizing the content of the submissions and providing the [Board's] response to the data, views, comments, and arguments contained in the submissions," N.J.S.A. 52:14B-4(a)(4). We do not consider these APA requirements to be insubstantial. They require more of the Board than merely making information available on a website and requesting comment.

Compliance with the requirements provides the stakeholders with the Board's analysis and assessment of the economic impact of a proposed rule and the Board's response to a stakeholder's data, comments and arguments before a rule is adopted. Moreover, compliance provides the stakeholders with the opportunity to

present evidence and address the Board's economic impact assessment and response to the stakeholder's data, comments and argument. In other words, the statutory requirements guarantee that Rate Counsel and the stakeholders are fully informed of the Board's position concerning a rule's economic impact and the Board's response to the submitted data, comments and arguments, thus permitting Rate Counsel and the stakeholders an opportunity to present further evidence and argument. When the requirements are ignored, the Board gathers information and comment, but Rate Counsel and the stakeholders are deprived of the right granted by the APA to consider and contest the Board's assessment of economic impact and responses to the submissions prior to the adoption of a rule.

In our view, the Board's failure to comply with the requirements deprived Rate Counsel of substantial rights and interests under the APA: the right to obtain the Board's assessment of the economic impact of the proposed modified CTA and responses to Rate Counsel and the other stakeholders' submissions, and the right to provide evidence and argument in opposition to them. The failures are of particular significance here because of the conflicting evidence presented concerning the modified CTA's potential economic impact on ratepayers. We are therefore convinced that the Board's failure to comply with the APA's

requirements in its adoption of the modified CTA constituted an irregularity that tended to defeat and impair the rights and interests of Rate Counsel and the other stakeholders.

Because we reverse the Board's order, it is unnecessary to address the arguments that the Board's decision and order lacks sufficient support in the record or is otherwise contrary to applicable law. Any remaining arguments that we have not addressed directly are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed.

ATTACHMENT B

Attachment "B"

State of New Jersey
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TRENTON, NEW JERSEY 08625

PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

BRIAN O. LIPMAN
Director

April 24, 2023

Via Electronic Mail
Ms. Sherri Golden, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue
P.O. Box 350
Trenton, New Jersey 08625-0350
Board.Secretary@rpa.nj.gov

Re: I/M/O New Jersey Grid Modernization Interconnection Process
BPU Docket No. QO21010085

Dear Secretary Golden:

Please accept for filing these comments of the Division of Rate Counsel ("Rate Counsel") regarding the above-referenced matter. Consistent with the March 19, 2020, *Order of the New Jersey Board of Public Utilities ("Board") in I/M/O the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, copies of this comment letter are being filed electronically with the Secretary of the Board and provided electronically to the relevant parties. No paper copies will follow. Please acknowledge receipt of this comment letter.

Thank you for your attention and consideration in this matter.

Very truly yours,

BRIAN O. LIPMAN
DIRECTOR, DIVISION OF RATE COUNSEL

By: /s/ *David Wand*
T. David Wand, Esq.
Deputy Rate Counsel

I/M/O New Jersey Grid Modernization

Interconnection Process

BPU Docket No. QO21010085

Grid Modernization Study: New Jersey Board of Public Utilities

Comments of the Division of Rate Counsel

April 24, 2023

I. Introduction

The Division of Rate Counsel ("Rate Counsel") is pleased to provide these comments to the Board of Public Utilities (the "Board" or "BPU") pursuant to the January 27, 2023 Board Notice and the November 9, 2022 Board Order Accepting the Grid Modernization Consultant Report and Initiating Rulemaking, in *I/M/O Modernizing New Jersey's Interconnection Rules, Processes, and Metrics*, BPU Docket No. QO21010085. On June 28, 2022, Guidehouse and Board Staff issued a draft final Report, *Grid Modernization Study: New Jersey Board of Public Utilities*.

Interested parties, including Rate Counsel, submitted written comments on the draft final Report. Rate Counsel expressed agreement with many of Guidehouse's draft recommendations, which could potentially improve the interconnection process for all stakeholders and lead to the interconnection of additional renewable energy resources within the State. However, Rate Counsel expressed concern about some of the recommendations. In particular, Rate Counsel expressed strong opposition to those Guidehouse recommendations that would impose additional costs on ratepayers to upgrade the electric grid to accommodate new renewable energy projects. Rate Counsel also strongly insisted that allocation of any grid interconnection costs must comply with traditional cost-causation utility ratemaking principles. The Board must find that rates charged to customers are just and reasonable. Rate Counsel continues to have those same concerns.

Guidehouse and Staff then presented the Final Report to the Board during its November 9, 2022 agenda meeting.[1] The Final Report included recommendations on nine different topic areas, the first four being near term recommendations and the other five being longer term. Guidehouse and Staff considered the longer term recommendations as "generally more complex because of deeper process changes, conflicting business model impacts, financial assessment and accounting, and system integration," and observed that "they will require additional analysis and stakeholder input prior to being implemented."[2]

The Board accepted the Final Report, found that the near term recommendations, numbered 1 through 4, are ready to be implemented, and directed Staff to implement them expeditiously and to release for public comment a draft of the proposed rule changes. The Board also found that the longer term recommendations, numbered 5 through 9, would benefit from additional analysis and stakeholder input, and directed Staff to initiate a process to obtain the analysis and stakeholder input needed to initiate a rulemaking process for those recommendations in a timely manner.[3]

On January 27, 2023, the Board issued notice of a virtual stakeholder meeting to discuss proposed changes to New Jersey's process for interconnection rules. The virtual stakeholder meeting was held on February 10, 2023, with comments due by March 10, 2023. On March 2, 2023, the Board issued an amended notice that changed the comment due date to April 24, 2023.

Rate Counsel has concerns that these proposed rules exceed the Board's directive with regard to the first four near-term recommendations. Guidehouse's recommendations discussed updating the Board's interconnection technical requirements and references, streamlining the application process through software, improving transparency through uniform and improved hosting capacity mapping, and better feedback on interconnection applications. Guidehouse's near-term recommendations do not discuss or recommend the

[1] Guidehouse Inc. "Grid Modernization Study: New Jersey Board of Public Utilities," August 24, 2022.
[2] I/M/O Modernizing New Jersey's Interconnection Rules, Processes, and Metrics, BPU Docket No. QO21010085, Board Order Accepting the Grid Modernization Consultant Report and Initiating Rulemaking, Nov. 9, 2022, p. 3.
[3] Id.

cost and risk shifting contained in the currently proposed rules. Rather, Guidehouse noted in Finding #7 that BPU "does not currently have a mechanism to rapidly evaluate innovative cost allocation and cost recovery options that could enable NJ to meet state renewable energy goals" and recommended that "BPU should establish a steering committee and working groups" to look at additional options beyond the cost-causer approach.

Rate Counsel agrees with the Board's decision not to implement the five longer term recommendations at this time. Rate Counsel reiterates its concern that those five long-term recommendations risk imposing additional costs on ratepayers to upgrade the electric grid to accommodate new distributed generation resources, also known as Distributed Energy Resources ("DER"), and may allocate grid interconnection costs onto ratepayers that do not comply with traditional cost-causation utility ratemaking principles. Shifting the cost of DER development from the project developers to utility customers is inappropriate and acts as an additional subsidy for an already heavily subsidized and unregulated industry. Any discussion of additional subsidies must include a holistic re-evaluation of the current subsidies being provided. The current rule proposal does not accomplish this, yet nonetheless, seeks to levy additional costs and risks onto the ratepayers.

The January 27, 2023 Board Notice released for public comment a draft of the proposed changes and additions to the Board rules for interconnecting DER resources to the electric grid in New Jersey. Rate Counsel thanks the Board for the opportunity to comment on these proposed draft rules.

II. Legal Principles

Rate Counsel is generally supportive of the Board's decision to implement some of the four near term recommendations in the Final Report. However, Rate Counsel has some concerns about the rules' implementation of those broad recommendations. As a threshold matter, Rate Counsel strongly opposes the provisions in these proposed rules that would allow additional costs to be imposed on ratepayers but only serve to upgrade the electric grid for accommodation of new DER projects and shift additional risks

relating to those interconnections from the project developers to utility customers. Allocation of any grid interconnection costs should comply with traditional cost-causation utility ratemaking principles. The Board also is obliged to ensure that its decisions on cost recovery result in utility rates that are just and reasonable.[4]

New Jersey deregulated electric generation by statute over twenty years ago.[5] Ratepayers are not partners or investors in such unregulated ventures. Under the regulatory model established by the Electric Discount and Energy Competition Act ("EDECA"), an investor uses its own capital and hopes to earn a return on that investment. Since these privately-funded DER projects benefit from access to the utility's grid, the interconnection upgrades required for DER projects should be borne by the projects causing the need for the utility plant investment. Otherwise, ratepayers will proactively fund projects that only provide a benefit to unregulated investors. This would result in ratepayers funding the DER project and bearing the risk but, to the extent the project succeeds, not sharing in the financial benefit that a private entity will reap. Therefore, if ratepayers must pay for costs to upgrade the grid to accommodate DER projects, then the subsidies that ratepayers already pay for DER project development under existing renewable energy programs should be reduced proportionately.[6] Imposing additional costs on ratepayers, in addition to the subsidies such projects already receive, to supplement the profitability of unregulated investments, is simply unfair.

Similarly, Rate Counsel questions whether accelerated recovery of the EDCs' costs to replace working equipment to accommodate DER projects is necessary or prudent at this time. The Board has already approved, or is reviewing, proposals by each

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[4] N.J.S.A. 48:2-21.

[5] Electric Discount and Energy Competition Act, ("EDECA"), N.J.S.A. 48:3-49 et seq.

[6] Ratepayers pay substantial subsidies for solar distributed energy resource ("DER") projects in the form of Solar Renewable Energy Certificates ("SRECs"), Transition Renewable Energy Certificates ("TRECs") and Solar Renewable Energy Certificate IIs ("SREC-IIs"), and provide additional subsidies in the form of net metering credits for behind-the-meter solar and Community Solar facilities. According to estimates prepared by the Board's Clean Energy staff, the cost of the SREC and TREC programs in Energy Year 2021 was nearly $880 million. See, "Energy Year 2021 RPS Compliance Results 2004 to 2021," available at: https://njcleanenergy.com/files/file/rps/EY21/EY21%20RPS%20Compliance%20Results%202004%20to%202021%20Final%202022_05_17.pdf. These costs will only increase as SREC-II projects come online. Further, Staff's estimate does not include the substantial additional subsidies that ratepayers provide in the form of net metering credits for behind-the-meter solar and Community Solar facilities.

EDC (as well as by gas utilities) for projects that it considers necessary and appropriate for accelerated recovery to improve the safety, security, and reliability of utility infrastructure. Additional accelerated recovery is unneeded and unnecessarily burdensome on the State's ratepayers. Rather, the public utilities should continue to perform their duty of providing safe, adequate, and proper service by replacing equipment as needed in the normal course of business, and recovering their costs through the traditional utility ratemaking process which evaluates the utility revenue requirement as a whole.

The cost-shifting proposed in these rules, from unregulated private investors onto utility ratepayers, is inconsistent with the deregulation of electric generation under EDECA, whereby the functions and costs of generation were unbundled from the regulated utility industry, and ratepayers were relieved of the responsibility to guarantee recovery of the costs of generation investors. Additionally, under the governing ratemaking principle of cost-causation, the costs caused by DER projects should be borne by the unregulated investors through their application fees or other payment mechanism proposed by the Board. Moreover, with ratepayers taking on the risk, DER projects that are otherwise uneconomic or inappropriately sited may be built anyways, ultimately resulting in higher ratepayer costs without any real, demonstrable financial benefit to New Jersey residents or the utility's ratepayers' electric service. Basically, ratepayers should not be a free source of capital for unregulated private ventures.[7] The Board has a duty to ensure that utility rates remain just and reasonable, the utility's primary purpose of providing electric distribution service is not co-opted by speculative, private interests in search of more profits.

These proposed rules also raise some concerns about the rulemaking process required by the Administrative Procedure Act.[8] This proposal does not provide factual

[7] Indeed, ratepayers are being asked to provide capital to support these private ventures with no idea what return they are earning or if these additional subsidies are even needed. If the Board insists on providing ratepayer monies to private investors, these investors must be willing to provide accounting proof of their actual need, just as utilities do in a base rate case.

[8] N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23; see Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984) ("A critical aspect of this definition is the 'general applicability and continuing effect' of the pronouncement."); In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011); N.J.S.A. 52:14B-2(e).

support for limiting the costs for investors in DER projects that are already heavily subsidized by ratepayers; any quantification of the benefits or costs to ratepayers of increasing their utility bills; or the impact of those increased costs on the New Jersey economy. Higher electric rates can cause numerous effects on the economy: households overall will have less discretionary income, if any, and employers will have higher overhead costs, which may lead to hard financial decisions such as choosing to relocate out-of-state or reductions in their New Jersey workforces. For example, during 2021, U.S. retail electricity rates rose at the fastest rate since 2008.[9] Similarly, the True Poverty Report noted that nearly 3 million New Jersey residents were living below the Poverty Research Institute standard for New Jersey's cost-of-living-sensitive threshold. Affordability of utility rates is imperative and is not discussed or apparently considered in this rule proposal.[10]

As noted in detail in our comments below, several of the rule proposals will require additional discussion to ensure that all stakeholders have a common set of definitions and parameters to avoid duplicative or conflicting efforts across the EDCs. Rate Counsel recommends that the Board place a higher value on consistency and comparability of policies and plans across the EDCs.

Rate Counsel provides detailed comments on the proposed rules below.

[9] U.S. Energy Information Administration, "During 2021, U.S. retail electricity prices rose at fastest rate since 2008" (Mar. 1, 2022) (available at https://www.eia.gov/todayinenergy/detail.php?id=51438#). See also EIA expects significant increases in wholesale electricity prices this summer (June 16, 2022) (available at https://www.eia.gov/todayinenergy/detail.php?id=52798).

[10] Legal Services of New Jersey Poverty Research Institute, True Poverty What It Takes to Avoid Poverty and Deprivation in the Garden State (July 2021) (available at https://proxy.lsnj.org/rcenter/GetPublicDocument/00b5ccde-9b51-48de-abe3-55dd767a685a)

III. Discussion

SUBCHAPTER 4. NET METERING FOR CLASS I RENEWABLE ENERGY SYSTEMS

14:8-4.2 Net metering definitions

The Board proposes to amend the definition of a "customer-generator" to include customers whose facilities are aggregated for purposes of net metering, but are not located contiguously.

> "Customer-generator" means an electricity customer that generates electricity on the customer's side of the meter, using a class I renewable energy source, that stores electricity, or that involves multiple sources of generation that includes a class I renewable energy source, whether separately or as part of an aggregated resource. The Board may deem a pair of entities acting together - that is, a net metering generator and a net metering customer - to constitute one Customer-generator for the purpose of net metering.

Rate Counsel has concerns with this definition because, it is unclear what is intended by the proposed change to the Customer-generator definition or what situations are being addressed by expanding the definition to only "include" a class I renewable energy source. Indeed, the language could be read to include a large fossil fuel generation unit combined with a relatively small solar facility. Rate Counsel recommends that, before adopting this proposed rule amendment, the Board further explain how this rule change is expected to increase the number or capacity of class I renewable energy resources (and other types of DER resources). In the alternative, Rate Counsel believes it would be preferable to add the new language to the proposed amended definition to "customer-generator." The intended function of this new language would be to state that, notwithstanding the proposed expansion of the term "customer-generator" the additional types of facilities propose to be included do not qualify for net metering. This can be accomplished by the following changes:

> "Customer-generator" means an electricity customer that generates electricity on the customer's side of the meter, using a class I renewable energy source, that stores electricity, or that involves multiple sources of generation that includes a class I renewable energy source, whether

> separately or as part of an aggregated resource; provided, however, that only the electricity produced by the class I renewable energy sources shall be eligible for Net metering treatment. The Board may deem a pair of entities acting together - that is, a net metering generator and a net metering customer - to constitute one Customer-generator for the purpose of net metering.

Rate Counsel generally supports the proposed amendment to the definition of a "customer-generator facility." That proposed amendment would expand the definition to include "energy storage devices" and "vehicle to grid devices."

> "Customer-generator facility" means the equipment used by a Customer-generator to generate, store, manage, and/or monitor electricity. A Customer-generator facility typically includes an electric generator, energy storage device, vehicle to grid device, and/or interconnection equipment that connects the Customer-generator facility directly to the customer, whether separately or as part of an aggregated resource.

Expanding the interconnection process to include storage devices could facilitate the integration of storage in the State's electric grid. This is consistent with Strategy #2 in the New Jersey Energy Master Plan ("EMP"), to build 2,500 MW of energy storage by 2035.[11]

However, Rate Counsel notes that neither the terms "energy storage device" nor "vehicle to grid device" are defined. Clear definitions are needed here because of the wide range of technologies used for energy storage and for electric powered motor vehicles ("EVs").[12] Additionally, EVs are already the subject of separate proceedings by each of the EDCs in New Jersey. Rate Counsel respectfully requests that the Board address any EV-related issues in a separate stakeholder proceeding where technical issues, costs and benefits may be carefully considered with EV industry stakeholders.

[11] EMP at p. 13.

[12] For example, two manufacturers (Channing Street Copper Company and Impulse) have announced the availability of major home appliances equipped with an energy storage device: induction stoves equipped with batteries, with storage capacity in excess of 3 kWh. *These new induction stoves want to convince you to ditch gas*, Fast Company, (November 22, 2022), available at https://www.fastcompany.com/90814918/these-new-induction-stoves-want-to-convince-you-to-ditch-gas.

Rate Counsel supports the proposed amendment to the definition of a "Net metering generator," to clarify that only the electricity produced by the class I renewable energy sources shall be eligible for Net metering treatment.

> "Net metering generator" means an entity that owns and/or operates a class I renewable energy generation facility, the electricity from which is delivered to a Net metering customer; provided that only the electricity produced by the class I renewable energy sources shall be eligible for Net metering treatment. The Net metering generator may or may not be the same entity as the Net metering customer; and may or may not be located on the same property as the Net metering customer.

Rate Counsel supports the addition of this language to clarify that the draft rule proposal would no change the Board's existing regulations or policies regarding the facilities that qualify for net metering.

SUBCHAPTER 5. INTERCONNECTION OF CLASS I RENEWABLE ENERGY SYSTEMS

14:8-5.1 Interconnection definitions

Rate Counsel does not support adding the proposed new term "AGIR" or "Authority Governing Interconnect Requirements."

> "AGIR" or "Authority Governing Interconnect Requirements" means the agency that has authority for setting interconnection rules to the state-jurisdictional electric system, as set forth in IEEE 1547 Standard or subsequent standard as identified in a Board order. The term AGIR is functionally equivalent to the term "Relevant Electric Retail Regulatory Authority."

Adding to the already crowded vocabulary of renewable energy terms and acronyms risks adding further confusion and opacity. This is especially true when considering issues of authority and accountability. Rate Counsel recommends that the Board identify the agency to whom it intends to refer by simply stating, for example, "PJM" or "the Board," "…and any legally determined future successor."

Rate Counsel is concerned with some of the language in the proposed new definition, "DER Aggregation":

> "DER Aggregation" means a grouping of discrete interconnected Customer-generator facilities or behind the meter load modifying resources working as a combined or coordinated group for purposes of providing energy, grid services, or other value stream, on an aggregated basis, whether for the purposes of participating in retail or wholesale markets, including those established under Order No. 2222 or otherwise.

The definition includes several types of activities included within DER aggregation, but then refers to "…or other value stream." Rate Counsel opposes use of the term "value stream" in this definition. It is not defined or quantified, and it does not state who will receive that value or who will pay for it. Rate Counsel recommends substituting "value stream" with "functions."

Rate Counsel also notes that the proposed rule amendments refer at times to "Order No. 2222" and at others to "FERC Order No. 2222." These are the same order, but for purposes of consistency, we recommend a consistent term of reference. We also recommend clarifying the term "…or otherwise." It is unclear whether this refers to a specific federal or State legal authority. Rate Counsel recommends instead referring either to a specific legal authority or generally to "applicable federal or State statutes, rules and orders."

Rate Counsel's concern about potentially inappropriate cost-shifting arises again in the new definition, "EDC grid flexibility services," which characterizes such services as "compensated by the EDC." The rule proposal also provides no description of these services; no information on their technical functioning, necessity, advisability, or alternatives; and no data on costs, benefits, who will pay, who will benefit, or in what amount. Without such guidance, it is likely that the costs will fall on ratepayers, with no way to ensure that they receive benefits greater than the costs paid.

Rate Counsel also advises against the final sentence in the definition of "EDC grid flexibility services", which states: "Volt VAR provided by smart inverters is one example." The cost-effectiveness of Volt VAR measures have not been adequately addressed in a proceeding before the Board. A stakeholder process on voltage

optimization began over three years ago.[13] The EDCs submitted reports on various technical issues relating to implementing Volt VAR measures on their systems. Some of those EDC filings expressed concern about the "highly variable and limited" potential benefits, the cost of implementing such measures and whether they are technically ready for implementation.[14] However, the Board did not notify stakeholders of any intended action on Volt VAR and did not solicit comments from stakeholders on any proposal. Thus, significant questions remain unaddressed about the viability and cost of Volt VAR measures. If the Board intends to include voltage optimization measures in its grid interconnection rules, Rate Counsel respectfully recommends that the Board first hold a stakeholder process that considers and decides the technical and financial issues currently unresolved.

Rate Counsel does not support including "Rule 21," a regulation of the California Public Utilities Commission, in this rule proposal, as a definition or otherwise. Incorporating and relying on a regulation from another state into the New Jersey Administrative Code is inappropriate because it would violate several legal principles: 1) the scope of the Board's delegated powers from the New Jersey legislature[15] to an administrative agency in a different state; 2) the Board's rulemaking obligations;[16] and 3) the due process obligations of the Board, to give New Jersey residents notice of its proposed actions and the opportunity to be heard. If the Board intends to promulgate a regulation modeled on California's Rule 21, or any other state's regulation, it must do so using the well-established legal processes set forth in New Jersey law.

Rate Counsel recommends specifying, in the new definition, "system impact study," that, to the extent this study is necessary to determine whether a proposed project would harm the safety and reliability of the EDC's electric grid, the costs of the study should be paid by the applicant applying for an interconnection to the grid.

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[13] I/M/O the New Jersey Board of Public Utilities - A Study to Determine the Optimal Voltage for Use in the Distribution Systems of Each Electric Public Utility in the State, BPU Docket No. EO19040499.
[14] E.g., Jan. 15, 2020 Report on Study of Optimal Voltage by JCP&L.
[15] N.J.S.A. 48:2-16 et seq.
[16] See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984) ("A critical aspect of this definition is the 'general applicability and continuing effect' of the pronouncement."); In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011); N.J.S.A. 52:14B-2(e).

14:8-5.2 General interconnection provisions

14:8-5.2(b):

Rate Counsel notes that the Board has not provided a factual basis for allowing an applicant to rely on the use of non-exporting technology to enable their facilities to qualify for a less stringent level of interconnection review. ,

14:8-5.2(e):

Rate Counsel strongly objects to proposed new N.J.A.C. 14:8-5.2(e), which mandates that the entire cost of establishing, operating and maintaining the CIAP, portal and software will be imposed upon ratepayers. "The cost of implementing the CIAP portal and related costs shall be recovered by each EDC as part of its base rates or through an approved Infrastructure Investment Program, pursuant to N.J.A.C. 14:3-2A.2" (emphases added).

First, this proposal violates well-established ratemaking principles. Any utility cost sought to be recovered in rates must be reasonable, prudently incurred, and result in just and reasonable rates. This proposed new rule does not include any of the review standards that are legally required before allowing any utility investment to be included in its rate base and to ensure that the resulting rates are just and reasonable. Such standards include, without limitation, determining whether the investment is prudent, used and useful, and necessary to provide safe, adequate and proper service.[17] The Board may not abdicate its duty to review utility investments, and may not delegate to the EDCs or to private investors, the Board's authority to determine which investments may be included in the EDC's rate base. Utility investments must be reviewed for prudency and other traditional ratemaking criteria, before being placed into rates.[18]

Additionally, imposing the CIAP portal costs carte blanche onto customers would be inappropriate and would represent an additional subsidy paid by ratepayers to private

[17] See N.J.S.A. 48:2-21.

[18] See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984) ("A critical aspect of this definition is the 'general applicability and continuing effect' of the pronouncement."); In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011); N.J.S.A. 52:14B-2(e).

investors in renewable DER projects, without any corresponding, quantifiable financial benefit to ratepayers. Access to the electric grid is a valuable benefit for which renewable DER projects should pay their fair share. This proposed new rule would shift the costs and risks of achieving grid access onto ratepayers. However, all profits from the project would still be retained by the investors in the DER project. Well-established ratemaking principles indicate that the costs of connecting to the grid must be borne by the party who requests the grid connection.

Moreover, the costs of installing, maintaining and updating the CIAP are potentially large and may significantly increase customer rates. The result will be an open-ended commitment of ratepayer funds to pay for investments in unregulated DER projects. Accordingly, the costs of the CIAP and its portal and software should be recovered through the fees charged to the applicants for the benefit of a grid interconnection, and not from ratepayers.

14:8-5.2(e)(3)

Rate Counsel does not support this proposal as written, which would require the ratepayer-funded CIAP portal to include grid integration software for solar projects that are "selected and implemented jointly by the EDCs, and approved by the Board." This proposal does not include any procedural requirements for stakeholder input. Additionally, to the extent every electric utility will seek recovery of software costs, Rate Counsel recommends promulgating applicable standards by rule to comply with principles governing rate-setting and administrative law.

14:8-5.2(o),

This proposed new rule would require each EDC, on an annual basis, to

> make a Proactive System Upgrade Planning filing in which the EDC identifies targeted proactive circuit and system upgrades aimed at expanding opportunities for Customer-generator facilities and detail the costs and benefits of the proposed upgrades, as set forth at N.J.A.C. 14:8-5.15.

Rate Counsel has three concerns with this proposed rule. First, this proposed rule does not state who will be responsible to ultimately pay for the EDC's preparation of the

Proactive System Upgrade Planning filing and for the proposed upgrades if implemented. Second, this appears to prematurely implement Guidehouse's Recommendation #8, which advises the BPU to "consult [with] industry experts as necessary to gain insights as they develop guidance." Finally, this proposed rule refers to N.J.A.C. 14:8-5.15, which does not exist.

Rate Counsel respectfully recommends amending proposed new N.J.A.C. 14:8-5.2(o) to state that the fees paid by applicants for a grid connection will be set at a level to cover the EDC's cost of preparation of the Proactive System Upgrade Planning filing.[19] Rate Counsel reserves the right to comment on N.J.A.C. 14:8-5.15 if and when it is proposed.

14:8-5.2(p):

This proposed rule describes a process to facilitate the participation of "entities with interconnection agreements" in DER aggregations. That process requires, among other measures, that the EDC will receive only 10 days' written notice before the entity initiates the DER aggregation, and the EDC will have only 10 business days after receiving notice either to approve the DER aggregation or to issue a formal letter of objection. If the EDC issues a formal letter of objection, the parties must engage in a dispute resolution process.

Rate Counsel is concerned that proposed new N.J.A.C. 14:8-5.2(p) will require the EDCs to incur additional costs, manage the additional work and that the short time frames. The rule fails to explain why 10 days is the appropriate timeframe for notice and 10 business days is appropriate for review. EDCs are in the best position to address the appropriate timeframes for notice and review of DER aggregations. Rate Counsel recommends that any incremental costs reasonably incurred by EDCs to comply with this rule be borne by the applicants through an application fee.

Rate Counsel also notes that the reference to the rule setting forth the applicable dispute resolution process should be amended to cite N.J.A.C. 14:8-5.13.

14:8-5.2(q):

[19] Rate Counsel also recommends that the Board propose its preferred method(s) of structuring grid interconnection application fees. These fees could be pooled, shared or allocated among DER grid interconnection applicants.

This proposed new rule establishes a reporting obligation for EDCs if they miss a deadline applicable to connecting DER projects to the grid. The rule states that the methodology will be established by Board order. Due to the universal applicability of this rule, the methodology for reporting a missed deadline should be established by regulation, not by individualized Board orders.[20]

14:8-5.2(s):

Rate Counsel has several concerns about this proposed new rule, which reads:

> In conducting studies pursuant to this chapter, each EDC shall plan its system to allow for reverse power flow through substations where minor changes to the substation's control system allow for such flows in a safe and reliable manner and shall prioritize upgrading such control systems in response to interconnection applications that would benefit from such reverse flows.

This rule proposal would require EDCs to plan and upgrade their systems to allow for reverse power flow through its substations, in response to interconnection applications that "would benefit" from such reverse flows. The costs would evidently be imposed upon the EDC, which would presumably in turn seek to recover those costs from ratepayers. This appears to exceed the Board's directive on implementing Guidehouse's near-term recommendations. This proposal also violates several well-established rules governing ratemaking and cost causation principles, which require that the beneficiary should pay for costs that it causes. To the extent this planning and upgrading "would benefit" a particular DER project requesting a grid connection, the associated costs should be recovered from the project developers.[21] Further, if these investments are ultimately not used to provide utility service, they could become "stranded" assets whose costs are not recoverable from ratepayers. It is unfair to impose the costs of such speculative and imprudent investments on ratepayers or on the EDCs. This transfer of developer costs and risks onto ratepayers and EDCs represents another subsidy to the

[20] See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984) ("A critical aspect of this definition is the 'general applicability and continuing effect' of the pronouncement."); In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011); N.J.S.A. 52:14B-2(e).

[21] See In re Intrastate Industrial Sand Rates, 66 N.J. 12, 22 (1974).

DER investors that will increase utility costs for all ratepayers. Additionally, it is not clear that these investments would be reasonable without DER investor contributions because the reverse flows will not support the utility's provision of safe, adequate and proper service but rather only benefit specific applicants' access to the grid for their private gain. Rate Counsel recommends amending proposed new N.J.A.C. 14:8-5.2(s) to clarify that recovery of costs incurred to upgrade substations for the accommodation of reverse power flows will comport with well-established cost-causation principles.

14:8-5.3:

This rule amends the criteria for certification of Customer-generator interconnection equipment. Rate Counsel has concerns with this amended rule. In N.J.A.C. 14:8-5.3(a)3, Rate Counsel does not support directing the Board to approve equipment for operation using "California's Rule 21 process." "Rule 21" is a regulation of the California Public Utilities Commission. Incorporating and relying on a regulation from another state into the New Jersey Administrative Code is inappropriate because it would violate several legal principles: 1) the scope of the Board's delegated powers from the New Jersey legislature[22] to an administrative agency in a different state; 2) the Board's rulemaking obligations;[23] and 3) the due process obligations of the Board to give New Jersey residents notice of its proposed actions and the opportunity to be heard. If the Board intends to promulgate a regulation modeled on Rule 21, or any other state's regulation, it must do so using well established legal processes. Accordingly, Rate Counsel respectfully recommends revising proposed new N.J.A.C. 14:8-5.3(a)3 to remove its reliance on Rule 21.

[22] N.J.S.A. 48:2-16 et seq.

[23] See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984) ("A critical aspect of this definition is the 'general applicability and continuing effect' of the pronouncement."); In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011); N.J.S.A. 52:14B-2(e).

14:8-5.4:

This rule amends the criteria for Level 1 interconnection review. Rate Counsel has several concerns with this amended rule.

N.J.A.C. 14:8-5.4(b) proposes to limit the application fee, not to exceed $100 "or other value established by Board order." First, this statement is vague and confusing as to whether there is a specific limit on the application fee. Second, the proposal to continue to limit the application fee to a sum certain must arise from a rulemaking process that sets forth supporting facts and explains the reasoning for its establishment; this proposal includes neither. Third, if this proposal contemplates limiting the application fee to $100, it does not explain whether this amount will pay for the application and interconnection costs that the Level 1 interconnection will impose on the EDC and ratepayers. Without such foundation, it is impossible to assess the reasonableness of the fee amount. Application fees should cover all costs caused by the interconnection of a DER project to the electric grid. There is no basis to impose those costs onto other ratepayers. Accordingly, Rate Counsel respectfully recommends revising N.J.A.C. 14:8-5.4(b) either to remove the application fee cap or to require that application fees should set at a level that covers all costs related to the interconnection of a DER project to the utility's system.

N.J.A.C. 14:8-5.4(p)1 would require the EDC to review on an expedited basis amended Level 1 applications denied because they did not meet applicable criteria in N.J.A.C. 14:8-5.4. Rate Counsel recommends revising this proposal to state that expediting these reviews should not compromise the EDC conducting an appropriate engineering review to ensure the interconnection would not present a risk to safe and reliable utility service. Moreover, if EDCs must hire more staff or incur other costs to expedite DER interconnection requests, application fees should be structured to ensure that applicants, not ratepayers, pay for these costs.

14:8-5.5:

This amendment to N.J.A.C. 14:8-5.5(n) would specify that, after receiving the Pre-Application Verification/Evaluation ("PAVE") report for a Level 2 interconnection, the Customer-generator may elect to make changes to its application without incurring additional expense. Rate Counsel objects to this provision to the extent that application fees are not structured to cover the additional costs EDCs may incur through this pre-application process.

14:8-5.6: Level 3 Interconnection Review

This rule amends the criteria for Level 3 interconnection review. New N.J.A.C. 14:8-5.6(c) would cap application fees for a Level 3 interconnection application at an amount not to exceed $2,000. Rate Counsel objects to this provision. To the extent that the cost of processing an application for a Level 3 interconnection exceeds $2,000, this proposal would shift onto ratepayers certain costs that are caused by and the responsibility of the applicant requesting to connect their DER project to the grid. As stated above regarding each of these cost-shifting proposals, this violates cost-causation principles of rate-making and unreasonably shifts the risk of interconnection onto ratepayers. Applicants should cover their costs to the EDC in their interconnection application fees. Further, the rule proposal provides no facts on how much a Level 3 interconnection application review is assumed to cost, which could help stakeholders understand whether this fee cap will cover the EDC's costs to process a Level 3 application. Rate Counsel respectfully recommends revising this proposed new rule to state that, "An Application fee shall set by the EDC based on its historic, actual costs incurred per a Level 3 application" In the alternative, Rate Counsel respectfully suggests that the Board hold a stakeholder proceeding to solicit facts from the EDCs and other interested parties as to the actual cost to review an application for a Level 3 interconnection and how those costs could be successfully collected through application fees.

New N.J.A.C. 14:8-5.6(j) sets certain limits on the costs that the interconnection applicant must pay for a System Impact Study and system upgrades required to

accommodate the proposed interconnection. These limits include whether the cost is less than $200,000 or the EDC determines the modifications are "not substantial." Rate Counsel objects to this cost-shifting proposal because limiting the applicant's responsibility to pay for the costs it directly causes violates cost-causation principles of rate-making, is contrary to the purpose of the unbundling and deregulation of electric generation in the State, and may result in rates that are not just and reasonable. Interconnection application fees should cover all costs to the EDC to process the application, otherwise an additional subsidy will result. Moreover, this proposal does not provide any facts about the cumulative cost to ratepayers of paying up to $200,000 toward the cost of grid upgrades needed to accommodate the grid connection for each Customer-generator DER project. Rate Counsel respectfully recommends revising this proposed new rule to add this sentence: "The Customer-generator will be responsible to pay the costs of any system upgrades needed to connect its proposed DER facility to the EDC's grid."

Rate Counsel respectfully recommends revising proposed new N.J.A.C. 14:8-5.6(m) to state that the interconnection applicant must agree to pay all costs of any system upgrades needed to connect its proposed DER facility to the EDC's grid.

Rate Counsel supports proposed new N.J.A.C. 14:8-5.6(q), which sets forth the process for the Customer-generator to pay for the costs necessitated by interconnecting its DER project to the EDC's grid.

14:8-5.7: Interconnection fees

Rate Counsel strongly objects to the proposed amendments to N.J.A.C. 14:8-5.7, which sets limits on the amounts that EDCs may charge for application fees, engineering review of applications, connecting to the grid or operating a customer's grid-connected facility. Rate Counsel has several concerns with this amended rule. Primarily, to the extent that the EDC's fees are less than the actual cost to the EDC of reviewing, operating and maintaining the customer's connection to the grid, this proposed rule would seek to impose these costs upon ratepayers.

N.J.A.C. 14:8-5.7(a) proposes to limit the fee to review a Level 1 interconnection application, to an amount not to exceed $100 "or other value established by Board order."

Similarly, N.J.A.C. 14:8-5.7(b) proposes to limit the fee to review a Level 2 interconnection application, to an amount of up to $50 plus $1 per kilowatt of the Customer-generator facility's capacity "or such other value established by Board order." Proposed N.J.A.C. 14:8-5.7(b) also would limit costs for engineering work to review the application to a maximum of $100 per hour.

Similarly, N.J.A.C. 14:8-5.7(c) proposes to limit the fee to review a Level 3 interconnection application, to an amount not to exceed $100 plus $10 per kilowatt of the facility's nameplate rating. Proposed N.J.A.C. 14:8-5.7(c) also would limit costs for engineering work done as part of a System impact study or Facilities study to a maximum of $100 per hour.

First, the statement "or other value established by Board order" in N.J.A.C. 14:8-5.7(a) and N.J.A.C. 14:8-5.7(b) is too vague as to the specific limit on the application fee. Second, any proposed limit on the application fee must arise from a rulemaking process that sets forth supporting facts and explains the reasoning for its establishment. None of N.J.A.C. 14:8-5.7(a), N.J.A.C. 14:8-5.7(b) or N.J.A.C. 14:8-5.7(c) provides facts or explanations to support the amounts proposed, or whether they need to be updated to reflect current costs.[24] Third, none of these three proposed rule revisions explains whether the proposed limits would enable the EDCs to charge an application fee sufficient to pay for the costs that the interconnection application will impose on the EDC and ratepayers. Without such foundation, a $100 application fee cap may violate principles of cost causation and rulemaking, and may be arbitrary and capricious. Application fees should cover all costs caused by the interconnection of a DER project to the electric grid, including the cost to review the application. There is no basis to impose those costs onto ratepayers.

[24] For example, how does a maximum rate of $100 per hour compare with the typical amount currently charged by a qualified engineer to review a grid interconnection for a DER project in New Jersey?

Proposed N.J.A.C. 14:8-5.4(d) compounds these errors by prohibiting EDCs from charging any fee or charge, other than as set forth in this rule proposal, for a DER project to connect to the EDC's electric grid.

Accordingly, Rate Counsel respectfully recommends revising N.J.A.C. 14:8-5.4(a), (b) and (c) either to remove the application fee cap or to require application fees that cover all costs caused by the interconnection of a DER project to the electric grid. Proposed N.J.A.C. 14:8-5.4(d) should limit application fees to the EDC's actual costs to review the application and any other costs imposed on the EDC by the application or the interconnection itself.

However, Rate Counsel supports the provision in N.J.A.C. 14:8-5.7(c) stating that, "[i]f the EDC must install facilities in order to accommodate the interconnection of the Customer-generator facility, the cost of such facilities shall be the responsibility of the Applicant." This statement merely reflects well-established cost-causation principles.

14:8-5.9: Interconnection reporting requirements for EDCs

Rate Counsel questions whether quarterly reporting is necessary or whether annual or semi-annual reporting may be more appropriate. The Board should explain why quarterly reporting is more advantageous to less frequent reporting and why the additional administrative costs for the utility and Board Staff are justified. Also, it is not clear whether N.J.A.C. 14:8-5.9 requires a standardized reporting format for the monthly data to allow comparison between EDCs. At minimum, requiring submittal of interconnection tracking metrics in a standardized spreadsheet file would facilitate tracking and verification of EDC performance. Reporting requirements should include maximum, mean, and median processing times from receipt of request to issuance of report for each level of applications.

14:8-5.9(c)(10) requires reporting on hybrid interconnection projects. Rate Counsel suggests that this reporting should specify whether individual components of such projects are export limited or otherwise constrained to meet Level 1, 2 or 3 approval criteria.

The annual report required by 14:8-5.9(d) does not require EDC reporting of costs associated with implementation of interconnection applications, CIAP operation, engineering studies, or whether application fees are covering interconnection review expenses. Rate Counsel respectfully requests that the EDCs should be required to report this information, to ensure that fees remain appropriately set.

14:8-5.9 does not require EDCs to report their costs to prepare and update the Hosting Capacity Maps that would be required by proposed new 14:8-5.11. Rate Counsel respectfully recommends including reporting of those costs along with all the other costs associated with connecting DER projects to the grid.

14:8-5.10: Pre-Application Verification/Evaluation Process

Rate Counsel objects to proposed new N.J.A.C. 14:8-5.10(a), which limits the amounts an EDC may charge for the "Pre-Application Verification/Evaluation ("PAVE") process, for a "qualified" Level 2 or Level 3 project, to a fee of $300 or "such alternative fee as the Board shall establish by order." Rate Counsel has a number of concerns with this proposed rule. Primarily, to the extent that the EDC's fees are less than the actual cost to the EDC of the PAVE process, the EDC would seek to impose these costs upon its ratepayers. This flaw is compounded by N.J.A.C. 14:8-5.10(b), which requires the EDC to provide extensive information within 10 business days. Such expedited reporting may require the EDC to hire additional staff or retain additional consulting services. To the extent that the $300 application fee is insufficient to cover the EDC's costs of providing this information on an expedited basis, these costs too may be imposed on ratepayers. The Board should make clear that the costs associated with the PAVE process must be recovered through the applicants' fees.

14:8-5.11: Hosting Capacity Maps

Proposed new N.J.A.C. 14:8-5.11(a) requires each EDC, by January 1, 2024, to file a tariff that includes "a common Hosting capacity mapping process to aid Customer-generators. Hosting capacity maps shall indicate locations on the distribution [grid] with spare capacity and which locations are likely to require additional upgrades."

Proposed new N.J.A.C. 14:8-5.11(b) and (c) require each EDC to:

- update its hosting maps at least quarterly, with data at the circuit and substation level;
- calculate the hosting capacity values for each circuit using a common methodology;
- present the hosting capacity values in a consistent manner across all EDCs;
- update and summarize and changes to the data and coincidentally post it on the EDC's website and its subscriber e-mail list;
- label maps with a common legend and lexicon;
- integrate the maps with GIS systems;
- present all system data for substations, feeders and related distribution assets; and
- allow prospective applicants to easily determine detailed information by entering a street address; and
- specifies the detailed information that each EDC must provide with its Hosting capacity maps.

Proposed new N.J.A.C. 14:8-5.11(d) requires each EDC to include a process for validating capacity models, publishing the hosting capacity, and collecting and compiling customer feedback on its Hosting capacity mapping process. Finally, proposed new N.J.A.C. 14:8-5.11(e) requires each EDC to provide data based on a static grid and operational flexibility.

Rate Counsel is supportive of the proposal to require standardized hosting maps across the State's EDCs. Hosting maps that are uniformly similar across EDCs would be helpful for stakeholders, as would complete, accurate, and timely information. Moreover, access to the most current information will hopefully facilitate the successful, more cost-effective location of DER. The Board should also require all EDCs to provide timely information on any closed circuits and to set a date by which all EDCs will provide the requested information. Rate Counsel concurs that consistent labeling across the EDCs may facilitate the identification of closed circuits by interested parties. The EDCs should also explore if all of the maps can be hosted on a single site for the entire state. This may reduce costs and be more convenient and economical than multiple websites.

Rate Counsel agrees that the EDCs should present information on equipment

required for system upgrades in a consistent manner across the EDCs. However, as noted above, Rate Counsel opposes requiring ratepayers to pay the costs to prepare and update these hosting capacity maps and to upgrade the electric grid or replace equipment to subsidize unregulated DER projects. This is especially true where ratepayers would pay an additional amount in rates, on top of the subsidies ratepayers already pay for DER projects, to supplement the profitability of an investment by an unregulated industry. The responsibility to pay the costs to prepare and update these hosting capacity maps and to upgrade the grid to accommodate new DER projects should remain with the entity proposing the DER project and benefitting from its access to the grid.

The Board should adhere to cost-causation regulatory principles to protect ratepayers from paying charges for interconnection services that do not provide financial benefits to them. Insulating unregulated DER developers from the actual costs of interconnection can lead to imprudent utility infrastructure, unnecessary spending, poorly-sited facilities, and stranded assets that are not used and useful in the provision of utility service. None of these risks – nor the associated costs – should be passed on to ratepayers. Such cost-shifting would be contrary to the deregulation of electric generation in New Jersey, to well-established cost causation principles and to the Board's directives on the near-term recommendations.

14:8-5.12: Proactive System Upgrade Planning

Rate Counsel does not support requiring the EDCs to perform the "PSUP." Further, Rate Counsel strongly opposes imposing the costs of upgrades, requested by unregulated DER project developers, upon EDCs and their ratepayers. The purpose of the PSUP is for the EDC to identify "congested areas on each EDC system that are significantly limiting the ability to interconnect" new DER projects and "proposed grid upgrades that would 'proactively' alleviate" that congestion. Using this proposed new rule to impose this obligation onto EDCs and their ratepayers violates several administrative law and ratemaking principles:

This proposed new rule provides no facts on the costs or benefits of this proposal. For example, in preparing a list of PSUP upgrades so that unregulated DER projects may

interconnect with the EDC's grid, N.J.A.C. 14:8-5.12(b)d would require each EDC to focus on proposed upgrades that would upgrade "facilities costing over $2 million that are unlikely to be funded on a participant-funded basis." This rule proposal provides no factual or legal basis to assume that investors in unregulated DER projects are unlikely to pay for their interconnection costs, or to impose unregulated project costs of over $2 million on ratepayers. Moreover, if DER investors are unwilling to invest in the costs to connect their project to the grid, it is unfair to impose the costs of such predictably unprofitable ventures onto ratepayers.

Since this PSUP filing will identify future opportunities to expand Customer-generator facilities, the associated costs are not "used and useful" in providing utility services. Accordingly, such costs should not be imposed on ratepayers until they are used and useful. Rate Counsel respectfully recommends that the Board revise this proposed new rule to clarify that all costs related to the PSUP should not be imposed on ratepayers but should be reasonably apportioned among DER projects applying for a grid interconnection.

Conclusion

Rate Counsel opposes a cost allocation and cost recovery process that shifts the costs of grid planning and upgrading to accommodate DER projects to ratepayers to further subsidize private, unregulated developers. Attribution of interconnection costs to the cost-causer has been a normal cost of doing business for over a century. Rate Counsel has concerns about an open-ended grid upgrade investment process that insulates unregulated DER developers from the actual costs of their projects. Such a policy does not send accurate price signals to developers on the most efficient and economical type of or location for renewable generation, nor does it provide any additional benefits to ratepayers. Rather, ratepayers will likely be asked to subsidize imprudent utility infrastructure, unnecessary spending, poorly-sited facilities, and stranded assets that are not used and useful in the provision of utility service. Further, it shifts the risk of these projects not being completed or being unprofitable onto ratepayers with no commensurate benefit. Once ratepayers fund the upgrade, there is no guarantee the DER

project will be built. If it is built, the profits (which will be higher based on lower required initial capital investment) will be retained by the private unregulated entity. None of these risks – nor the associated costs – should be passed on to ratepayers; indeed, they could be deemed imprudent for purposes of rate recovery.

Rate Counsel supports maintaining the current traditional utility ratemaking process. Rate Counsel's position reflects well-established law. Otherwise, any new cost sharing mechanism would enter a new paradigm where ratepayers, including the most economically vulnerable, would essentially subsidize the startup costs of well-funded and sophisticated for-profit ventures, with no sharing of the profits, or any mechanism to determine whether these subsidies are even needed. The result would be regulated utility rates that are not just and reasonable. Since DER projects already receive an array of ratepayer-subsidized subsidies, the result would be highly unfair to ratepayers.

Rate Counsel thanks the Board for this opportunity to provide these comments on the proposed new and amended rules for N.J.A.C. 14:8-5, and looks forward to working with all parties throughout this Grid Modernization proceeding.