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October 18, 2007

<u>Via UPS Overnight Delivery</u>
Stephen W. Townsend
Clerk, Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
P.O. Box 970
Trenton, NJ 08625-0970

Re: In the Matter of the Petition of Atlantic City Electric Company d/b/a Conectiv Power Delivery for Approval of Amendment to its Tariff to Provide for an Increase in Rates for Electric Service
Supreme Court No. 61,685

Dear Mr. Townsend:

Please accept this letter brief as a reply on behalf of the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel"), to the opposition to its Cross Petition for Certification, filed by Atlantic City Electric Company ("Atlantic" or the "Company") and by the Office of the Attorney General on behalf of the New Jersey Board of Public Utilities ("BPU" or the "Board").

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1. LEAC Interest Calculation

In its opposition to Rate Counsel's Cross Petition for Certification, the Company first argues that the Appellate Division properly affirmed the Board's use of a twenty six month period for the purpose of calculating interest on Levelized Energy Adjustment Clause ("LEAC") over-recoveries. The Company argues that "[s]ince the BPU reserved the right to change the time period, the fact that it did so is not a violation of the regulations." *Atlantic's Brief in Opposition*, p.5. Rate Counsel respectfully disagrees.

The Board's authority to modify the LEAC clause period is not without limitation. The regulations provide that a twelve month clause period is in effect, "unless otherwise specified by the Board within the context of an appropriate rate proceeding." N.J.A.C. 14:3-13.4. The Board did not find that the deferred balance proceeding was “an appropriate rate proceeding” and specified no reason for deviating from the twelve month clause period. The Board merely noted that Board Staff agreed with the Company and so did the Board. *Aa120*. This decision and order of the Board is deficient in its findings of fact and in its statement of the reasoning process that led to the result. Stevens v. Board of Trustees of the Public Employees Retirement System, 294 N.J. Super. 643, 654-55 (App. Div. 1996).

The Board decision, in this proceeding, to allow the utility to offset interest due on over-recoveries by interest on under-recoveries from a prior LEAC period violates long standing Board precedent that the utility is not entitled to collect interest on under-recovered LEAC balances. *See, RPA Initial Brief filed in the Appellate Division*, pp. 43-47. This decision also violates express Board policy. In enacting the one-way interest calculation, the Board recognized the huge benefit the LEAC clause granted the utilities, and that to add to this benefit the gift of interest on under-recoveries would be inequitable. Id. at 48. Moreover, the one-way interest clause was established in recognition of the fact that the LEAC projections were developed by the Company and to grant the utility interest on any shortfall due to its own flawed projections was not in the public interest. Id. at 49. The Board’s rejection of decades of LEAC policy and precedent, without reason and without explanation, is arbitrary and capricious and is unfair to Atlantic's ratepayers who have been denied the protections promised when the LEAC was first established.

2. Excess Capacity Charges

In its opposition to Rate Counsel's Cross Petition for Certification on the issue of Atlantic's Excess Capacity purchases, the Company argues, as it has throughout this proceeding, that there is nothing in the record to support a finding that "such costs were either excessive or imprudently incurred." *Atlantic Brief in Opposition*, p. 7. However, it is the Company that has the burden of proof to establish that its actions were reasonable and that expenses were prudently incurred, it is not the burden of Rate Counsel to prove the opposite. In re Public Service Electric and Gas Co., 304 N.J. Super. 247, 265 (App. Div. 1997) certif. den., 152 N.J. 12 (1997); Public Service Coordinated Transport v. State, 5 N.J. 196, 219 (1950). Atlantic has not met this burden.

The Company further claims that Rate Counsel's position that Atlantic should be responsible for excess capacity costs imposes a "financial penalty" on the Company "where there was no showing that the Company had taken any action justifying such penalty." *Atlantic Brief in Opposition*, p. 6. This argument misses the point. Rate Counsel's argument is that the Company should be responsible for the excess capacity costs because there has been no showing that the Company took any action that would justify passing this "financial penalty" onto ratepayers. Atlantic points to no steps taken by the Company to protect its customers from the risk that the sale of its fossil assets would fall through. Atlantic failed to inform the Board in the fall of 2001 that it was making purchasing decisions worth millions of dollars based on the successful sale of its fossil assets. Atlantic failed to seek expedited treatment at the Board. Atlantic failed to inform the Board of the upcoming trigger date for the contract termination clause. Without some showing by Atlantic that its costs were reasonable and were prudently incurred, there is no basis for passing these costs onto the utility's ratepayers.

The Appellate Division erred when it endorsed the Board's finding that "ACE did not act unreasonably in failing to consummate the fossil unit sale." *Slip Op*. p. 53. Ratepayers are entitled to more, more than a finding that the Company's actions were not unreasonable. "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." I/M/O New Jersey Bell, 66 N.J. 476, 495 (1975). Atlantic did not meet this standard and to pass the entire $29 million cost of Atlantic's failure onto ratepayers is unfair and unjustified.

Reply to Opposition of Respondent BPU

The Board argues that Rate Counsel is asking this Court to "second guess" the ALJ, the Board and the Appellate Division regarding their analysis of the record evidence. *BPU Brief in Opposition*, p.1. The Board assures this Court that there is "no need" to review the Appellate Division decision. Id. at 2. The Board then concludes that Rate Counsel's Petition should be denied as "it does not meet any of the grounds for certification under *R.*2:12-4." Id.

In exercising its discretionary authority to decide whether to grant certification to review a final judgment of the Appellate Division, the Supreme Court is governed by the standards set forth in *R*. 2:12-4. Mahony v. Danis, 95 N.J. 50, 51 (1983)(Handler, J., concurring). R. 2:12-4 states that certification will be allowed on final judgments of the Appellate Division "if the interest of justice requires." *See*, Bandel v. Friederich, 122 N.J. 235, 237-238 (1991).

In this case, the interest of justice requires the Court's intervention. The Board characterizes this case as one which "simply involves the application of established Board policies and legal principles to the determination of just and reasonable utility rates." *BPU Brief in Opposition*, p.18. Rate Counsel respectfully disagrees. This case involves the Board's implementation of the State's complex electric restructuring legislation. It does not involve simple rate making but rather addresses the failure of a utility to fully protect its ratepayers in its attempt to divest fossil assets pursuant to EDECA and the failure of the Board to insist that recovery of excess capacity losses should be denied without proof that the utility's actions were those of a reasonable and prudent utility. This case involves questions regarding adherence to long standing Board policy and Board precedent in setting up deferred accounts. This case involves the Board's improper imposition on Atlantic's customers of $30 million in restructuring related costs without the requisite support in the record.

The recent increases in New Jersey's electric rates underscore the significance of this case. The BPU's authority over utility regulation has a significant affect on the economy of this State. Therefore, although deference to the agency's fact finding and administrative expertise is appropriate, the exercise of that deference must be "premised on [the] confidence that there has been a careful consideration of the facts in issue and appropriate findings addressing the critical issues in dispute." Bailey v. Board of Review, 339 N.J. Super. 29, 33 (App. Div. 2001). It is in the public interest that the decisions of this Board are given the "careful and principled consideration of the agency record and findings" ratepayers deserve. I/M/O Eva Taylor, 158 N.J. 644, 657-58 (1999) (citation omitted).

Conclusion

Rate Counsel respectfully submits that the decision of the Appellate Division affirming the Board's use of an interest calculation that violated Board regulation, Board precedent and Board policy is contrary to the public interest and as such should be reversed by this Court. Similarly, the Appellate Division's approval of the Board's decision to pass on 100% of excess capacity costs to Atlantic's ratepayers violates the letter and the spirit of EDECA and therefore is contrary to the public interest.

Respectfully submitted,

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