



State of New Jersey  
DIVISION OF THE RATEPAYER ADVOCATE  
31 CLINTON STREET, 11<sup>TH</sup> FL  
P. O. BOX 46005  
NEWARK, NEW JERSEY 07101

JON S. CORZINE  
*Governor*

SEEMA M. SINGH, Esq.  
*Ratepayer Advocate  
and Director*

February 17, 2006

**VIA HAND DELIVERY**

Kristi Izzo, Secretary  
Board of Public Utilities  
Two Gateway Center  
Newark, New Jersey 07102

RE: Proposed Amendments to N.J.A.C. 14:1-5.14  
Standard of Review of Petitions for Approval of a  
Merger, Consolidation, Acquisition and/or Change  
in Control  
BPU Docket No. AX05080742

Dear Secretary Izzo:

Please accept for filing an original and ten copies of these comments by the Division of the Ratepayer Advocate ("Ratepayer Advocate") concerning the proposed amendments to N.J.A.C. 14:1-5.14, promulgated by the Board of Public Utilities ("Board" or "BPU"), which addresses petitions for approval of mergers, consolidations, acquisitions, and changes in control of New Jersey utilities. Also included is one additional copy. Please stamp this copy and return to the courier.

We thank the Board for the opportunity to comment on this matter. The Ratepayer Advocate believes that protection of New Jersey ratepayers is of paramount importance during all proceedings involving the merger of any New Jersey utility. The

Ratepayer Advocate supports, and indeed welcomes, the Board's proposed amendments to N.J.A.C. 14:1-5.14. We do, however, offer the following comments and suggestions, which we feel will enhance the protections afforded to ratepayers under the proposed amendments.

### **BACKGROUND**

The proposed amendments to N.J.A.C. 14:1-5.14 accomplish two things. First, N.J.A.C. 14:1-5.14(a) clarifies the jurisdiction of the Board by requiring the filing of a petition with the Board not only when the petitioners are proposing a merger or consolidation of a New Jersey utility with another public utility, but also any acquisition and/or change in control of a New Jersey utility, as well as the merger or consolidation of a New Jersey utility with a parent holding company of another public utility. Secondly, the proposed amendments require that the Board find that any petition for a merger, consolidation, acquisition, or change in control show that: 1) "positive benefits will flow to customers and the State of New Jersey," and 2) at a minimum, that none of the four criteria the Board is required to examine under N.J.S.A. 48:2-51.1 will be adversely impacted by the merger.

The Ratepayer Advocate fully supports the Board's proposal to regulate all forms of mergers, changes in control, consolidations, and/or acquisitions that may impact utilities it regulates, and to implement a positive benefits standard of review for all future petitions for such mergers, consolidations, etc. The Ratepayer Advocate feels such amendments are especially necessary in light of the recent repeal of the Public Utility Holding Company Act of 1935 (PUHCA) and subsequent enactment of the 2005 Energy Policy Act by the Federal government. Moreover, the proposed positive benefits

standard of review is a natural extension of the BPU's decisions in the two most recent energy merger cases to review each of those petitions under a positive benefits standard. *See I/M/O Public Service Electric and Gas Co. and Exelon Corporation for Approval of a Change in Control of Public Service Electric and Gas Co., and Related Authorizations*, BPU Docket No. EM05020106 (Order, November 9, 2005) at p. 25 ("PSE&G/Exelon Standard of Review Order") ("in considering the Joint Petitioners' request for approval of the acquisition of control of PSE&G...the Board shall utilize a positive benefits standard of review."); *I/M/O NUI Utilities, Inc. (D/B/A Elizabethtown Gas Company) and AGL Resources for Authority Under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 of a Change in Ownership and Control*, BPU Docket No. GM04070721 (Order, November 17, 2004) at p. 6 ("the Board believes that it is appropriate to expand the scope of its review to capture expectations for improvements, e.g., some positive benefits....")

As the Board noted in the PSE&G/Exelon Standard of Review Order, in reviewing merger petitions the Board has historically "considered the appropriate treatment of the acquisition's claimed benefits, including but not limited to, merger savings, and examined whether benefits had been properly derived and equitably shared with ratepayers." *PSE&G/Exelon Standard of Review Order*, at p. 16. The Board's decision to delineate a positive benefits standard of review through Title 14 is not only a natural progression from the Board's previous decisions, but has several distinction advantages over deciding standards of review for merger petitions on a case-by-case basis. Adopting a positive benefits standard of review regulation should facilitate the regulatory process before the Office of Administrative Law, and ultimately the Board. Merger proponents will be well aware in advance of the burden required of them for

merger approval and will have the opportunity to prepare their petitions and present their cases accordingly. Concrete establishment of the positive benefits standard will also assist other parties to the ensuing regulatory proceeding, including Board Staff and the Ratepayer Advocate, in development of a comprehensive record of the case and, if applicable, during settlement negotiations.

Moreover, the positive benefits standard will help prevent merger petitioners from making vague, glamorous representations to the Board of anticipated improvements to service quality, rates, employees, etc. during the merger approval process, while avoiding substantiation of these purported positive benefits. Positive benefits as a prerequisite to a merger approval is especially warranted in light of recent post-merger problems this State has endured, such as the reliability and labor relations issues experienced after FirstEnergy took over JCP&L.

### **RECOMMENDATIONS**

In addition to the changes outlined in the proposed regulation that we support, the Ratepayer Advocate first recommends that the Board further amend N.J.A.C. 14:1-5.14(c) so that the positive benefits that are required to flow to ratepayers be substantial. The Ratepayer Advocate is concerned that, absent such a requirement that customers enjoy substantial positive benefits, merger proponents may insist that a negligible benefit satisfies this requirement. For example, merger petitioners offering a \$1 ratepayer benefit could be construed as satisfying the proposed standard as long as they demonstrate that none of the four criteria delineated in N.J.S.A. 48:2-51.1 will be adversely impacted. N.J.A.C. 14:1-5.14(c) could be distorted to the point that it becomes practically indistinguishable from a no harm standard of review. To prevent against this possibility,

the Board should incorporate a substantiality requirement. The Ratepayer Advocate respectfully suggests the following language for N.J.A.C. 14:1-5.14(c):

The Board shall not approve a merger, consolidation, acquisition, and/or change in control unless it is satisfied that **substantial** positive benefits will flow to customers and the State of New Jersey, and at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1. **In order for a merger proponent to satisfactorily demonstrate substantial positive benefits, the Board must be satisfied that, at a minimum, the benefits to the criteria delineated in N.J.S.A. 48:2-51.1, when considered in the aggregate, will be in the public interest.**

The above language should enhance ratepayer protections and benefits during future merger proceedings, an inherent goal of implementing a positive benefits standard of review regulation. The Ratepayer Advocate urges the Board to adopt this language.

The Ratepayer Advocate's second concern involves the burden of proof proposed by the language of N.J.A.C. 14:1-5.14(d). Under the language of N.J.A.C. 14:1-5.14(d) as proposed, "[t]he petitioners seeking merger, consolidation, acquisition, and/or change in control of a public utility shall have the burden of proving to the Board, by preponderance of the evidence, that the requirements of this section are met." The Ratepayer Advocate respectfully recommends that the Board amend the burden of proof in N.J.A.C. 14:1-5.14(d) to a clear and convincing evidence standard. Such a heightened burden, while merger petitioners may find it inconvenient during the regulatory process before the Board, is both appropriate and necessary given the continuous impact, and irreversible nature, of the Board's approval of any given merger petition. Accordingly, the Ratepayer Advocate respectfully suggests the following language for N.J.A.C. 14:1-5.14(d):

The petitioners seeking merger, consolidation, acquisition, and/or change in control of a public utility shall have the burden of proving to the Board **by clear and convincing evidence** that the requirements of this section are met.

The Board's use of a clear and convincing standard in Title 14 would not be without precedent. Under N.J.A.C. 14:10-11.5(f)(4), anti-slamming regulations for telephone service, upon receipt of a complaint of an unauthorized telecommunications service provider (TSP) change, the Board requires the accused unauthorized TSP to produce clear and convincing evidence of a valid authorized TSP change. Accordingly, the Board's use of a clear and convincing burden of proof is wholly appropriate. The Ratepayer Advocate urges the Board to apply this standard to N.J.A.C. 14:1-5.14.

Finally, the Ratepayer Advocate recommends that N.J.A.C. 14:1-5.14(a)(3) be clarified to explicitly include spin-offs and divestitures. We suggest the following language for N.J.A.C. 14:1-5.14(a)(3): "the acquisition of a public utility of New Jersey and/or a change in control of the public utility, **including spin-offs and divestitures.**"

Respectfully Submitted,

Seema M. Singh, Esq.  
Ratepayer Advocate

By: s/ Christine M. Juarez  
Christine M. Juarez, Esq.  
Assistant Deputy Ratepayer Advocate

c: Jeanne M. Fox, President  
Frederick F. Butler, Commissioner  
Connie Hughes, Commissioner  
Joseph Fiordaliso, Commissioner  
Christine V. Bator, Commissioner