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APR 19 2018

BOARD OF PUBLIC UTILITIES
 TRENTON, NJ

April 18, 2018

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APR 18 2018

BOARD OF PUBLIC UTILITIES
 TRENTON, NJ

VIA HAND DELIVERY

Aida Camacho-Welch, Secretary
 State of New Jersey, Board of Public Utilities
 44 South Clinton Avenue, 10th 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:

We have been informed that Petitioner New Jersey American Water Company (“Company”) intends to serve written notice on the Board seeking to implement a provisional rate increase pursuant to N.J.A.C. 14:1-5.12(e) through (k) (“Interim Rate Regulation”). Rate Counsel was informed of this intention orally on April 13, 2018. Board Staff also provided Rate Counsel an email served only on Board Staff that same day enclosing a proposed form of notice of this intent. Although formal notice has not yet been served, the issues raised by this action and the extremely short timeframe provided in the Board’s regulations for formal notice, compel us to seek relief from the Board regarding the implementation of Interim Rates in this matter. For the reasons set forth below, the Division of Rate Counsel (“Rate Counsel”) urges the Board to issue an Order establishing a procedural schedule to review the Company’s proposed Interim Rates and prohibiting the Company from implementing provisional rates until the Board has completed its review. In addition, Rate Counsel asks that the Board direct the Company to continue settlement discussions in good faith, and direct Board Staff to convene a settlement conference for that purpose.

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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. As of the filing of this letter, the Parties are still waiting for the Company to file its "12 + 0" update with fully known and measurable Test Year information.

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. The Board ordered utilities with annual revenues greater than \$4.5 million to file petitions by March 2, 2018 which include, among other things, tariffs reflecting the new tax rate to be effective on April 1, 2018. On February 13, 2018, the Company filed a Motion with the Board seeking to be relieved of its obligation to file tariffs effective April 1, and to consolidate its tax case with its pending base rate case. By Order dated February 28, 2018, the Board denied the Company's motion to consolidate. By Order dated March 25, 2018, the Board re-affirmed its position that the Company's tax case should remain separate from its pending base rate case. 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 No., AX18010001, 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 from its position any further. 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.

In adopting the Interim Rate Regulation, the Board retained the discretion to deny interim rate increases when appropriate. N.J.A.C. 14:1-5.12(f). Rate Counsel maintains that allowing the Company to implement Interim Rates in this case would be unjust and unreasonable and seeks an opportunity to present its position to the Board. We therefore ask that the Board use this discretion to establish a procedure for Rate Counsel and other parties to the rate case to be heard, and prevent the Company from implementing provisional rates until or unless they are approved by the Board.

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 here appears to be utilizing the regulation as a means to gain leverage in settlement negotiations rather than as a means to address regulatory lag. 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. Even if the evidentiary hearings were held immediately after the full Test Year actual data was supplied to the other parties (which, as noted, has not yet occurred), it is unlikely that the Initial Decision and Final Board Order could be issued by June 16, the date the Company proposes to implement the Interim 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 and given that the matter cannot be resolved within nine months as a result, the Company should not be allowed to implement Interim Rates and manipulate the procedural timing of the case in this manner.

Second, allowing the Company to implement Interim 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 Interim Rate Regulation, the Company made a unilateral decision to end settlement discussions and proceed to litigation, evidently intending to use the Interim Rate Regulation as a means of gaining leverage and evading the consequences of its decision to litigate. If the Company is permitted to utilize the regulation in this manner, we should expect this tactic to be used more frequently, significantly increasing the number of cases that will not be settled and will have to be litigated. 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)). The Board should clarify that the Interim Rate Regulation is intended to address unusual regulatory lag, not to discourage settlement or provide leverage to one party in settlement discussions.

Furthermore, in reviewing the Interim Rate Regulation and the draft notice provided by the Company to Board Staff, Rate Counsel has identified several problems with the practical implementation of the regulation. For example, the Interim Rate Regulation requires that any interim 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 an interim 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. If the rate that is ultimately deemed “just and reasonable,” is lower than what the Company has implemented provisionally, the refund process will be extremely complicated.¹ This could have disproportionate impacts on municipal budgeting and on certain customers that are already paying more than their fair share. While utilities are required under the regulation to file a plan detailing the utility’s method for providing possible refunds, the mere “notice” provision in the regulation does not establish a sufficient process to ensure that the interim rates and the refund methodology are just and reasonable. 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). Accordingly, the Board must develop a procedure to ensure that even interim rates implemented under its regulation are not arbitrarily and unilaterally set by the utilities without a nexus to fairness.

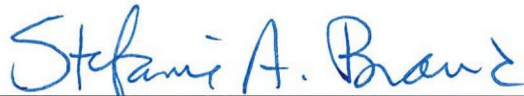
Rate Counsel recognizes that the statute does give the utility the option of implementing a provisional rate at the end of the suspension period, subject to refund and interest. See, Toms River Water Co. v. NJBPU, 82 N.J. 201 (1980). However, the statute also provides that any adjustment of rates during 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. See also, 50 N.J.R. 625 (b), “no provision of these amendments waives the Board’s statutory authority, including its authority to ensure just and reasonable rates.” The Supreme Court has also 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 where, as here, the Company has chosen to file its case so that complete data will only be available more than seven months into the eight month suspension period, and where it has chosen to move forward with provisional rates rather than

¹ The regulation is written in a way that virtually ensures that the interim rates will meet or exceed the final rate that is ultimately approved. The Interim Rate Regulation gives a utility wide latitude in choosing the amount of its proposed increase to implement, but because any under-collection cannot be recovered retroactively, a utility has an incentive to implement an increase that exceeds the amount it believes the Board will eventually grant.

good faith settlement negotiations, the Board must establish appropriate administrative mechanisms to maintain the fairness of the ratemaking process.

For these reasons, the Board should ensure that the Interim Rate Regulation is used judiciously, to address the issues that justified the rule, and not simply to provide a litigation advantage to the utilities. 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 establish a procedure by which the justification for and the amount of the Interim Rate proposed by the Company will be reviewed and direct Board Staff to convene a settlement meeting among all parties.

Respectfully submitted,



STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

SAB:CJ/lg

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

**In the Matter of the Petition of
New Jersey American Water Co.
Inc. for Approval of Increased
Tariff Rates and Charges for
Water and Wastewater Service,
Change in Depreciation Rates and
Other Tariff Modifications**

BPU Docket No. WR17090985

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