

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

<u>Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water New York Inc. for Water Service</u>	:	Case 13-W-0295
<u>Verified Petition of United Water New York Inc. for Implementation of a Long-Term Water Supply Surcharge, And Related Tariff Amendment</u>	:	Case 13-W-0246
<u>Proceeding on Motion of the Commission to Examine United Water New York Inc.'s Development of a New Long-Term Water Supply Source</u>	:	Case 13-W-0303
<u>Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water New Rochelle Inc. for Water Service</u>	:	Case 13-W-0539
<u>Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water Westchester Inc. for Water Service</u>	:	Case 13-W-0564
<u>Verified Joint Petition of United Water Westchester Inc. and United Water New Rochelle Inc. for Approval, Pursuant to New York State Public Service Law Sections 108 and 89-h, to Merge and Become United Water Westchester Inc.</u>	:	Case 14-W-0006

RESPONSE OF UNITED WATER NEW YORK INC., UNITED WATER NEW ROCHELLE INC., AND UNITED WATER WESTCHESTER INC. TO THE FILINGS OF THE MUNICIPAL CONSORTIUM AND THE TOWN OF RAMAPO

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I. INTRODUCTION

Pursuant to 16 NYCRR §§ 3.6(d) and 3.7(c), United Water New York Inc. (“UWNY”), United Water Westchester Inc., and United Water New Rochelle Inc. (collectively, the “Companies”) hereby submit this response to the following submissions: a) Supplement to Petition for Rehearing and/or Clarification on Behalf of the Municipal Consortium filed October 10, 2014, in Case 13-W-0295¹ (“Supplement to Rehearing Petition”); b) the Supplement to Motion to Dismiss the Verified Petition of UWNY for a Long Term Water Supply Surcharge or in the Alternative for a Prudence Investigation filed October 10, 2014, by the Town of Ramapo in Case 13-W-0246² (“Motion to Dismiss Supplement”); c) the Supplement to Motion for a Prudence Investigation on Behalf of the Town of Ramapo filed October 10, 2014, in Case 13-W-0303³ (“Supplement to Motion to Investigate”);⁴ and d) the Supplement to Municipal Consortium’s Opposition to the Joint Proposal dated October 10, 2014, in Cases 13-W-0539, 13-W-0564 and 14-W-0006⁵ (“Supplement to Opposition”).⁶

Although the Supplemental Filings were filed in separate dockets and were not all filed by the same party, they share common counsel and are virtually identical with respect to their

¹ Case 13-W-0295 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water New York Inc. for Water Service (“UWNY Rate Case”).

² Case 13-W-0246 – Verified Petition of United Water New York Inc. for Implementation of a Long-Term Water Supply Surcharge And Related Tariff Amendment.

³ Case 13-W-0303 – Proceeding on Motion of the Commission to Examine United Water New York Inc.’s Development of a New Long-Term Water Supply Source.

⁴ Although counsel for the Municipal Consortium served the parties and the Secretary to the New York State Public Service Commission (“Commission”), the Supplement to Motion to Investigate was not posted to the Commission’s Document and Matter Management System.

⁵ Cases 13-W-0539, 13-W-0564 and 14-W-0006 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water New Rochelle Inc. and United Water Westchester Inc. for Water Service; Verified Joint Petition of United Water Westchester Inc. and United Water New Rochelle Inc. for Approval, Pursuant to New York State Public Service Law Sections 108 and 89-h, to Merge and Become United Water Westchester Inc.

⁶ The four supplemental filings will be collectively referred to herein as the “Supplemental Filings.”

arguments and requested relief. Accordingly, for administrative efficiency, the Companies submit this single joint response.

For the reasons set forth below, the Supplemental Filings are not authorized by either the New York State Public Service Law (“PSL”) or the Commission’s regulations. The Supplemental Filings are also devoid of substantive merit in that they rely exclusively on unattributed media speculation and innuendo – as opposed to record evidence – and the Supplemental Filings never demonstrate how or why the alleged events meet the applicable statutory or regulatory standards governing the motions. Accordingly, the Supplemental Filings are procedurally and substantively defective and the Commission should dismiss them in their entirety.

II. DISCUSSION

This flurry of wholly unauthorized submissions are an attempt by the Municipal Consortium⁷ (“MC”) and the Town of Ramapo to reopen several of the Companies’ proceedings based on a recent change in the Companies’ personnel and highly speculative blog posts and local media reports surrounding that personnel change. The MC and the Town of Ramapo’s pleadings are replete with baseless accusations and statements of opinion that are not supported by the record in any of the underlying proceedings.⁸ Rather than focus on record evidence, the latest “scattershot” filings are based solely on repetition of an unattributed blog post and media

⁷ The Companies recognize that the municipalities that comprise the Municipal Consortium in Case 13-W-0295 are different than the municipalities that comprise the Municipal Consortium in Cases 13-W-0539, 13-W-0564 and 14-W-0006. However, for administrative ease, both Municipal Consortia (which are represented by the same counsel) will be referred to herein as “MC.”

⁸ Despite seven days of evidentiary hearings, which produced no such evidence, the Town of Ramapo and the MC once again set forth unsupported statements regarding past Company communications regarding the need for the desalination plant and for a long-term water supply project that the Town of “Ramapo believes contain knowingly incorrect and unsupported information” (Motion to Dismiss Supplement at 3; Supplement to Motion to Investigate at 3) and that “the MC believes contain knowingly incorrect and unsupported information” (Supplement to Rehearing Petition at 3). The Town of Ramapo and the MC have not (and cannot) produce any evidence in support of these groundless accusations.

speculation and therefore rest primarily, if not exclusively, on mere innuendo. A careful review of the Supplemental Filings indicates that they are singularly without merit and are procedurally deficient.

In executing normal internal detective controls related to UWNY's nine-month short rate year, 9/1/13 – 5/31/14, the Companies noted a difference between UWNY's deferred balance and its proposed revenue reconciliation surcharge filing. A subsequent Company investigation revealed that revenues for the Companies were overstated in 2010 and 2011. This overstatement of revenues was reported to the Commission and the Department of Public Service.

Despite the misuse of the term "misappropriation" in the Supplemental Filings and the unattributed blog post on which the Supplemental Filings are primarily based, the Companies' internal investigation of the aforementioned accounting irregularity did not find any evidence or allegations of funds being misappropriated – and the Companies have been forthright and clear in responding to Department of Public Service Staff ("Staff") inquiries on the subject. The Companies have retained PricewaterhouseCoopers LLP ("PwC") to evaluate the Companies' conclusion that the misstatements of revenues did not impact rates for the Companies' customers by reviewing the deferred balance/surcharge applications submitted to the Commission from 2003 up to and including the Commission's July 20, 2010 Order Adopting Joint Proposal as Modified and Establishing a Three-Year Rate Plan in Case 09-W-0731.⁹ PwC has commenced this evaluation, the cost of which will be paid by the Companies' shareholders, not the Companies' customers. Staff has been very actively engaged on this issue, and the Companies will provide the results of the PwC evaluation to Staff when it is completed.

⁹ Case 09-W-0731 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of United Water New York Inc. for Water Service.

A. The Supplement to Rehearing Petition Is Untimely (Case 13-W-0295)

The Supplement to Rehearing Petition is untimely and must be denied. PSL § 22 expressly provides that an application for rehearing of a Commission order “must be made within thirty days after the service of such order, unless the commission for good cause shown shall otherwise direct.”¹⁰ Similarly, pursuant to the Commission’s regulations, requests for rehearing must be made “within 30 days of service of the order.”¹¹ The most recent order in Case 13-W-0295 was issued on June 26, 2014.¹² Accordingly, petitions for rehearing of that order were due within 30 days of its issuance – or July 28, 2014 – a deadline that has long passed.

Neither the Commission’s regulations nor the PSL authorize parties to supplement petitions for rehearing. In addition, the Supplement to Rehearing Petition fails to establish a procedural or substantive nexus to the MC’s prior rehearing petition¹³ and does not otherwise comply with the requirements of 16 NYCRR § 3.7. Furthermore, neither PSL § 22 nor the Commission’s regulations make any provision for the Commission to consider supplemental petitions filed after the date for seeking rehearing of the underlying order has expired. To permit such filings would directly and impermissibly undermine the intent of the PSL and the Commission’s regulations which carefully prescribe and limit when rehearing may be sought.

The Supplement to Rehearing Petition (like the other Supplemental Filings) requests that the Commission “direct UWNY to show cause why the Commission should not institute a prudence proceeding and to make 20% of UWNY current revenues temporary and subject to

¹⁰ N.Y. Pub. Serv. Law § 22 (McKinney 2011).

¹¹ 16 NYCRR § 3.7(a).

¹² Case 13-W-0295, Order Establishing Rates (June 26, 2014).

¹³ Case 13-W-0295, Petition for Rehearing and/or Clarification on Behalf of the Municipal Consortium (July 28, 2014).

refund while an independent auditor, unaffiliated with UWNY, undertakes a complete review of the company's books."¹⁴ This is similar to a request the MC made in the UWNY Rate Case, which was rejected by the Commission.¹⁵ Having been properly denied under the Commission's previous deliberative process, the pleading at issue can only be viewed as an impermissible attempt to obtain rehearing of the Commission's prior determination in clear violation of the Commission's procedural rules and the PSL.

Even assuming *arguendo* that the time for rehearing has not passed (which it has), the pleading falls far short of the standard necessary to support rehearing. The Commission's regulations state that "[r]ehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. A petition for rehearing shall separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing."¹⁶

The MC does not attempt to identify any specific error of law or fact or new circumstance warranting a different determination as required by 16 NYCRR §3.7(b). That the Supplement to Rehearing Petition includes discussion of a purported recent event involving three Company employees does not meet the error of law or fact or new circumstances threshold sufficient to support rehearing. While the MC pleading discusses certain media coverage, it makes no reference to 16 NYCRR § 3.7(b) and fails to demonstrate how or why the alleged events described meet the standards set forth in the Commission regulations or PSL § 22.

¹⁴ Supplemental to Rehearing Petition at 3.

¹⁵ Case 13-W-0295, Order Establishing Rates at 17 (June 26, 2014).

¹⁶ 16 NYCRR § 3.7(b).

As shown above, the Supplement to Rehearing Petition was unauthorized and untimely filed and, as a result, the Commission should disregard it.¹⁷ Even assuming *arguendo* that the pleading was timely filed, it fails to meet the requisite substantive standard for rehearing.

B. The Motion to Dismiss Supplement Is Untimely and Improper (Case 13-W-0246)

The Motion to Dismiss Supplement is procedurally improper because the Commission's regulations do not authorize parties to "supplement" motions. Moreover, in its unauthorized Motion to Dismiss Supplement, the Town of Ramapo conveniently ignores the fact that the pleading is procedurally infirm because the underlying Motion to Dismiss the Verified Petition of UWNY for a Long Term Water Supply Surcharge or in the Alternative for a Prudence Investigation ("Motion to Dismiss") was already denied on March 6, 2014 by the Administrative Law Judge ("ALJ") assigned to Case 13-W-0246.¹⁸ The deadline to file a request for interlocutory review of that ruling expired long ago on March 21, 2014.¹⁹ Merely filing a self-styled "supplement" does not extend the time for interlocutory review of an adverse ALJ ruling. Accordingly, the Motion to Dismiss Supplement must be denied.

Moreover, the Town of Ramapo previously filed an interlocutory appeal of the Ruling on Motion and Scope which was denied by the Commission.²⁰ Thus, the Town of Ramapo's attempt, via the Motion to Dismiss Supplement, to turn Case 13-W-0246 into a prudence-type investigation has not only been denied by the ALJ but also by the Commission. Specifically, in its Order Denying Interlocutory Appeal, the Commission expressly stated that:

¹⁷ See, e.g., Powerline Coal., Inc. v. Pub. Serv. Comm'n, 674 N.Y.S.2d 458, 461 (3d Dep't 1998) (18-month delay in filing petition for rehearing); MCI Telecomm. Corp. v. Pub. Serv. Comm'n, 659 N.Y.S.2d 563, 568 (3d Dep't 1997) (petition filed six weeks after order time-barred); Village of East Williston v. Pub. Serv. Comm'n, 545 N.Y.S.2d 750 (2d Dep't 1989) (petition filed more than three months after order considered untimely).

¹⁸ Case 13-W-0246, Ruling on Motion and Scope (Mar. 6, 2014).

¹⁹ See 16 NYCRR § 4.7(b) ("Any request for interlocutory review must be filed within 15 days of the issuance of the ruling to which it pertains.").

²⁰ Case 13-W-0246, Order Denying Interlocutory Appeal (May 8, 2014).

issues of need (and hence prudence) are not to be resolved in this Surcharge Case. It would have been impractical to turn this statutorily-required hearing on the proposed surcharge into a prudence proceeding; it is impossible to do so at this time. Denial of the instant request to expand this proceeding on a surcharge for recovery of carrying costs related to development expenditures, to address prudence issues related to UWNYS need generally and the desalination plant in particular, does not mean that prudence cannot be evaluated at a later point, possibly when the issue of cost recovery is decided.²¹

At the same time, the Commission further held as follows:

...any determination of imprudence with respect to the development costs can best be made after a determination of need in Case 13-W-0303 [the Continuing Need Proceeding]. Once that determination is made the Commission and the parties are in a much better position to evaluate prudence. Absent a determination of need, it is an inefficient use of resources to attempt to evaluate UWNYS prudence in dealing with issues of need and whether to construct the desalination plant...The Town's effort to use this proceeding to make the prima facie showing of imprudence is therefore not appropriate at this time.²²

Had the Town of Ramapo objected to this Commission order it could have sought rehearing or other appeal on a timely basis. It did not do so. In fact, no party availed itself of that opportunity. The Motion to Dismiss Supplement can thus be viewed, at best, as an untimely petition for rehearing.

The Motion to Dismiss Supplement can also be viewed as an attempt by the Town of Ramapo to re-litigate and reverse the Commission's prior pronouncements concerning the time and forum for prudence reviews. These prior determinations are the law of the case and cannot be overlooked simply because a party (e.g., the Town of Ramapo) prefers a different result. The law of the case doctrine is designed to prevent a party from attempting to re-litigate previously

²¹ Case 13-W-0246, Order Denying Interlocutory Appeal at 3 (May 8, 2014).

²² Id. at 6-7.

decided issues²³ absent a showing of “extraordinary circumstances,” such as subsequent evidence affecting the prior determination or a change of law.²⁴

Here, the Commission previously held in the Order Denying Interlocutory Appeal that the prudence of UWNYS development of the Long-Term Major Water Supply Project could not be properly evaluated until after the Commission made a determination in Case 13-W-0303 regarding the continuing need for the Project. That prior determination represents the law of this case and under the law of the case doctrine that order is binding on all the parties to Case 13-W-0246 – including the Town of Ramapo – and on the Commission itself.²⁵

The unattributed blog post identified by the Town of Ramapo does not constitute the type of “extraordinary circumstances” cited in Fox (e.g., subsequent evidence affecting the prior determination or a change of law) that would warrant a re-examination. First, there has been no change in law that would represent an extraordinary circumstance. Second, citation to a blog post or newspaper article portraying events from an unnamed source does not constitute “evidence affecting the prior determination.”²⁶

Based on the foregoing, the Town of Ramapo’s attempt to reopen its Motion to Dismiss through the Motion to Dismiss Supplement must be rejected as both an untimely rehearing petition and a violation of the law of the case doctrine.

C. The Supplement to Motion to Investigate is Premature (Case 13-W-0303)

As noted above, the Commission’s regulations do not permit a party to “supplement” previously filed motions. Even if the Commission’s regulations allowed for such “supplements,”

²³ Tamly v. Gen. Contracting Corp., 234 A.D.2d 774, 775 (3d Dep’t 1996); People v. Evans, 94 N.Y.2d 499, 502 (2000).

²⁴ Fox v. Fox, 309 A.D.2d 1056, 1057 (3d Dep’t 2003); Lipp v. Port Auth. of N.Y. & N.J., 57 A.D.3d 953, 954 (2d Dep’t 2008).

²⁵ See Dukett v. Wilson, 31 A.D.3d 865, 868 (3d Dep’t 2006).

²⁶ See Lipp, 57 A.D.3d at 954.

which they do not, the Town of Ramapo's Supplement to Motion to Investigate, like the Motion for a Prudence Investigation in Case 13-W-0303,²⁷ is premature and ignores previous Commission rulings and orders. As noted above and in UWNY's response to the Town of Ramapo's initial Motion for a Prudence Investigation, the Commission determined that the prudence of UWNY's actions in developing the Long-Term Major Water Supply Project cannot be properly evaluated until *after* the Commission's ultimate determination on the continuing need for a long-term major water supply source in Rockland County.²⁸ Specifically, the May 22, 2014 Notice Seeking Comments and Scheduling Conference issued in Case 13-W-0303 reiterates and adopts the Commission's prior determination in the Order Denying Interlocutory Appeal:

In Case 13-W-0246, concerning UWNY's pending surcharge, the Commission's Order Denying Interlocutory Appeal (issued May 8, 2014) observed that any determination of imprudence with respect to development costs can best be made after a determination of need in Case 13-W-0303.²⁹

The Motion for a Prudence Investigation as well as the current Supplement to Motion to Investigate openly disregard the Commission's unambiguous prior determinations. The Town of Ramapo is once again attempting to impermissibly re-litigate and reverse the Commission's prior decisions in clear violation of the law of the case doctrine.³⁰ Accordingly, for the same reasons the Motion for a Prudence Investigation is procedurally defective and premature, so too is the Supplement to Motion to Investigate and both should be denied in their entirety.

²⁷ Case 13-W-0303, Motion for a Prudence Investigation by the Town of Ramapo (July 10, 2014) ("Motion for a Prudence Investigation").

²⁸ Case 13-W-0303, United Water New York Inc.'s Opposition to the Town of Ramapo's and the Utility Intervention Unit's Motions for a Prudence Investigation (July 18, 2014).

²⁹ Case 13-W-0303, Notice Seeking Comments and Scheduling Conference at 2 (May 22, 2014).

³⁰ Case 13-W-0303, United Water New York Inc.'s Opposition to the Town of Ramapo's and the Utility Intervention Unit's Motions for a Prudence Investigation at 10-15 (July 18, 2014).

D. The Supplement to Opposition is Untimely and Unauthorized (Cases 13-W-0539, 13-W-0564 and 14-W-0006)

At the evidentiary hearing held on August 14, 2014, in Cases 13-W-0539, 13-W-0564 and 14-W-0006, the ALJ established a schedule for the filing of the MC's opposition to the Joint Proposal and the other parties' responses thereto. Pursuant to the established schedule, the MC filed its opposition to the Joint Proposal on August 25, 2014, and the Companies filed their response on September 4, 2014. The ALJ did not and has not authorized supplements to those filings and thus the MC's current Supplement to Opposition is untimely and unauthorized. The ALJ and the Commission should not entertain such an untimely and unauthorized filing, especially since the MC has failed to establish any nexus between the subject of the Supplement to Opposition and why the Joint Proposal entered into by diverse parties is not in the public interest.

E. The Supplemental Filings are Unnecessary

In addition to being procedurally unauthorized and substantively devoid of merit, the Supplemental Filings are unnecessary. Notwithstanding the erroneous information in the highly speculative blog posts and local media reports on which the Supplemental Filings are exclusively based, it was the Companies that identified the accounting irregularity through their own internal controls. The Companies then promptly commenced their own investigation, took swift corrective action including human resources and employment decisions, and retained PwC to evaluate the Companies' conclusion that the misstatements of revenues did not impact rates for the Companies' customers. The Companies have been fully cooperative with Staff's ongoing investigation of the matter, and have committed in writing to continuing that cooperation. The various and sundry motions and requests included in the Supplemental Filings will contribute nothing to the resolution of Staff's investigation.

III. CONCLUSION

The Supplemental Filings are untimely, unauthorized and must be denied on that basis alone. Even if the Supplement to Rehearing Petition and Motion to Dismiss Supplement are timely (which they are not), they fail to meet the standard for rehearing, and the relief sought violates the law of the case doctrine. Furthermore, the Supplemental Filings are sensationalistic and unnecessary given Staff's ongoing investigation into the accounting issues discussed herein. For the foregoing reasons, the Supplemental Filings should be denied in their entirety.

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