Agenda Date: 11/10/10
Agenda Item: 9B

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center – Suite 801
Newark, NJ 07102
www.nj.gov/bpu

IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES N.J.A.C. 14:3-8.1 ET SEQ.

ORDER

NON-DOCKETED MATTER

(SERVICE LIST ATTACHED)

BY THE BOARD[1]

This matter was heard by the New Jersey Board of Public Utilities ("Board") at its Agenda meeting on August 18, 2010. The Board subsequently issued an Order on October 22, 2010. At that time, the Board identified 19 commenters who submitted information to the Board regarding the Board's May 3, 2010, Notice seeking comments. The Board subsequently determined that an additional comment was submitted by South Jersey Gas ("SJG") which was not considered by the Board on August 18, 2010. Although SJG's comments are similar to those submitted by other parties, the Board hereby amends its October 22, 2010 order to include the following discussion of SJG's comments.

SJG indicated that it does not believe that the Board has authority to implement rules with a retroactive effect. Nonetheless, SJG believes that the Board may issue an order directing companies to adopt proposals for treatment of extensions from 2005 – 2009. SJG further indicated that the Board should order utilities to apply the growth area formula to all main extensions from 2005 – 2009. SJG indicated that it entered into ~ 500 main extension agreements during the relevant period and ~ 440 of these agreements were in non-growth areas. SJG indicates that its proposed course of action would "blunt the number of developer lawsuits seeking refunds".

DISCUSSION AND FINDINGS:

In reviewing SJG's comments in conjunction with the other information before the Board and comments identified in the August 18, 2010 order, the Board notes that the rules contained an exemption for main extensions resulting from the conversion of a household to natural gas. The Board is mindful of SJG's concern that dissatisfied parties could pursue legal action. The Board notes that reopening concluded matters and contracts will significantly impact the administration of justice, and all utilities will likely seek recovery of such refunds through rate base.[2] The Board evaluated these factors in issuing its October 22, 2010 Order and after reviewing the Comments

[1] Commissioner Elizabeth Randall recused herself in this matter and did not participate in the discussion or vote.
[2] The Board does not here determine the appropriateness of any potential application by utilities for recovery in rate base of any costs associated with this matter.

submitted by all parties HEREBY REAFFIRMS its October 22, 2010 Order for the reasons set forth therein incorporating the above discussion.

Consistent with the Board's October 22, 2010 Order, the Board HEREBY ORDERS all utilities to file updated tariff pages, consistent with the Board's March 24, 2010 Secretary's Letter, the October 22, 2010 Order and this Order, no later than November 21, 2010.

DATED: 11/10/10

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES
N.J.A.C. 14:3-8.1 ET SEQ. – NON-DOCKETED MATTER

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May 27, 2010

VIA FEDERAL EXPRESS

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

Re: In the Matter of the Board's Main Extension Rules at N.J.A.C. 14:3-8.1 et seq.

Dear Secretary Izzo:

We represent South Jersey Gas Company in the above-referenced matter. Enclosed please find an original and ten (10) copies of South Jersey's comments relative to the Board of Public Utilities' main extension regulations and potential retroactive application of main extension regulations.

Respectfully submitted,

COZEN O'CONNOR, PC

Ira G. Megdal

By: Ira G. Megdal

IGM/lbs
Enclosures
cc: Samuel Pignatelli
John Stanziola
Larry Lhulier

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES AT N.J.A.C. 14:3-8.1 ET SEQ. (NON-DOCKETED MATTER)

TO: Kristi Izzo
Secretary of the Board
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

I. INTRODUCTION

On behalf of the South Jersey Gas Company ("South Jersey" or "Company") we are pleased to offer comments relative to the Board of Public Utilities ("Board") main extension regulations and the potential retroactive application of main extension regulations. South Jersey is a local distribution company which provides gas service to approximately 345,000 customers in the seven southern-most counties of New Jersey. The Company appreciates the opportunity to comment on this matter and commends the Board for taking this approach. We believe this open, transparent and collaborative process provides for the valuable exchange of information that will ultimately assist the Board in making this important and difficult regulatory decision. South Jersey welcomes the opportunity to offer the Board a practical, reasonable and equitable solution to the extensive regulatory problems created by the recent decision in *Centex, infra.* The Company believes that the Board has the authority to implement this solution by issuing an Order directing South Jersey to follow its recommended proposal and not retrospectively applying rules to South Jersey, or any other utility company in New Jersey.

By way of Board Notice dated May 3, 2010, the Secretary of the Board solicited comments on whether the recent Appellate Division decision in *Centex, infra,* which invalidated the Board's main extension regulations, should be given retroactive effect. As explained in greater detail below, South Jersey does not believe the Board has the authority to implement retroactive rulemaking under the circumstances presented here. Moreover, any newly adopted rules may not be adopted until the Board satisfies statutory rulemaking provisions under the New Jersey Administrative Procedures Act ("APA"). South Jersey believes, that the Board should initiate a formal rulemaking to be applied prospectively. However the Board has ample authority through the issuance of a Board Order to direct individual companies to implement such Company's proposal for treatment of extension deposits taken between 2005-2009.

II. BACKGROUND AND PROPOSAL

On December 30, 2009, the Superior Court of New Jersey, Appellate Division issued a decision invalidating portions of the Board's regulations related to main extensions, *In re Centex Homes, LLC Petition for Extension of Service*, 411 N.J. Super. 244 (App. Div. 2009). There, the petitioner challenged the Board's refusal to issue an order directing various public utilities to pay for or contribute to the cost of main extensions pursuant to *N.J.S.A.* 48:2-27. The Board denied

the petition on the basis that the requested main extensions did not qualify for public utility contribution under the Board's main extension regulations, *N.J.A.C.* 14:3-8.1 to 8.13. The Appellate Division held that the Board did not have the statutory authority to prohibit public utilities from contributing to extensions to areas that were not designated for growth ("Smart-Growth Areas") on the State Planning Map.

Pursuant to *N.J.S.A.* 48:2-27, the Board may:

> after hearing, upon notice, by order in writing, require any public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and when the financial condition of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Thus, the statute granting the Board authority to order public utilities to extend mains only granted the authority to require a utility to pay for an extension. The statute did not grant the Board the authority to prohibit a utility from voluntarily paying for an extension.

Although the Court was reluctant to invalidate Board regulations, the Appellate Division found that the Board's main extension regulations exceeded the narrowly circumscribed authority delegated pursuant to *N.J.S.A.* 48:2-27. In so doing, the Court invalidated *N.J.A.C.* 14:3-8.2, *N.J.A.C.* 14:3-8. 6 and *N.J.A.C.* 14:3-8.8, thereby eliminating any distinction between smart growth and non-smart growth areas when processing an application for an extension.

On March 24, 2010, the Board's Secretary issued a letter advising that the Board will analyze applications for main extensions made on or after December 30, 2009 pursuant to *N.J.S.A.* 48:2-27 by applying the applicable suggested formulae at *N.J.A.C.* 14:3-8.9 through 8.11. The Board further directed utilities to process an application for an extension as if it were in a Designated Growth Area under *N.J.A.C.* 14:3-8.1, *et seq.*

As a company with approximately seventy-five (75%) of its service territory in non-growth areas, South Jersey's business practices have been significantly impacted by the cost differential contained in the Board's main extension regulations. During the period 2005- 2009, South Jersey entered into approximately five-hundred (500) main extension agreements which required some form of customer payment. Of this amount approximately four-hundred forty (440) agreements were executed in non-smart growth areas. The remaining agreements, approximately sixty (60) in total, were executed in growth areas. All main extension agreements and customer payments were calculated in accordance with the regulations contained in *N.J.A.C.* 14:3-8.1.

From 2005 through 2009 South Jersey collected customer extension deposits for non-smart growth areas, under the now invalidated rules totaling approximately $1.85 million. For these agreements, customers contributed the full cost of the extension. During the same time frame, South Jersey received approximately $140,000 in customer payments for extension agreements in growth areas. The payments were calculated at the ten (10) times revenue test.

All extensions in both growth and non-growth areas have been completed and not one dispute was filed with the Board regarding the prices or costs imposed.

The *Centex* decision has created a unique situation within the utility industry by invalidating financially related rules which were in effect for approximately five (5) years. During this period customers were treated and charged differently for similar work depending upon their geographic location. The geographic price differential had never been a part of the Board's regulations prior to 2005. The suggested formula contained in the Administrative Code prior to 2005 was similar for customers throughout the State. South Jersey believes that a fair and equitable solution to the dilemma presently before the Board, is to simply apply equal treatment to customers for the period in question. From a practical point of view we believe this can only be accomplished by implementing a similar cost measurement for growth and smart growth areas.

It is unrealistic to believe that companies would be able to approach customers in growth areas and obtain payment for extensions completed during 2005 through 2009. We believe the appropriate solution would be to recalculate customer contributions in non-growth areas and refund any money back to customers based upon these calculations.

South Jersey therefore proposes that the Board consider a proposal that all main extensions in Smart-Growth and Non-Smart-Growth areas made during 2005-2009 be given equal treatment. We believe that all extension agreements performed in Non-Smart-Growth areas should be recalculated based upon the same ten (10) times revenue formula with any excess payments refunded to customers. The ten (10) times formula used during this period for extensions to Smart-Growth areas remains in effect today. South Jersey is of the opinion that the Board should consider refunding the deposits previously collected from customers in Non-Smart-Growth areas, after applying the formulae equally.

South Jersey believes that this approach is the most realistic means of resolving this regulatory dilemma. Applying the formulae equally to customers in Smart-Growth and Non-Smart-Growth areas will blunt the number of developer lawsuits seeking refunds from South Jersey. This will avoid unnecessary consumption of judicial and perhaps administrative time.

III. LEGAL ISSUES

In light of the *Centex* decision, the Board must now make a determination regarding how to retrospectively and prospectively effectuate the Appellate Division's ruling. Any such determination made prospectively will have, *inter alia*, general applicability and continuing legal effects on the regulated community as a whole. Thus, the Board must comply with the formal rule-making procedures mandated by the APA. Furthermore, the Board is not authorized to impose any such rulemaking retroactively in the context of the issues presented here. Therefore, any newly promulgated rule must apply prospectively after the Board has completed the rulemaking process.

A. While for Prospective Effect the Board Must Engage in Formal Rulemaking, It May Issue an Order to South Jersey, Allowing Its Proposal

In the exercise of their delegated statutory authority, administrative agencies may act "informally, or formally through rulemaking or adjudication in administrative hearings." *Texter v. Dep't of Human Servs.*, 88 N.J. 376, 383-84, 443 A.2d 178 (1982). Informal agency action is "any determination that is taken without a trial-type hearing, including investigating, publicizing, negotiating, settling, advising, planning, and supervising a regulated industry." *Northwest Covenant Med. Ctr. v. Fishman,* 167 N.J. 123, 136-37, 770 A.2d 233 (2001). Such action "constitutes the bulk of the activity of most administrative agencies." *In re Request for Solid Waste Util. Customer Lists,* 106 N.J. 508, 518, 524 A.2d 386 (1987). South Jersey therefore believes that the Board has ample authority to issue an order authorizing South Jersey to implement its proposed policy.

In contrast, the Administrative Procedures Act ("APA") generally defines an "administrative rule" as any agency statement of general applicability and continuing effect that implements or interprets law or policy." *N.J.S.A.* 52:14B-2(e). "[A]n agency determination can be regarded as a 'rule' when it effects a material change in existing law." *Gonzalez v. New Jersey Property Liability Ins. Guaranty Assoc.*, 412 N.J. Super. 406, 991 A.2d 243 (App. Div. 2010). The APA itself recognizes that an agency action or determination "that implements or interprets law or policy" can constitute an "administrative rule." *N.J.S.A.* 52:14B-2(e). If an agency's action or determination constitutes rulemaking, it must comply with the APA's specific procedures. *St. Barnabas Med. Ctr. v. N.J. Hosp. Rate Setting Comm'n,* 250 N.J. Super. 132, 143, 593 A.2d 806 (App. Div. 1991).

In *Metromedia, Inc. v. Director, Division of Taxation,* 97 N.J. 313, 331-32, 478 A.2d 742 (1984), the Court established criteria for determining whether a particular agency determination should be subject to formal rulemaking. These criteria include when the agency determination:

> (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.

Ibid.

These factors, "either singly or in combination," determine whether agency action amounts to the promulgation of an administrative rule. *Id.* at 332, 478 *A.*2d 742. All six of the *Metromedia* factors need not be present to characterize agency action as rulemaking, and the

factors should not be merely tabulated, but weighed." *In re Request for Solid Waste Util. Customer Lists,* 106 N.J. 508, 518, 524 A.2d 386 (1987). Moreover, the hallmark of an administrative rule is its expression of a general standard of administrative policy with widespread coverage and continuing effect. *Metromedia,* 97 N.J. at 331, 478 A.2d 742.

Generally, a regulation only applies prospectively. *In re Failure by Dep't of Banking & Ins.*, 336 N.J. Super. 253, 267, 764 A.2d 494 (App. Div. 2001). Nevertheless, as the Appellate Division explained in *Seashore Ambulatory Surg. Ctr. v. Dept. of Health,* 288 N.J. Super. 87, 97-98, 671 A.2d 1088 (App. Div. 1996), the prospectivity rule is subject to certain exceptions, not applicable here.

IV. CONCLUSION

The Board may implement new rules of general application prospectively through rulemaking. As to older deposits, it may authorize utility companies to follow its proposal prospectively.

Because South Jersey has incorporated the non-invalidated rules into its tariffs, in accordance with Board policy, it now requests an order allowing it to apply the policy suggested here.

Such an order would allow South Jersey to override the provisions of its tariff which now have been voided by the *Centex* decision. It would provide for equitable treatment retroactive to the period January 1, 2005 through December 31, 2009, in that all customers, regardless of their geographical area would be treated equally. Moreover, it would have the very positive effect of eliminating lawsuits and time consuming administrative litigation.

We thank you for the opportunity to present these views, and hope that you find them instructive.