NEW YORK STATE

PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water New York Inc. for Water Service	:	Case 13-W-0295

PETITION FOR REHEARING AND/OR CLARIFICATION

ON BEHALF OF THE

MUNICIPAL CONSORTIUM

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INTRODUCTION AND SUMMARY

The Commission, on June 26, 2014, granted United Water New York Inc. ("UWNY") a rate increase offering UWNY a one year rate plan with a $9.8 million[1] (13.3%) increase or a two year rate plan with a $7.4 million (10%) rate increase in Rate Year 1 and a $7.4 million (9.1%) rate increase in Rate Year 2. Order Establishing Rates (Issued and Effective June 26, 2014) ("Order"). The Commission awarded this hefty rate relief at the very same time it castigated UWNY for deficient management conduct. Not surprisingly, UWNY

1 $3.5 million of the $9.8 million is due to a revenue shortfall from the Rate Year ending June 30, 2014. Order at page 1.

accepted the two-year option that increased rates starting on July 1, 2014 and then again starting on July 1, 2015.

UWNY has now received two more years of rate increases that are many times the rate of inflation. These rate increases are not justified by efficient and economical management and operations. This is why, *inter alia*, the Municipal Consortium[2] files this Petition for Rehearing and/or Clarification pursuant to 16 NYCRR §3.7.

The MC asserts that the Commission committed an error of law in granting a rate increase despite its explicit recognition that UWNY is not managed in an efficient and economical manner.

The MC asserts that the Commission committed an error of law in not making the revenue requirement associated with 50% of the authorized Management & Service Fees temporary and subject to refund to protect the ratepayers while the M&S audit is underway.

The MC asserts that the Commission erred in not providing a specific financial incentive to reduce Non-Revenue Water ("NRW"). The Order effectively condones UWNY's intolerably high NRW and its

[2] The Commission's Order recognized that "[t]he Municipal Consortium is an ad hoc group composed of municipal entities and schools which are supplied service by United Water. The members are: Rockland County; Rockland County Waste Management Authority; Rockland County Sewer District No. 1; Rockland County Fire Chiefs Association; the Towns of Clarkstown, Haverstraw, Orangetown, Ramapo and Stony Point; the Villages of Grandview-on-Hudson, Haverstraw, Sloatsburg and West Haverstraw; Nyack Union Free School District; and Ramapo Central School District." Order at page 3, footnote 5.

failure to report to the Commission pursuant to the regulations when NRW exceeds 18% as if has for many years.

The MC asserts that the Commission erred in not initiating a prudence investigation of UWNY's failure to seek Economic Obsolescence ("EO") Adjustments to reduce property taxes.

The MC asserts that it and the other Parties were deprived of procedural and substantive due process by the sudden introduction of the revised DeForest Agreement into the Order in this case when there was absolutely no record in this case on which to base a decision. The intervenors asked about the status of the DeForest Agreement several times during the proceeding. Indeed, the MC sought a seat at the negotiating table as early as the procedural conference, but was rebuffed by UWNY. When UWNY filed the revised agreement, it was not incorporated into any of the three pending dockets but was given a separate matter number that never became a case number. Only Rockland County submitted comments. The other Parties because of the below the radar approach taken by UWNY and the Commission were denied an opportunity to comment. Presumably Rockland County knew about the revised Agreement because Rockland County was an original signatory in the 1950s.

The MC also seeks clarification since it believes that all parties should be involved in the implementation of the various directives, e.g., rate design and management studies, that are contained in the Order and not just Staff. This is a perfect

opportunity for UWNY to improve relationships with its customers and local governments as the Commission so correctly observed is necessary.

The Order comes on top of the history of cases where UWNY was awarded the following rate relief:

Effective Date	Amount	Percentage
May 1, 1995	$622,000	(1.5%)
May 1, 1996	$723,000	(1.75%)
May 1, 1997	$743,000	(1.75%)
May 1, 1999	$856,000	(2.00%)
May 1, 2000	$437,000	(1.00%)[3]

Then comes the modern era:

Effective Date	Amount	Percentage
January 1, 2007	$9.77 million	(23.04%)
January 1, 2008	$1.1 million	(2.11%)
January 1, 2009	$0.96 million	(1.78%)[4]
September 1, 2010	$11.2 million	(19.6%)
September 1, 2011	$5.4 million	(7.8%)
September 1, 2012	$3.9 million	(5.25%)[5]

3 Cases 06-W-0131 and 06-W-0244, Order Approving Merger and Adopting Three-Year Rate Plan (Issued and Effective December 14, 2006) at page 2. Parentheses are carried forward and do not represent decreases. All percentages are positive increases in overall revenues.

4 Id. at page 12.

July 1, 2014	$7.4 million	(10.0%)
July 1, 2015	$7.4 million	(9.1%)
Average percentage increase		**(9.8%)**

So in the modern era, the Commission authorized UWNY to increase rates by $47.13 million starting from Total Operating Revenues of $44.6 million for the twelve months ended December 31, 2007.[6] In other words, in eight years, UWNY's revenues will have increased by over 105%.

The MC believes that the management failures recognized by the Commission in the Order should result in a complete denial of all rate relief. The Commission also knows that UWNY is seeking, in Case 13-W-0246, an initial 8.08% surcharge to recover money spent on the Haverstraw Desalination Plant.[7] The capital component of that surcharge alone will reach almost 22% if the $153 million revised forecast for Phase I (2.5 mgd) is spent. Throw in the O&M and it is likely that the desal plant, now shown to be unnecessary[8], will more than double UWNY's rates.

Let's compare that to the urban NY/NJ CPI over this time period:

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5 Case 09-W-0731 – Order Adopting Joint Proposal as Modified and Establishing a Three-Year Rate Plan at page 2.

6 See Exhibit 2 to the Joint Proposal in Cases 06-W-0131 and 06-W-0244.

7 UWNY has voluntarily extended the suspension period in that case to November 30, 2014.

8 See Staff Report on Need, dated May 22, 2014, in Case 13-W-0303.

	CPI Index (all items)	
	(NY – NJ)	Percent Change
2006	603.9	-
2007	621.106	2.998%
2008	644.951	3.839%
2009	642.658	(0.356%)
2010	653.198	1.640%
2011	673.818	3.157%
2012	687.761	2.069%
2013	697.836	1.465%[9]

The extraordinary rate increases UWNY has received in the modern era against the back drop of low single digit inflation makes the case even more compelling that rates should not be increased. What is it about UWNY's management of its business that causes its costs to be multiple times higher than general inflation? Is it simply that it knows that the majority of the costs will be recovered in rates and, therefore, has little incentive to hold down costs as any other business would do? Is it the demand of its ultimate owner for more dividends that were increased by 50% to $6 million from $4 million, before the rate case was filed? Or is it just poor management? This fully litigated rate case, the first in quite some time,

9 http://www.bls.gov/xg_shells/ro2xgcpius1967.htm

suggests strongly that there are equal components of each factor that play a role.

REGULATORY FRAMEWORK

As the Order states:

> The Public Service Law (PSL) assigns us the jurisdiction and responsibility to supervise the production, sale, and distribution of water in New York State.[14] The Commission is specifically called upon to regulate water rates so that all charges are just, reasonable and designed to ensure that the provision of such services will be safe and adequate.[15] The Commission is free to entertain, ignore or assign whatever weight it deems appropriate to factors in setting utility rates, and Commission determinations of rates are not to be set aside unless they are without any rational basis or reasonable support in the record.[16] The Commission must make a revenue requirement allowance that will allow the Company not a guarantee but a reasonable opportunity to recover the cost of funds supplied to it by investors. A revenue allowance so determined will enable UWNY, assuming the Company is managed efficiently, to maintain and support its credit and raise capital at a rate generally equal to that available from other investments in other business undertakings with corresponding risks and uncertainties.[17] At the same time, in carrying out our responsibilities under the PSL, we must strive to protect ratepayers from unreasonable expenses. Overall we must accomplish a reasonable balance of ratepayer and shareholder interests.[18]

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14 PSL §§5(1)(f), 89-a et seq.

15 PSL §89-b.

16 Abrams v. PSC, 67 N.Y.2d 205, 501 N.Y.S.2d 777, 492 N.E.2d 1193 (1986).

17 Federal Power Com. v. Hope Natural Gas Co., 320 U.S. 591 (1944); Bluefield Water Works & Improvement Co. v. PSC, 262 U.S. 679 (1923).

18 Abrams v. PSC, supra.

One key ingredient in the Commission's Regulatory Framework

formulation is “assuming efficient and economical management by the Company.”

Here the record reflects that we have neither efficient nor economical management – as was specifically acknowledged in the Order.

The Order states in the Introduction:

> We are also taking this opportunity to strongly remind UWNY of the need to carefully examine strategies to reduce upward rate pressure and call on the Company to demonstrate that it is pursuing all reasonable management and cost control strategies and address such efforts in its next major rate filing.

That introductory language was informed by the following accurate observations in the Order:

> The commenters unanimously oppose UWNY's rate request, and predominantly argue that the Company has not earned a rate allowance predicated on the assumption that the Company would provide adequate service. More specifically, much of the public commentary was focused on issues also argued by parties and their witnesses in the formal evidentiary proceedings.
>
> Issues in this category and discussed below include UWNY's failure to obtain an economic obsolescence deduction from property taxes; proposals that we require an audit of charges to UWNY from its affiliated service company, M&S Co. Inc.; UWNY's alleged failure to plan its construction program rationally on the basis of cost benefit analyses; views about the proper level of the cost of common equity, i.e., the rate of return UWNY legally must have a reasonable opportunity to earn if it operates efficiently; fire service deficiencies; and the merits of a comprehensive management audit.
>
> Other comments refer to specific incidents where UWNY is alleged to have operated in disregard of customers' best interests. Some of these criticisms involve supposed diversion of water to UWNY's New Jersey affiliate, to the detriment of New York customers' supplies, through two mains which provide an underground route for water from Lake DeForest to New Jersey. These practices were said to have included an instance when a valve at the DeForest Reservoir was left open because a

shutoff valve failed and was not immediately repaired. Another mishap alleged in the comments involves major flooding in West Nyack in the aftermath of Hurricane Irene, which struck in August 2011. Among other things, the flooding extensively damaged residential basements and forced a lengthy closure of the post office. The comments suggest that West Nyack would have weathered Irene successfully, if only UWNY had not inexplicably opened the Lake DeForest floodgates upstream of the Village--inexplicably, in the commenters' view--after the hurricane ended.

A third important area of comment is the general theme that UWNY represents a special case in which typical regulatory procedures do not suffice. A basic argument pervading such comments is that although UWNY's franchise rights and rate allowances should be contingent on the Company's providing safe and adequate service, we should deny the rate increase because this conventional regulatory paradigm has failed. Commenters' more particular assertions in that vein are that UWNY's rate allowances persistently increase faster than inflation; to put UWNY to its proof that its proposed rates are reasonable, we should apply zero-based budgeting; we should not set rates simply by granting the Company half the increase it requests; and we should not condone a procedural environment in which the public must participate in multiple forums in order to be heard regarding the interrelated practices of a single company. Regarding other substantive outcomes of our proceedings, commenters argue that UWNY fails to deliver palatable water; we should hold UWNY accountable for the alleged predations of its affiliates throughout the world; water should be recognized as a public resource rather than a profit center; management and director salaries stand in inequitable contrast with the hardships borne by typical UWNY customers as a consequence of rate increases; those burdens make continued residence in the service territory untenable, thus impairing customers' right to remain in their homes, and sapping the territory's economic vitality by driving out the middle class; a better managed company would have neither a preference nor a need to pursue the Haverstraw desalination project; and UWNY focuses myopically on rate relief, at the expense of more imaginative options such as developing renewable energy resources (especially hydropower) for its internal use and stepping up the Company's conservation goals and strategies.

As we discuss below, some of these visions of a well regulated utility company misconceive or disregard the reasons for rate increases, including both the rationale and the limits of a company's legal entitlement to rates. Nevertheless, much

> of the commentary has important validity in that it serves to call attention to a fundamental breakdown in understanding between the Company and its key stakeholders. As we describe further below, it would be useful for UWNY to undertake a serious examination of its customer and municipal relationships and propose a plan for improving them.

Order at pages 6 to 8.

So given the foregoing accurate statements and observations in the Order, the Municipal Consortium is at a loss to understand how the Commission can justify any rate increase at all for UWNY.

UWNY Bears the Burden to Prove that the Requested Rate Increase is Just and Reasonable

It is axiomatic that the utility bears the burden of proof to justify rate relief. Actually, the requirement that the utility bears the burden of proof is codified in the Commission's regulations at 16 NYCRR §61.1:

> The burden of proof is upon the utility whose rates, rules and regulations relating thereto, charged or proposed to be charged, are being considered.

And that regulation is simply the implementation of the Public Service Law 89-c(10)(h)

> At any hearing involving a rate, the burden of proof to show that the change or proposed change if proposed by the corporation, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the corporation; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it.

When the Commission sets rates it must make sure, and it has been doing so for over a century, that such rates are just and reasonable.

A. Management and Service Company Fees

The MC believes that this issue is so important it is taking the liberty (and asking for the Commission's indulgence) of presenting almost verbatim the argument it made in its Initial Brief submitted on March 4, 2014.

United Water's Management & Services Company ("M&SCo") is a wholly owned subsidiary that provides various services such as administrative, finance and legal to all United Water North American affiliates – both regulated utilities and non-regulated businesses. The M&S fees that UWNY pays to M&SCo "represent 14% of total historic test year O&M expenses." Tr. 1085. Staff found that the $4.272 million adjustment to rate year expense proposed by UWNY to be excessive citing four main reasons:

> *(1) the Company cannot explain or support the substantial increases in M&S fees in recent years; (2) Staff has found a number of charges that were incorrectly included in the historic test year; (3) the allocation of general and administrative costs from the M&S Company unfairly allocates costs to the regulated affiliates;; and (4) the Company's use of wage increases to forecast M&S fees is inappropriate.*

Tr. 1086 to 1087.

Referring to UWNY's

> *response to IR Staff-13 (AAE-4), M&S fees charged to UWNY increased 13% from 2011-2012 and 15% from 2012-2013, while inflation during these years was 2.1% and 1.7% respectively. Additionally, in the joint proposal from the Company's last rate case, Case 09-W-0731, the Company was allowed $2.919 million for the rate year ending August 31, 2013, which is $1.0 million, or 35% less than what was charged in the historic test year.*

Q. Was the Company able to explain these increases?

A. No, despite numerous Staff IRs, the Company has been unable to provide an explanation.

Tr. 1087. Furthermore, when Staff delved into individual charges, the following were found:

1. *double charge for National Association of Water Company dues. Tr. 1093.*
2. *Costs incurred prior to the historic test year but not normalized out of the cost of service. Tr. 1094.*
3. *Costs incurred for individual affiliates that were charged to all affiliates, e.g., hotel charges in Idaho and Massachusetts and a "breakfast with New Jersey Commissioners." Tr. 1095*
4. *Cost for a "wives breakfast". Tr. 1096.*
5. *Cost for a restaurant of $2,340 that included $996 in alcohol. Tr. 1096.*

As Staff testified, "Ratepayers should not have to bear the cost of alcoholic drinks." Id. All of the foregoing charges that were incurred for specific affiliates should not be charged to all of the affiliates. Staff noted that the M&S Services Agreement requires that charges "shall be based on actual time spent". Tr. 1095. Staff further went on to note:

> *Nowhere in the M&S agreement, or in the Company's accounting policies, does it state that senior level employees should just charge their time and expenses across all entities.*

Tr. 1096. Staff then proceeded to completely debunk the "reasons" UWNY provided to rationalize the huge M&S expenses. See Tr. 1096 to

1100.

Finally, Staff proposed a conservative adjustment to reduce M&S fess by $1.467 million. The key to Staff's adjustment is the use of the rate year allowance from the prior JP, rather than the unsubstantiated and bloated costs in the historic test year. Tr. 1101. However, Staff did not stop with its M&S adjustment, but offered some comments and observations. This includes the lack of transparency of the allocated costs. Staff explained:

> *There are three types of costs that are allocated from the M&S company: payroll, fringe benefits and other departmental costs. Payroll is charged to various affiliates based on work that the employee performed during that pay period and fringe benefits are then loaded onto these payroll allocations. Departmental costs are totaled and then allocated to various affiliates based on the amount of payroll allocated to each one during the time period. This makes it extremely difficult, and in some cases perhaps impossible, to determine how any particular invoice was actually charged to affiliates.*

Tr. 1102 to 1103 (emphasis added). If it is impossible for Staff after a concerted effort to determine how a particular invoice was charged, then it is obvious such charges should not be included in rates. Said another way, the Company has failed to satisfy its burden of proof.

Staff also observed that with respect to M&S fees, UWNY lacks oversight of these costs.

> *As previously discussed, the Company seems completely unaware of what is actually causing these costs to increase. Considering that the M&S fees represent almost 15% of total O&M expense, this lack of understanding is quite worrisome. Additionally, from my very limited review of the charges, I found a number of examples of erroneous charges, further supporting the notion that*

there is a lack of oversight of these costs.

Tr. 1103. Again, this is a failure of UWNY to carry its burden of proof. Rates cannot be set based on such unproven charges.

Finally, Staff observed that the Cost Allocation Manual is inadequate in that it provides only "a very general description of the allocation process. The lack of a comprehensive document clearly explaining the various allocation processes is needed to ensure accuracy and consistency." Tr. 1104.

If as Staff observes the allocation process is not-transparent, not properly overseen and without a comprehensive policy guide, then how can it be said that these charges support just and reasonable rates? On the contrary, these observations support just the opposite conclusion — these charges do not provide support for just and reasonable rates. UWNY has not borne its burden of proof with respect to M&S charges.

Staff then makes six recommendations that the MC fully supports.

> *(1) Develop a cost accounting manual that explicitly and thoroughly explains the allocation process and how all types of charges are accounted for; (2) Improve transparency by ensuring that transactions can be traced from incurrence at the M&S Company through the allocation process and to a bill for UWNY; (3) Retain documentation for each non-payroll transaction supporting its basis of allocation; (4) Modify the three factor formula to include more appropriate, unbiased data that eliminates cross subsidization; (5) Complete benchmarking studies to ensure that buying services from the M&S company is the most cost effective alternative for UWNY; and (6) Periodically analyze charges to UWNY to be able to explain increases in charges with specific reference to type of cost and/or department charged.*

Tr. 1104 – 1105.

The MC would like to add a seventh recommendation -- in the interim, that 50% of all M&S charges be translated into revenues and be made temporary and subject to refund. This amounts to approximately $1.4 million that should be made temporary and subject to refund. The entire M&S constellation of charges, both direct and allocated need to be audited based on the problems detected by Staff's random audit in this rate case of merely a handful of expenses. Without such a procedure, the ratepayers are forced to pay for unproven, undocumented costs and UWNY will have, in effect, been rewarded for its managerial failure in this area.

This approach is exactly what the Commission did with National Grid's Niagara Mohawk Power Corporation in Case 10-E-0050. There the Commission was confronted with all sorts of allocation errors from the service company. So the Commission made $50 million subject to refund until it could get to the bottom of what turned out to be a very complex and time-consuming accounting project. This is exactly what should be done here with UWNY in order to protect the ratepayers.

The Order rejects the recommendation of both the MC and UIU to set rates temporary and subject to refund on the grounds that using the historic level (from the last case) adjusted for inflation of M&S charges "provides ratepayers with adequate protection pending the outcome of the comprehensive audit." Order at page 17. This statement is in error since it assumes *a priori* that the historic

level of M&S charges is appropriate. Given Staff's findings as described above, there should be no such benefit of the doubt given at the expense of the ratepayers. If after a comprehensive audit it is found that the historic level is appropriate then UWNY loses nothing. If, however, as suspected there are many inappropriate charges[10], the ratepayers are not protected since the doctrine against retroactive ratemaking would bar refunds of those inappropriate charges. And as the Commission observed an expenditure is not reasonable simply because it was made.[11] Making the rates temporary and subject to refund is administratively easy and will afford ratepayers, complete, not just "adequate" protection. The Order adopted temporary rates in anticipation of the potential applicability of the Qualified New York Manufactures' tax credit. Order at page 26. It should do so for the M&S fees awaiting the results of the audit.

B. Non-Revenue Water

The Order tolerates and, therefore, condones UWNY unacceptable level of NRW. While the MC appreciates the requirement that UWNY must now include a cost/benefit analysis[12], this does nothing to

10 Or that it was imprudent to use the M&S Company when local services could have been obtained.

11 "The fact that UWNY may be incurring a specific expense level does not necessarily make that expense level reasonable, particularly where the expenses originate in non-arms-length transaction with an affiliate." Order at page 16.

12 The MC continues to urge that UWNY expand the use of cost/benefit analyses in all of its business decisions involving

incent UWNY to really tackle the problem. There should be an incentive mechanism as urged by Ramapo Town Supervisor Hon. Christopher St. Lawrence that would penalize UWNR for not achieving specific NRW goals.

The Order fails to see the connection between conservation measures and NRW.

> Moreover, unless a party presents evidence to the contrary in future cases, we do not believe subsidization of customers' conservation measures would be more cost effective than advertising, because the unsubsidized cost of such plumbing fixtures is not substantial enough to significantly deter their use.

Order at 38. First, there is no record support for the Commission's "belief" that "unsubsidized cost of plumbing fixtures is not substantial enough to significantly deter their use."[13] Second, the Order misses the point that supply side measures should come last after exhausting all demand side opportunities. The MC believes that conservation programs should be explored that utilize UWNY investment (on which UWNY should be authorized to earn a return) in pursuit of upgrading customers' water fixtures and appliances. This is what is currently being explored in the REV proceeding, Case 14-M-0101, for electric and gas utilities. There is no reason such strategies would not work (or at least be considered) for water utilities.

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significant capital and O&M projects.

13 While one may concede for the sake of argument that the cost of the plumbing fixture "is not substantial enough to significantly deter their use," that cannot be said for the cost of the plumber!

C. Economic Obsolescence

UIU recommended that a prudence investigation be initiated over UWNY's continuing historic failure (until this case) to file for Economic Obsolescence ("EO") awards. Even when UWNY became aware of the possibility of an EO award, it did not make the filing correctly and was able to obtain only less than one-half of what it was entitled to. This failure has caused UWNY ratepayers to pay substantially higher rates for many years.

> UIU's exception to the RD's failure to recommend a prudence investigation is denied. The record does not include sufficient information regarding the Company's eligibility for awards in past years and the potential financial impact of such awards to justify instituting an investigation at this time. We believe that our imputed economic obsolescence level, coupled with our acceptance of the annual reporting requirement recommended by the Judges, provides adequate protection for ratepayers going forward. The reports shall be filed with the Commission's Secretary for inclusion in this case to permit access by all parties.

Order at 31. The Order's conclusion that the record does not contain sufficient information regarding EO awards in past years is not entirely accurate. The Office of Real Property Tax Services has a template that, according to Staff, almost anyone can use given the utility's annual reports. So it would not have taken an Herculean effort to produce that information. Nevertheless, it is only appropriate that this gross negligence by investigated, as UIU recommends, to protect the ratepayers.

D. Lake DeForest Agreement

From out of nowhere appears a section in the Order at page 43

entitled “Lake DeForest Agreement”. The Order notes that the Lake DeForest Reservoir Cost Allocation Agreement (“Deforest Agreement”) was filed with the Commission on February 11, 2014. While the subject of much discussion in the various cases involving UWNY, there is nothing in the record of this case discussing the merits of that now thrice revised agreement. The Order notes the revised Deforest Agreement was also submitted to the New Jersey Board of Public Utilities for its approval. But the Order does not say whether or not the New Jersey Board approved that revised Agreement.[14]

The Order states at page 45

> We view the Amendment Agreement as providing UWNY with greater operational flexibility, in that it will be able to retain additional water resources for Rockland County's UWNY ratepayers with no detriment to UWNJ or its customers. We also did not find during our review of the calculation and allocation of the AOC and Amendment Agreement, any inherent defects or inequities in the agreement. Consequently, and based on our review, we accept the Amendment Agreement and recognize the approximately $1.7 million in annual revenues provided by UWNJ to UWNY, under the Agreement Amendment cost sharing protocols, as Interdepartmental revenues.

And then the Order chides the Company for not better educating its ratepayers:

> As described elsewhere in this order, it is incumbent upon the Company to better educate its ratepayers regarding this issue and others and to attempt to restore their trust that the Company is operating with the welfare of its customers as its first and foremost objective.

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14 It is the MC’s understanding that both the Commission and the New Jersey Board of Public Utilities must approve the agreement before it can become effective.

Order at 46. This statement is ironic in that the Commission gave the Parties no notice that the DeForest Agreement would be considered in this rate case. There is no evidence on the record demonstrating that the allocation of the Annual Operating Charge did not have any inherent defects or inequities.

Is this the new rate making standard that this Commission now applies – no inherent defects or inequities? What happened to just and reasonable? The MC finds that this "no procedure" procedure violates elementary notions of both procedural and substantive due process.

As the Supreme Court stated in Mullane v. Central Hanover Trust, 339 US 306 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean, 234 U.S. 385; Priest v. Las Vegas,232 U.S. 604; Roller v. Holly, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions [*315] are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." [***874] American Land Co. v. Zeiss, 219 U.S. 47, 67; and see Blinn v. Nelson, 222 U.S. 1, 7. (emphasis added).

Despite numerous comments by intervenors and citizens regarding the passing flows of the DeForest Reservoir, the broken valve and the

general controversy where most believe Rockland County is being short changed in favor of United Water's New Jersey customers, the revised Agreement was reviewed by the Commission with only one comment, as can be determined from a review of the Commission's website using the matter number 14-00290. And that comment by Rockland County was not even mentioned, no less addressed in the Order.

In the Order Denying Petition for Rehearing in Case 96-E-0898, In the Matter of Rochester Gas and Electric Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12 (Issued and Effective November 8, 2001) the Commission stated:

> The Supreme Court has held that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands."[20] The determination of whether administrative procedures provided are constitutionally sufficient requires analysis of the governmental and private interests that are affected.[21] In cases arising as a result of actions by New York State agencies, the Court of Appeals and the Second Circuit have consistently applied the three-step balancing test for procedural due process used by the United States Supreme Court in Mathews v. Eldridge.[22] First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[23]
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> ---
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> 20 Mathews v. Eldridge, 424 US 319, 334 (1976) citing Cafeteria Workers v. McElroy, 367 U.S.886,895 (1961) and Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
> 21 Id.
> 22 Id. At 335.
> 23 Id.

Here the private interest[15] that was affected by official action is clear. The risk of an erroneous deprivation of that interest through the lack of notice is also clear. The value of an additional notice is abundant. There is virtually no fiscal or administrative burden to the Commission to include a notice in the rate case to the interested parties that it sought comment on the revised DeForest Agreement.

Such notice would not only comport with constitutional requirements, it also is congruent with the Commission's mission of "Ensuring Safe, Reliable Service and Just, Reasonable Rates since 1907". "Rate cases are a primary instrument of government regulation" of utilities according to the Commission's website. To deny the Parties and customers proper notice of the impact of the revised Agreement on the proposed rate increase is not only constitutionally infirm it violates established principles of transparency that this Commission has worked so hard and consistently to establish.

The New York Court of Appeals has also opined on the importance of notice:

> The determination as to what process is constitutionally due does not depend upon a mechanistic or rigid analysis (Mullane v Central Hanover Bank & Trust Co., 339 US 306). Instead, [HN1] the State's interests and administrative burdens

15 A property right in water rates is not being asserted here. Rather customers have an interest in what they must pay for and the quality of that water service.

> are balanced against the need to safeguard the individual's interest by requiring actual notice of the specific government action (id.,at 314; Mathews v Eldridge, 424 US 319, 334-335).
>
> In Matter of McCann v. Scaduto (71 NY 2d 164,176), for example, we held that "[HN2] where the interest of a property owner will be substantially affected by an act of government, and where the owner's name and address are known, due process requires that actual notice be given"(see also, Mennonite Bd. Of Missions v Adams, 462 US 791; Matter of ISCA Enters. v City of New York, 77 NY2d 688; Congregation Yetev Lev D'Satmar v County of Sullivan,59 NY2d 418). We see no reason why that rationale should be limited to tax sale or condemnation cases.
>
> In this case, like McCann, the interest of a property owner was substantially affected by government action, and the owner's name and address were known. Although the Town of Dover complied with Town Law § 239, which provides only for notice by publication, compliance with this statute under the circumstances presented was inadequate to satisfy due process requirements.

Garden Homes Woodlands Company v. Town of Dover, 95 NY 2d 516, 594-595; 742 N.E. 2d 79, 80-81 (2000). Here we have active parties representing consumer interests that had already expressed concerns about, and interest in, the DeForest Agreement.

A constitutional mistake at both the federal and state levels was made in this case and it must be corrected. The Commission should provide the parties with 30 days to submit comments on the revised DeForest Agreement, before rendering a final decision.

E. Implementation of Commission Directives Should Include All Parties Participation, Not Just Staff

In an effort to improve the performance of UWNY, the Order includes a number of directives:

Ordering Paragraph 6 requires UWNY “to conduct a comprehensive

examination of its management practices" that includes an audit of the M&S fees. UWNY is further directed to coordinate the scope of the examination with Staff. The MC respectfully seeks clarification that all parties should be afforded an opportunity to participate in the scoping of the comprehensive management and M&S audits.

Ordering Paragraph 7 directs UWNY to submit to Staff within 90 days of the Order the "the cost/benefit measurement criteria for any planned new programs to reduce non-revenue water." The MC respectfully seeks clarification that all parties should receive a copy of such criteria and be given an opportunity to provide comments to Staff.

Ordering Paragraph 8 requires UWNY to file within six months a comprehensive class revenue allocation and rate design study. The MC respectfully requests that such study be provided to all Parties.

Ordering Paragraph 9 requires UWNY to submit a report within 60 days of the adoption of regulations implementing the New York Manufacturer tax credits. The MC respectfully requests that report should be provided to the parties and the parties should be made aware of any proceedings that would make such potential tax reduction a permanent part of rates.

Ordering Paragraph 10 requires UWNY to submit a written plan to improve public communications and relationships with stakeholders. The MC respectfully requests that such plan be provide to all Parties with an opportunity to comment.

The MC believes that such clarifications will begin the long process of establishing a new relationship between UWNY and its customers. As a result of the misleading propaganda campaign for the desal plant, the annual multi times the inflation rate increases, the confusing triad of cases along with the Lake DeForest matter, the public perception of UWNY is at an historic low. Active public consideration of the creation of a Rockland County Water Authority has just begun in response. It is essential that the public have trust in the provider of essential services. MC's requested clarification of the Order would be a good first.

CONCLUSION

The regulatory framework cited in the Order explicitly "assumes efficient and economical management" of the company before rate relief can be granted. Here we have a litany of examples acknowledged by the Commission showing that UWNY is not run efficiently or economically. UWNY has now received and will be receiving eight straight years of rate increases averaging 9.8% – many times the rate of inflation. The Order's language critical of UWNY is welcome, but money and actions speak louder than words. The Commission should, at the very least, make one-half of the revenue associated with M&S fees temporary and subject to refund to protect the ratepayers. Otherwise the results of the M&S audit could be without a remedy. The Commission should also initiate a prudence investigation over UWNY's failure to file for EO awards.

Finally, the Commission should clarify the Order that the various directives, including the development of the scope of the management and M&S audits, communications plan and conservation rate designs, should include all parties, not just Staff.

Respectfully submitted,

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