



State of New Jersey  
DIVISION OF RATE COUNSEL  
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May 18, 2018

**VIA HAND DELIVERY**

Aida Camacho-Welch, Secretary  
State of New Jersey, Board of Public Utilities  
44 South Clinton Avenue, 10<sup>th</sup> Floor  
P.O. Box 350  
Trenton, New Jersey 08625-0350

**Re: I/M/O the Petition of New Jersey American Water Company, Inc. for  
Approval of Increased Tariff Rates & Charges for Water & Wastewater  
Service, Change in Depreciation Rates & Other Tariff Provisions  
BPU Docket No. WR17090985  
OAL Docket No. PUC 14251-2017 S**

Dear Secretary Camacho-Welch:

Please accept for filing an original and ten copies of the letter brief in Support of Motion to Issue Order Rejecting Company's Proposed Provisional Rates being filed on behalf of the Division of Rate Counsel ("Rate Counsel") regarding the above-referenced matter. Enclosed is one additional copy. Please date stamp the copy as "filed" and return it to the courier. Thank you for your consideration and attention to this matter.

### **PRELIMINARY STATEMENT**

On May 14, 2018, Petitioner New Jersey American Water Company (“Company”) submitted a Provisional Rate Filing (“Filing”) with the Board of Public Utilities (“BPU” or “Board”) advising of its intention to implement a provisional base rate increase of approximately \$75 million, or 12.3%, effective June 15, 2018. This rate increase is being proposed pursuant to the Provisional Rate Regulation, N.J.A.C. 14:1-5.12(e) et seq. The proposed provisional rate increase, if permitted, will be significantly greater than what Rate Counsel believes the Board will likely find to be justified when it issues an order approving final rates. Given the excessive amount of this proposed increase, the circumstances of this case that led up to the Company’s request, and the failure of the Company to satisfy the requirements of the regulations, Rate Counsel respectfully requests that the Board exercise its authority to deny the requested provisional rates. Rate Counsel asks further that this motion be addressed on an expedited basis since NJAW has indicated its intent to implement these rates on June 15, 2018. Expedited review would ensure that the matter could be heard prior to the implementation of the proposed provisional rates and that ratepayers are not subject to frequently changing rates.

### **BACKGROUND**

On September 15, 2017, the Company filed a petition in the above-referenced matter seeking to increase its base rates approximately \$129.3 million per year, or about 17.54%. In its Petition, the Company filed with only 5 months of actual data, proposing a Test Year ending on March 31, 2018. By Order dated January 21, 2018, the Board held that the reduction in corporate tax rates as a result of the Tax Cuts & Jobs Act of 2017 shall be passed on to the

State's ratepayers. I/M/O the N.J. Bd. of Pub. Utilities' Consideration of the Tax Cuts & Jobs Act of 2017, BPU Docket No. AX18010001, Order dated 1/31/18 ("Tax Act Order"). Consistent with this, the Board ordered utilities to defer the tax savings, with interest, starting from January 1, 2018. Id. The Board also initiated a proceeding to determine the appropriate amounts and mechanism by which to refund the savings to customers. Id. On February 13, 2018, the Company filed a Motion with the Board seeking to be relieved of its obligation to file tariffs reflecting new tax rates effective April 1, and to consolidate its tax case with its pending base rate case. The Board denied that relief in Orders dated February 28, 2018, and March 26, 2018. I/M/O the N.J. Bd. of Pub. Utilities' Consideration of the Tax Cuts & Jobs Act of 2017 & I/M/O N.J. American Water Co., Inc., for Approval of Increased Tariff Rates and Charges for Water and Wastewater Service, Change in Depreciation Rates and Other Tariff Provisions, BPU Docket Nos., AX18010001 and WR17090985, Order on Emergent Motion, dated 2/28/18 and I/M/O the N.J. Bd. of Pub. Utilities' Consideration of the Tax Cuts & Jobs Act of 2017 & I/M/O N.J. American Water Co., Inc., with Calculation of Rates Under the Tax Cuts & Jobs Act of 2017, BPU Docket Nos., AX18010001 and WR18030233 Order, dated 3/26/18.

The discovery phase in this matter proceeded uneventfully. Settlement discussions began as expected, with several settlement meetings being attended by all parties during February and March. Rate Counsel and Board Staff engaged fully in these discussions. Rate Counsel updated its settlement position several times, often on short notice, in response to offers put forth by the Company. These settlement talks proceeded in fairly typical fashion until early April, at which time the Company informed Rate Counsel that settlement discussions were ending because the Company could not move any further from its revenue requirement position. Up until this point,

Rate Counsel and Board Staff were prepared to continue settlement discussions with the goal of reaching an amicable settlement. Instead, however, the Company cut off settlement discussions and decided to proceed to litigation.

On April 13, 2018, Rate Counsel filed the Direct Testimony of seven witnesses. In this testimony, Rate Counsel witness Robert Henkes testified , inter alia, that a rate decrease of approximately \$17.1 million annually would be appropriate to produce just and reasonable rates for New Jersey American's ratepayers. On that same day, Rate Counsel learned that the Company intended to serve written notice on the Board seeking to implement a provisional rate increase pursuant to the Interim Rate Regulation.

On May 14, 2018, the Company submitted its Filing for provisional rates to the BPU. In the Filing, the Company states that it intends to implement a provisional rate increase of approximately \$75 million annually, or about 12.3%, to be effective June 15, 2018. Rate Counsel hereby submits this motion requesting that the Board issue an order rejecting the Company's proposed provisional rates.

### **ARGUMENT**

While the New Jersey Supreme Court has acknowledged that provisional rates are an available mechanism to deal with regulatory lag, the Court has also stressed the importance of developing procedures that "strike an equitable balance between the interests of the utility and its consumers when "regulatory lag" threatens the fairness of the ratemaking process." Toms River Water Co. v. BPU, 82 N.J. 201, 212 (1980). The Court held that the BPU "must devise appropriate administrative mechanisms for regulating utilities which elect to implement proposed

tariffs at the end of the suspension period.” Id. In adopting the Provisional Rate Regulation, the Board clearly intended to satisfy these obligations, setting forth specific requirements for notice and implementation and retaining the discretion to deny provisional rate increases when appropriate. N.J.A.C. 14:1-5.12(f) (“Unless otherwise ordered by the Board, a utility that seeks to implement a provisional rate increase shall....”). In fact, when responding to comments regarding the proposed rule, the Board made clear that “No provision of these amendments waives the Board’s statutory authority, including its authority to ensure just and reasonable rates.” 50 N.J.R. 625(b), response to Comment 43. Rate Counsel maintains that allowing the Company to implement any provisional rate in this case, let alone the excessive rate sought by the Company, would be unjust and unreasonable. Therefore, Rate Counsel asks that the Board exercise its authority and discretion to reject the Company’s proposed provisional rates.

There are a number of reasons why the Board should exercise its discretion in this manner. First, the procedural history of this matter compels it. The Company chose to file with only five months of actual data, meaning that it would be impossible to litigate this matter with full twelve-month Test Year data by the end of the eight month suspension period set forth in the statute. N.J.S.A. 48:2-21. The Company’s choice of a Test Year precluded evidentiary hearings and the issuance of an Initial Decision and Final Board Order by June 15, the date the Company proposes to implement the Provisional Rates. As it stands, with no unusual delays, this case is scheduled to be heard by the Administrative Law Judge in mid-June. Given that the Company chose to file with only five months of data, precluding resolution within nine months, there is no regulatory lag and the Company should not be allowed to implement Provisional Rates. The Provisional Rate Regulation was intended to address regulatory delay not within the control of a

utility, not to provide the utility relief from its own choices. Allowing provisional rates here is therefore contrary to the policy goal of addressing regulatory lag and undermines the fairness of the ratemaking process.

Second, allowing the Company to implement Provisional Rates in this case would be contrary to the long established jurisprudential policy favoring settlement. For at least the last four or five of the Company's base rate cases, the parties have reached mutually agreeable settlement. Now, shortly after the adoption of the Provisional Rate Regulation, the Company made a unilateral decision to end settlement discussions and proceed to litigation, evidently intending to use the Provisional Rate Regulation as a means of either gaining leverage or of collecting excessive, unjustified provisional rates. If the Board permits the Company to implement provisional rates, the Company will be evading the consequences of its decision to litigate, thereby encouraging it, as well as all other utilities, to forego settlement in the future. Indeed, the Company actually appears determined to benefit from its decision to litigate by implementing a provisional rate increase greatly in excess of a likely litigation outcome. If the Company is permitted to utilize the regulation in this manner, the Board should expect this tactic to be used more frequently, significantly increasing the number of cases that will not settle. This is contrary to long-established public policy favoring settlement of litigation. Puder v. Buechel, 183 N.J. 428, 437 (2005) ("For nearly forty-five years, New Jersey Courts have found that '[s]ettlement of litigation ranks high in [the] public policy' of this State." (quoting Nolan ex. rel Nolan v. Lee Ho, 120 N.J. 465, 472)). Once again, rather than serving the goal of striking an equitable balance to address regulatory lag, NJAW's proposed use of the Provisional Rate

Regulation serves to undermine the fairness of the ratemaking process by making the Company indifferent to the benefits of settlement and cooperation.

Furthermore, the Company's "plan" to refund over-collections – of particular importance here since the Company is choosing to impose interim rates that greatly exceed what Rate Counsel believes will ultimately be found to be just and reasonable - is woefully inadequate. Among other omissions, the Company has failed to specify when the over-collection will be refunded, and how its calculations of over-recovery will be reviewed and verified by the Board and Rate Counsel. The regulation specifically requires the Company to refund the over-collection, with interest, to customers no later than the customer billing cycle 30 days after the effective date of the Board Order concluding the rate case. N.J.A.C. 14:1-5.12(h). The proposed refund plan does not provide any detail on how the Company will accomplish this task.<sup>1</sup> This is clearly not the detailed plan envisioned by N.J.A.C. 14:1-5.12(f)2.

Rate Counsel has also identified several other problems with the practical implementation of the provisional rate regulation. For example, the Provisional Rate Regulation requires that any provisional rate increase be implemented "across the board," *i.e.*, an equal percentage to all rate classes based on existing rate design, while the final base rates may very well have a different rate design. This means that customers whose cost of service may require no increase or a rate decrease in final base rates will still experience a provisional rate increase. This often includes large users that are already paying more than their cost of service and municipalities that must pay for public fire while staying within the 2% municipal property tax cap. In the likely event that the rate that is ultimately deemed "just and reasonable" is lower than what the

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<sup>1</sup> To the extent any interim rate is permitted, the Board Order should require compliance with this deadline and explicitly state that failure to comply is a separate violation of the Board's Order for each day that each customer does not receive the proper refund.

Company has implemented provisionally, the refund process will be extremely complicated.

This could have disproportionate impacts on municipal budgeting and on certain customers that are already paying more than their fair share. The utility's plan should have included a discussion of how it will address these issues, but it does not.

The Board has an over-arching obligation to ensure that the ratemaking process is fair and that rates are "just and reasonable" which cannot be abrogated by regulation. N.J.S.A. 48:2-21(b)(1). While Rate Counsel recognizes that the statute does give the utility the option of implementing a provisional rate at the end of the suspension period, subject to refund and interest, Toms River Water Co. v. NJBPU, 82 N.J. 201 (1980), the Board has made clear that "no provision of these amendments waives the Board's statutory authority, including its authority to ensure just and reasonable rates." 50 N.J.R. 625 (b). The Board specifically reserved its authority under the regulations to reject proposed provisional rates, and the statute also provides that any adjustment of rates during the pendency of a hearing "shall at all times be subject to change through the proceedings provided for by this chapter, or through negotiations and agreement under this section." N.J.S.A. 48:2-21.1. The Board should exercise that authority here, and under the circumstances of this case, should reject the proposed provisional rates and the Company's inadequate "plan" to provide accurate refunds to ratepayers consistent with the timeframes in the statute.



### CONCLUSION

The Supreme Court has stated that the Board must establish “appropriate administrative mechanisms” to “strike an equitable balance between the interests of the utility and its consumers when ‘regulatory lag’ threatens the fairness of the ratemaking process.” Toms River, *supra*, at 212. Rate Counsel maintains that the Board has an obligation to ensure fairness by rejecting NJAW’s provisional rate proposal where, as here, the Company has:

(1) chosen to file its case so that complete data will only be available more than seven months into the eight month suspension period;

(2) chosen to attempt to implement provisional rates while ending good faith settlement negotiations;

(3) submitted a plan for refunds that does not indicate how the refunds will be verified and returned within the 30 day period as required by the regulations; and

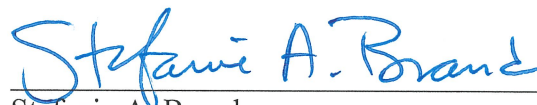
(4) proposes to implement an excessive provisional increase of \$75 million that is unjust and unreasonable.

The Board should reject the Company’s proposed provisional rates. This would ensure that the Provisional Rate Regulation is used judiciously, in situations that justified the adoption of the rule, rather than simply encouraging litigation and leading to excessive provisional rate increases. Most importantly, the rule should not interfere with the Board’s overriding obligation to ensure that rates are just and reasonable and that the ratemaking process is fair. For this reason, Rate Counsel respectfully requests that the Board issue an Order rejecting the Company’s proposed provisional rates. In addition, to ensure that these issues are addressed before the Company’s proposed June 15, 2018 implementation date, Rate Counsel asks that review of this

Ms. Aida Camacho-Welch, Secretary  
May 18, 2018  
Page 10

motion be expedited. This will ensure that ratepayers are not subject to multiple rate changes in a short period of time.

Respectfully submitted,



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Stefanie A. Brand

Director, Division of Rate Counsel

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c: Service List (via electronic mail and USPS regular mail)