STATE OF NEW YORK
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

RESPONSE OF UNITED WATER NEW YORK INC. TO THE MUNICIPAL CONSORTIUM'S PETITION FOR REHEARING AND/OR CLARIFICATION

Brian T. FitzGerald
Gregory G. Nickson
Cullen and Dykman LLP
99 Washington Avenue, Suite 2020
Albany, New York 12210
Tel: (518) 788-9440
bfitzgerald@cullenanddykman.com
gnickson@cullenanddykman.com

John T. Dillon
Senior Corporate Attorney – Regulated Operations
United Water
360 West Nyack Road
West Nyack, New York 10994
Tel: (845) 623-1500
john.dillon@unitedwater.com

Robert J. Alessi
Jeffrey D. Kuhn
DLA Piper LLP (US)
677 Broadway, Suite 1205
Albany, New York 12207-2996
Tel: (518) 788-9710
Robert.Alessi@dlapiper.com
Jeffrey.Kuhn@dlapiper.com

Attorneys For United Water New York Inc.

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I. INTRODUCTION

On June 26, 2014, the New York State Public Service Commission (the "Commission") issued its Order Establishing Rates[1] in the above referenced proceeding in which the Commission authorized United Water New York Inc. ("UWNY" or the "Company") to increase rates over a two-year rate plan with a $7.4 million (10%) rate increase for the rate year ending May 31, 2015 and a $7.4 million (9.1%) rate increase for the rate year ending May 31, 2016 – substantially less than the Company's requested increase of $17.9 (24.3%) for the rate year ending May 31, 2015, which was designed to provide the Company with the financial resources necessary to maintain safe and reliable water service. On July 28, 2014, the Municipal Consortium[2] filed a Petition for Rehearing and/or Clarification (the "Rehearing Petition") of the Rate Order. Pursuant to 16 NYCRR § 3.7, the Company hereby submits this Response to the Rehearing Petition. For the reasons set forth below, UWNY opposes the Rehearing Petition and

[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, Order Establishing Rates (June 26, 2014) (the "Rate Order").

[2] The Municipal Consortium states that it is an ad hoc group composed of municipal entities and schools which are supplied service by UWNY. 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.

requests that the Commission deny the Municipal Consortium's request for hearing in its entirety.[3]

II. ARGUMENT

A. The Rehearing Petition Fails to Meet the Commission's Rehearing Standard

The standard for granting rehearing is well-settled and the Rehearing Petition fails to meet that standard. The Commission's rules 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."[4] The Municipal Consortium's Rehearing Petition fails to meet these requirements.

The Municipal Consortium argues that the Commission committed an error of law or fact in five respects. First, the Municipal Consortium asserts that the Commission committed an error of law in granting a rate increase because UWNY is allegedly not managed in an efficient and economical manner. Second, the Municipal Consortium argues that the Commission committed an error of law in not making the revenue requirement associated with 50% of the authorized Management & Service ("M&S") Fees temporary and subject to refund to protect the ratepayers while the M&S audit is underway. Third, the Municipal Consortium asserts that the Commission erred in not providing a specific financial incentive to reduce Non-Revenue Water ("NRW"). Fourth, the Municipal Consortium argues that the Commission erred in not initiating a prudence investigation of UWNY's failure to seek economic obsolescence ("EO") awards to reduce property taxes. Fifth, the Municipal Consortium contends that it and the other parties

[3] As noted below, however, the Company does not oppose all of the Municipal Consortium's requests for clarification.

[4] 16 NYCRR § 3.7 (b).

were deprived of procedural and substantive due process by the alleged "sudden introduction" of the revised Lake DeForest Reservoir Cost Allocation Agreement into the Rate Order.

As described more fully below, granting rehearing on any of the above-listed matters is unwarranted because, contrary to the Municipal Consortium's allegations, the Commission did not commit any errors of law or fact, and there are no new circumstances that would warrant a different outcome.

1. The Rate Order's Authorized Rate Increase Was Lawful and Fully Supported by the Record Evidence

As an initial matter, the Municipal Consortium's repeated attempts to obfuscate the Company's demonstrated need for a rate increase via a comparison to prior authorized rate increases and the current rate of inflation as measured by the Consumer Price Index ("CPI") must be rejected. The Municipal Consortium's argument is at best a red herring. The only relevant inquiry is whether absent rate relief UWNY would have the revenue support it needs to continue to provide safe and reliable service, not what the Company's revenue requirements were in the past or whether any increase was above or below the rate of inflation. As the Commission properly recognized in the Rate Order, absent the provided rate relief the Company's ability to continue to provide high quality water service to its service territory and customers would be jeopardized.

Despite its misplaced attempt to raise a populist argument in support of rehearing based on a fatally flawed comparisons to inflation rates, the Municipal Consortium knows or should know that the Company's revenue requirement is driven by changes in operating costs, increases in local property taxes (which have far exceeded inflation), road opening permit fees, and necessary capital investment in the Company's system. Indeed, the Municipal Consortium fails to mention that a good portion of UWNY's rate increases over the past seven years are due in

large part to the significant local property tax increases from the very municipalities that make up the Municipal Consortium. In fact, the Company's total real estate taxes increased approximately 78% from 2007 to 2012, far exceeding inflation rates. Given that a significant element of the Company's revenue requirement is composed of property taxes, it is no coincidence that UWNY's rates increased by a similar percentage over this time frame. The Municipal Consortium's misguided assertions that the Commission should limit or even compare the Rate Order's rate increase levels to the CPI ignore the cost-based nature of a rate case. It is therefore patently unreasonable and unprincipled for the Municipal Consortium to compare the Company's authorized rate increase to the CPI. As New York State Department of Public Service Staff ("Staff") recently recognized "[i]nflation affects a utility's expenses, but it would be inequitable and irresponsible to base a rate increase solely on inflation because significant cost drivers are not limited to general inflation."[5]

The Municipal Consortium's arguments seeking rehearing based on a claim that the Company is allegedly not being managed economically and effectively similarly must fail for lack of record evidence. There is simply no record support for the Municipal Consortium's position. The Municipal Consortium's sole basis for its position is the following passage from the Rate Order:

> 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.

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[5] Cases 13-W-0539 et al. - 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, Statement of the New York State Department of Public Service Staff in Response to Opposition to the Joint Proposal at 3-4 (Aug. 1, 2014).

Rehearing Petition at 7 (citing Rate Order at 10). Based on this passage, the Municipal Consortium argues that "[o]ne key ingredient in the Commission's regulatory framework formulation is 'assuming efficient and economical management by the Company.'" Rehearing Petition at 7-8. The Municipal Consortium then erroneously claims that the Commission determined the Company is being mismanaged,[6] and asserts that as a result it was an error of law for the Commission to grant any rate relief.

The Municipal Consortium's argument grossly misinterprets the Commission's Rate Order. The quoted passage relates to the Commission's obligation to set a return on equity and revenue requirement allowance that will enable UWNY to maintain and support its credit, raise capital, and allow for an opportunity to earn a reasonable rate of return.[7] The Rate Order merely states (in essentially "boiler-plate" language found in other orders)[8] that the Commission-authorized revenue requirement allowance in this case does such, assuming the Company is efficiently and economically managed.

Moreover, the Rate Order does not stand for the proposition that "efficient and economic management" was lacking. While the Municipal Consortium references several passages of the Rate Order in support of this flawed argument (Rehearing Petition at 8-10), it neglects to note that the Rate Order language cited reflects mere recitations of the comments submitted in this

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6 As noted below, the Commission made no such determination.

7 Under the New York State Public Service Law ("PSL"), the Commission must set just and reasonable rates that afford a utility a reasonable opportunity to recover prudently incurred costs and earn a fair rate of return on its investment. See Abrams v. Pub. Serv. Comm'n, 67 N.Y.2d 205, 211 (1986); see also In re Nat. Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n, 16 N.Y.3d 360, 368-69 (2011). In setting just and reasonable rates, the Commission may consider any factor it deems relevant, disregard any particular factor and assign whatever weight among factors that it considers appropriate. Abrams, 67 N.Y.2d at 211-12; see also In re Consol. Edison Co. v. Pub. Serv. Comm'n, 53 A.D.2d 131, 133-34 (3d Dep't 1976) (stating "[o]ther than the accomplishment of a just and reasonable result there is no requirement in law that any specific factors should be considered in fixing utility rates, nor that any be excluded from consideration"). The Commission's Rate Order does just that.

8 See e.g., Cases 13-E-0030 et al. - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric, Gas and Steam Service, Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal at 4 (Feb. 20, 2014).

proceeding and does not represent Commission findings. There simply is no record evidence in this proceeding that supports the Municipal Consortium's empty allegations that the Company is being mismanaged. To the contrary, the evidence is clear that UWNY stringently controls operation and maintenance expenses so that the Company runs as efficiently as possible. Tr. 147. The record also demonstrates that the current need for a rate increase is primarily driven by costs beyond the Company's control (e.g., real estate taxes, labor expense, medical benefits and outside contractors' expense). Tr. 148. UWNY management has also taken several actions that have directly benefited customers, such as pursuing litigation against several oil companies based on contamination or potential contamination of water supply from the gasoline additive MTBE.[9]

While it is true the Commission reminds the Company of a need to "carefully examine strategies to reduce upward rate pressure" and directs 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" (Rate Order at 2-3), those statements are a far cry from findings of mismanagement.

It is irrefutable that UWNY required a rate increase based on the record evidence in this proceeding and that the Rate Order properly granted such an increase. The Company and Staff submitted voluminous testimony, exhibits, workpapers, and discovery responses, all of which amply support the Rate Order and its rate increase determination. In contrast, the Municipal Consortium's attempt to refute the need for a rate increase with mere sophistry, bombast, irrelevant references to CPI and baseless allegations of Company mismanagement is

[9] See Case 09-W-0731 - Proceeding on Motion of the Commission at to the Rates, Charges, Rules and Regulations of United Water New York Inc. for Water Service, Direct Testimony of M. Pointing at 22-23 (Sept. 25, 2009). UWNY was the only New York water utility to join in the suit. The lawsuit was successful and because UWNY agreed to take on the role of one of four "focus cases," it was able to provide its customers approximately $3.2 million in benefits.

demonstrably false, legally deficient, and must be rejected. Based on the foregoing, the Commission did not commit an error of law or fact that requires rehearing on this issue.

2. There Is No Factual or Legal Error to Justify Rehearing the Commission's Proper Rejection of the Municipal Consortium's Recommendation to Set Fifty Percent of the Company's Management and Service Fees Temporary and Subject to Refund

The Municipal Consortium incorrectly argues that the Commission erred in not setting 50% of the Company's M&S fee expense temporary and subject to refund. In support of its argument, the Municipal Consortium repeats, nearly verbatim, the same arguments it made in its Initial Brief filed on March 4, 2014. Rehearing Petition at 11-15. The Commission carefully considered and denied the Municipal Consortium's recommendation (as well as an identical recommendation by the Utility Intervention Unit ("UIU")). The Commission properly found that "setting of the M&S fee allowance by escalating the final year of the last rate plan rather than UWNY's test year expense level effectively disallows $1.3 million or 30% of the Company's claimed expense. This adjustment provides ratepayers with adequate protection pending the outcome of the comprehensive audit." Rate Order at 17. No further protection (i.e., setting M&S fee expense temporary and subject to refund) is justified or required, particularly since the Municipal Consortium has raised no new arguments or facts to support its request that the Commission rehear this issue. Therefore, for the same reasons the Commission initially rejected the Municipal Consortium's recommendation, the Commission should deny the Municipal Consortium's request for rehearing on this issue.

Indeed, it is undisputed that United Water Management Services ("UWM&S") provides valuable and essential services to the Company. In the absence of UWM&S, the Company would either need to hire additional staff or contract with other, for-profit, third-party vendors to perform these necessary services. Under either scenario, the cost to perform the essential

services provided by UWM&S would likely be more. There is simply no record evidence to support the Municipal Consortium's contention that the UWM&S fees are inappropriate such that the Commission should set 50% of the UWM&S fees temporary and subject to refund.

In support of its position, the Municipal Consortium inappropriately compares this case to another proceeding involving a large combination electric and gas corporation (National Grid).[10] In the National Grid case, Staff and various intervenors raised concerns about National Grid's treatment of shared service company expenses. During the course of that proceeding, the Commission ordered an investigation into Niagara Mohawk's business arrangements with the National Grid service companies.[11] The Commission subsequently commenced a separate proceeding, the "Service Company Audit" case, to examine National Grid's cost allocations to Niagara Mohawk[12] and also ordered that $50 million of temporary rates be subject to refund pending the results of the National Grid service company expenses audit.[13] The Municipal Consortium erroneously claims that the National Grid case supports its false contention that a full audit is required in this case and that 50% of the Company's M&S fees should be made temporary subject to refund.

As noted in the Company's Reply Brief in this matter, the prior actions of a separate, much larger utility, one operating in different industries and with completely different allocation methodologies and policies, fails to provide even a scintilla of record evidence that the actions of UWNY require a managerial or operations audit of UWNY or that any portion of the Company's

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[10] Case 10-E-0050 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service, Order Establishing Rates for Electric Service (Jan. 24, 2011).

[11] Id. at 4-5.

[12] Id. at 8; Case 10-M-0451 - Proceeding on Motion of the Commission to Investigate National Grid Affiliate Cost Allocations, Policies and Procedures, Order Directing Submission of Implementation Plan and Establishing Proceeding (Jan. 18, 2013).

[13] Case 10-E-0050, Order Establishing Rates for Electric Service at 2 (Jan. 24, 2011).

rate increase should be made temporary and subject to refund.[14] The present situation is quite different than the National Grid case. For example, in the National Grid case, Staff argued that Niagara Mohawk, as the largest affiliate in the National Grid system, created more economies of scale and the formula used to allocate M&S fees among affiliates failed to account for this.[15] However, UWNY is not the largest affiliate in the United Water Resources system and therefore does not create economies of scale analogous to those created by Niagara Mohawk. Furthermore, UWNY's M&S fees are periodically audited to ensure that the allocation of fees among the affiliates comports with the M&S Agreement, which sets forth the allocation of M&S fees among United Water affiliates and has been utilized by the Company and the Commission since it was filed with the Commission in 1995. Tr. 622; Company RB at 10-11.

Based on the foregoing, the Commission properly considered and rejected the Municipal Consortium's request that the Commission set 50% of the Company's M&S fee expense temporary and subject to refund and the Commission did not commit any error of law or fact warranting rehearing on this issue.

3. A Non-Revenue Water Penalty Mechanism Is Not Warranted

The Rate Order provides sufficient measures addressing NRW, directing the Company to include a cost/benefit analysis on new NRW program options. Rate Order at 43. This requirement, coupled with the current 18% reporting threshold under 16 NYCRR § 503.8, will assist the Company in monitoring and curbing NRW. As such, the Commission appropriately rejected the Municipal Consortium's recommendation to implement an NRW incentive mechanism or negative revenue adjustment (Rate Order at 43) and committed no error of law or fact necessitating rehearing.

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[14] Case 13-W-0295, Reply Brief of United Water New York Inc. at 14-15 (Mar. 14, 2014) ("Company RB").

[15] Case 10-E-0050, Recommended Decision at 19 (Nov. 17, 2010).

There is no record basis for the implementation of an NRW incentive mechanism. As the Commission found, there are simply no facts in this case to "conclude that through the Company's efforts it could reduce the NRW level to an acceptable threshold level and bypass triggering such an adjustment." Rate Order at 43. As the Company discussed in both its Initial and Reply Briefs, it has already undertaken significant steps to reduce NRW and will continue to do so. Company IB at 76-77;[16] Company RB at 61. For example, the Company will continue with the Underground Infrastructure Replacement Program and make further investments in AMI and DMAs to target a reduction in Apparent Losses through unauthorized unmetered consumption. Tr. 400; Company IB at 77. The Company also proposes that all new meters be installed outside a residence whenever possible, which will reduce NRW leaks on a customer's service line and allow earlier detection and repair. Tr. 176; Company IB at 77. Moreover, the Company's proposal to convert to monthly billing will also enable water theft and meter tampering to be more readily and quickly detectible thereby producing an estimated 0.5% reduction in NRW. Hearing Exh. 94A at14; Company IB at 77. In fact, the Commission recognized the Company's various NRW initiatives, asserting that UWNY "already has a host of programs… designed either to directly reduce NRW or obtain a reduction in NRW as an ancillary program benefit." Rate Order at 43.

In fact, the Rate Order already incentivizes the Company to reduce NRW because any water losses over 18% are paid by the Company. Additionally, the purchased water reconciliation method only allows the Company to recover costs on 18% over its projected water sales volumes. The Company is also already financially penalized due to the fact that production costs (e.g., power, purchased water, and chemicals) for NRW over 18% are not recovered in

[16] Case 13-W-0295, Initial Post Hearing Brief of United Water New York Inc. (Mar. 4, 2014) ("Company IB").

rates. Therefore, the Rate Order already provides the Company with a cost incentive to reduce NRW and protects ratepayers from bearing the cost of NRW above 18%.

Additionally, NRW consists of both physical losses and apparent losses. Physical losses, such as leaks on mains and customer services, represent a minimal component of NRW that can be reduced as evidenced by UWNY's Infrastructure Leakage Index ("ILI") calculated by American Water Works Association ("AWWA") methodology.[17] Tr. 315-316. Apparent losses include unbilled, unauthorized use of water and theft of service. Tr. 318. In UWNY's case, theft of service is the largest component of apparent loss ranging from 4-8%. Tr. 319; Company IB at 78.

UWNY's 2012 NRW consisted of 12% for physical losses and 8% for apparent losses. Tr. 316. Included in the physical losses is a calculation that is known as the Unavoidable Actual Real Losses ("UARL") and that particular calculation is based on the AWWA audit methodology, the industry recognized practice. Tr. 316. UARL is a theoretical number that a company can never get below and in UWNY's case, the UARL is approximately 9.3% of the 12%. Tr. 316-317. Thus the delta between the 12% and the 9.3% is the real leakage within UWNY's system that is economically viable to impact. Tr. 317.

Running those numbers through the AWWA audit methodology produces an ILI, which is relative to the remaining 2.7% (the delta between 9.3% and 12%). Tr. 317. In the case of UWNY for 2012, the ILI was 1.21. Tr. 317. The AWWA audit methodology recognizes that a system with an ILI of less than 2 and over 50,000 connections (as is the case with UWNY) is

[17] It is worth nothing that, as Staff has acknowledged, repair of leaks in the Company's water system will not significantly reduce NRW. See 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, Department of Public Service Staff Report on Need at 31-33 (May 22, 2014).

considered excellent in terms of its NRW. Tr. 317. There is no basis for an NRW penalty mechanism when UWNY has an ILI of 1.21.

Finally, it is ironic that the Municipal Consortium boldly complains that UWNY's NRW is unacceptably high when a significant portion of the Company's NRW is due to unauthorized unmetered consumer water from its municipalities, including the Town of Ramapo. Tr. 319-321; Company IB at 78. As UWNY noted in its Initial Brief, theft of water is by far the biggest component of NRW. Tr. 319; Company IB at 78.

Based on the foregoing, the Municipal Consortium has failed to meet its burden to justify rehearing on this issue.

4. The Commission Did Not Commit an Error of Law or Fact in Rejecting the Recommendation for a Prudence Investigation Regarding the Company's Economic Obsolescence Filings

The Municipal Consortium erroneously asserts that the Commission committed "gross negligence" by failing to adopt the UIU's recommendation to implement a prudence investigation regarding the fact that UWNY only began filing for EO awards during this rate case. Rehearing Petition at 18.

As the Rate Order noted, a prudence investigation is entirely unwarranted because the Commission provided adequate protection for ratepayers going forward by imputing an EO level of 15.19% to reflect Staff's calculations and implementing certain reporting requirements to ensure that the Company continues to properly file for EO awards.[18] Rate Order at 31. Furthermore, there is simply no record basis for a prudence inquiry into the Company's EO

[18] The Commission adopted the Recommended Decision's suggestion that UWNY be directed to submit to the Director of Accounting, Audits and Finance a copy of the Company's annual EO filings within 10 days after submission to the New York State Office of Real Property Tax Services ("ORPTS") (including an analysis comparing the results that UWNY reached using both actual and rate-case capital structures) and that Staff survey the other Commission-regulated large utilities to determine whether they have sought and received EO awards from ORPTS. Rate Order at 28, 31; see also Case 13-W-0295, Recommended Decision (Apr. 8, 2014).

filings. Generally, a utility's actions undertaken in the ordinary course of business are considered prudent and are assumed to be exercises of reasonable managerial judgment. Intervenors are "obliged to demonstrate a tenable basis for raising the specter of imprudence before the utility can be called upon to defend its conduct."[19] Once "evidence" of imprudently incurred costs is put forward, "the burden shifts to the utility to prove either that its actions were reasonable or that they accounted for no additional costs."[20] In the present case, the Municipal Consortium fails to meet this burden by providing nothing more than conclusory allegations that UWNY acted imprudently by failing to submit EO filings.

Additionally, an investigation is not warranted pursuant to the Commission's standard in determining prudence. "Prudence is determined by judging whether a utility acted reasonably, under the circumstances at the time, considering that the company had to solve its problems prospectively rather than in reliance on hindsight."[21] "In effect, [the Commission's] responsibility is to determine how reasonable people would have performed the task that confronted the company."[22] Under this prudence standard, UWNY's actions with respect to EO filings were not imprudent.

As explained in the Company's Initial Brief and Reply Brief in this proceeding, the Company reasonably believed until last year that it was not eligible for an EO award based upon

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[19] See Long Island Lighting Co., v. Pub. Serv. Comm'n, 134 A.D.2d 135, 144 (3d Dep't 1987); Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n, 16 N.Y.3d 360, 369 (2011).

[20] Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n, 16 N.Y.3d 360, 369 (2011).

[20] Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n, 71 A.D.3d 62, 66 (3d Dep't 2009), aff'd, 16 N.Y.3d 360 (2011).

[21] Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n, 71 A.D.3d 62, 66 (3d Dep't 2009).

[22] Case 27123 - Consolidated Edison Company of New York, Inc. - Indian Point No. 2 Outage, Opinion No. 79-1 at 6 (Jan. 16, 1979).

the plain language of the relevant regulations and law.[23] Company IB at 9-12; Company RB at 23; Tr. 585-86; Hearing Exh. 95A at 9. And as the Company noted in briefing, it appears that other New York utilities have taken this same position and have not filed for EO awards in the past. Company RB at 23. Given these facts, it was reasonable for the Company to act in the manner it did. Therefore, a prudence investigation is utterly unwarranted and there is no basis for rehearing on this subject.

5. The Commission's Acceptance of the Lake DeForest Reservoir Allocation Agreement Amendment Was Appropriate and There Was No Due Process Violation Warranting Rehearing

The Municipal Consortium erroneously argues that the Commission's acceptance of an amendment to the Lake DeForest Reservoir Cost Allocation Agreement (the "Amendment Agreement")[24] filed by UWNY with the Commission on February 11, 2014 violated the Municipal Consortium's right to substantive and procedural due process. Rehearing Petition at 18-23. By way of background, the Amendment Agreement is an intracompany contract between two United Water affiliates and makes no change to the Lake DeForest reservoir safe yield or the allocation of that yield between UWNY and United Water New Jersey Inc. ("UWNJ") while retaining the existing cost allocation methodology of the reservoir's annual operating costs between the two companies. Rate Order at 44. The only material change is to effect the implementation of a "spill skimming" protocol which allows UWNY to retain certain additional amounts of water from the reservoir during periods when water is plentiful and not needed to satisfy minimum flows to the Village of Nyack and the State of New Jersey, according to specific procedures prepared in consultation with the New York State Department of

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[23] Moreover, the record demonstrates that once the Company was made aware of the possibility that it might be eligible for an EO award, it immediately took steps to make the necessary filing. Tr. 585-86.

[24] Case 14-00290 - In the Matter of United Water New York Inc. and Lake DeForest Reservoir Cost Allocation Amendment, Lake DeForest Reservoir Cost Allocation Agreement Amendment (Feb. 11, 2014).

Environmental Conservation and the New Jersey Department of Environmental Protection. Rate Order at 44. The Commission appropriately accepted the Amendment Agreement, asserting that the Agreement provides UWNY with greater operational flexibility because it enables the Company to retain additional water resources for its Rockland County customers with no detriment to UWNJ or its customers. Rate Order at 45.[25]

As an initial matter, the Municipal Consortium's due process arguments are misplaced as a matter of law since there is no "state action" at issue here because the Commission did not take any action with respect to the Amendment Agreement other than to note, in dicta, that it accepted the Amendment Agreement. PSL § 110 requires utilities to file affiliated agreements for the purchase of water with the Commission in order to provide the Commission an opportunity to review the terms of those agreements.[26] Under the law, the Commission is not required or expected to "approve" such contracts.[27] The PSL provides only that such agreements must be filed with the Commission before becoming effective.[28] The Amendment Agreement, therefore, was effective upon filing. The Commission's "acceptance" of the Amendment Agreement is not tantamount to Commission approval.

The Municipal Consortium also fails to properly assert a substantive due process challenge. To assert a violation of the Fourteenth Amendment Due Process clause, a party must

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[25] The Commission also concluded that the calculation and allocation of the Annual Operating Charge ("AOC") between UWNY and UWNJ was appropriate and that the Amendment Agreement had no inherent defects or inequities. Rate Order at 45.

[26] PSL § 110(4) provides in pertinent part "[a]ll written contracts and all arrangements . . . including such contracts and arrangements with any affiliated interest . . . for the purchase of . . . water before the same shall be effective, shall first be filed with the commission . . ." N.Y. Pub. Serv. Law §110(4) (McKinney 2014).

[27] See Case 89-G-126 - Re Brooklyn Union Gas Company, Order Adopting Recommended Decision at Footnote 27 (Mar. 27, 1991) ("Under Section 110(4), although the company is required to file [contracts] with the Commission, if the Commission does not affirmatively disapprove the contract, the contract takes effect. Hence, no affirmative approval is required.").

[28] N.Y. Pub. Serv. Law §110(4) (McKinney 2014).

show the existence of an interest protected by the due process clause.[29] "To establish such an interest, the plaintiffs must show that they had more than a unilateral expectation [;] they must, instead, have a legitimate claim of entitlement to the claimed property interest."[30] As the party asserting a due process violation, the Municipal Consortium bears the burden of establishing that it had a legitimate due process interest at stake.[31] The Municipal Consortium fails to meet this burden by its complete failure to properly assert exactly which substantive due process right has been implicated, merely making an off-hand reference in a footnote that "customers have an interest in what they must pay for and the quality of that water service" (Rehearing Petition at 22, Footnote 15) without providing any authority to support such a an "interest" as a constitutionally protected right. The Municipal Consortium also fails to explain how the Amendment Agreement deprives ratepayers and the Municipal Consortium of this "interest."

Furthermore, the Commission's acceptance of the Amendment Agreement does not violate the Municipal Consortium's procedural due process rights. First, as stated previously, the Municipal Consortium possesses no substantive due process right here and thus could not assert a procedural due process violation. Assuming arguendo the Municipal Consortium succeeded in showing the existence of a protected due process interest, which it has not, "the next question is whether the plaintiff was given adequate notice and an opportunity to be heard, before being deprived of that interest."[32] However, in the present case, the Municipal Consortium was given an opportunity to be heard, as evidenced by the fact that Rockland County, a member of the Municipal Consortium, provided comments and recommendations to the Amendment Agreement

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29 MacFall v. City of Rochester, 746 F.Supp.2d 474, 481 (2d Cir. 2010) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985).

30 MacFall, 746 F.Supp.2d at 481 (internal quotations omitted).

31 See MacFall, 746 F.Supp.2d at 481.

32 MacFall, 746 F.Supp.2d at 485.

on April 14, 2014 in which the County requested that the Commission review the fundamental calculation and allocation of the AOC between UWNY and UWNJ to ensure that UWNY had no financial disincentive to maximize water utilization under either this new protocol or the baseline reservoir operations in general.[33] Rate Order at 44-45. Additionally, the Commission accepted and reviewed written public comments on the subject of Lake Deforest and heard from concerned citizens on this subject at the public statement hearings held in this matter. Rate Order at 45. These actions indicate that the Commission implemented and followed a process to solicit and engage ratepayer comments—a process that the Municipal Consortium and the Company's customers participated in. The Municipal Consortium cannot deny that such a process was carried out and the mere fact that it is apparently dissatisfied with the ultimate outcome with respect to the Amendment Agreement provides no basis for rehearing. Consequently, the Municipal Consortium's contention that the Commission failed to provide adequate due process must be rejected.

In short, the Municipal Consortium was not deprived of any substantive or procedural due process under the Fourteenth Amendment and the Commission made no error of law or fact warranting rehearing pursuant to 16 NYCRR § 3.7.

B. The Majority of the Municipal Consortium's Requests for Clarification Are Inappropriate

The Municipal Consortium also seeks several "clarifications" with respect to the directives contained in the Rate Order.[34] Each "clarification" is discussed in turn below.

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[33] Case14-00290, Recommendation to the PSC from the County of Rockland Regarding the Lake DeForest Reservoir Cost Allocation Amendment (April 15, 2014).

[34] While all of these requests are couched as requests for "clarification," the requests pertaining to Ordering Paragraphs 6 and 7 are in fact requests for "reconsideration" given the Commission's unambiguous language in this Ordering Paragraphs.

First, the Municipal Consortium seeks clarification that all parties should be afforded an opportunity to participate in the scoping of the "comprehensive examination of [UWNY's] management practices" pursuant to Ordering Paragraph 6, not just Staff. The Company believes that the scope of the examination should be determined by Staff, the Company and any independent consultant that may be retained to perform the examination. The Company believes that it is appropriate for Staff to be involved in the scoping process because one of Staff's core statutory functions is to take an active role in any type of utility examination or audit and Staff will have the responsibility to review the outcome of such examination. The Company agrees with Staff that other parties "do not have a right to participate in implementation of the Commission's decision. The [Rate] Order embodies the Commission's disposition of the arguments raised in the rate case, and the [Municipal Consortium] and other parties have no right to further input in the regulatory process."[35] As such, the Commission should reject this request for clarification.

Second the Municipal Consortium seeks clarification that all parties should receive a copy of and be given an opportunity to comment on "the cost/benefit measurement criteria for any planned new programs to reduce [NRW]" required under Ordering Paragraph 7. The Company does not oppose providing all parties a copy of the cost/benefit measurement criteria for any planned new programs to reduce NRW. UWNY, however, agrees with Staff that this request should be rejected in all other respects as an inappropriate attempt of the Municipal Consortium to interject itself into the regulation of UWNY.[36] .

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[35] Case 13-W-0295, Staff Response to the Petition for Rehearing and/or Clarification on Behalf of the Municipal Consortium at 9 (Aug. 12, 2014).

[36] Id.

Third, the Municipal Consortium seeks clarification that all parties will receive a copy of the class revenue allocation and rate design study the Commission directed the Company to perform pursuant to Ordering Paragraph 8. The Company does not oppose this request for clarification inasmuch as the Company will file such study with the Commission and will serve a copy of the study on all parties at the time of filing.

Fourth, the Municipal Consortium seeks clarification that the report UWNY must file pursuant to Ordering Paragraph 9 (regarding the manufacturer tax credit) will be provided to all parties and the parties will be made aware of any proceedings addressing the credit. The Company does not oppose this request for clarification as the Company will file the report with the Commission and serve a copy of the report on all parties at the time of filing.

Fifth, the Municipal Consortium seeks clarification that the Company's plan to improve public communications and relationships with stakeholders, which the Company must file pursuant to Ordering Paragraph 10, will be provided to all parties with an opportunity to comment. As with the case with the Municipal Consortium's second request for clarification, the Company does not oppose providing all parties a copy of the plan. However, the Company concurs with Staff that this request should otherwise be rejected.[37]

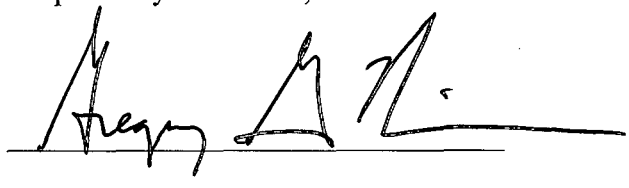
[37] Id.

III. CONCLUSION

For the reasons set forth herein, the Municipal Consortium's Rehearing Petition should be denied in its entirety, except with respect to certain requests for clarification as discussed above.

Dated: August 12, 2014

Respectfully submitted,



John T. Dillon
Senior Corporate Attorney – Regulated Operations
United Water
360 West Nyack Road
West Nyack, New York 10994
Tel: (845) 623-1500
john.dillon@unitedwater.com

Brian T. FitzGerald
Gregory G. Nickson
Cullen and Dykman LLP
99 Washington Avenue, Suite 2020
Albany, New York 12210
Tel: (518) 788-9440
bfitzgerald@cullenanddykman.com
gnickson@cullenanddykman.com

Robert J. Alessi
Jeffrey D. Kuhn
DLA Piper LLP (US)
677 Broadway, Suite 1205
Albany, New York 12207-2996
Tel: (518) 788-9710
Robert.Alessi@dlapiper.com
Jeffrey.Kuhn@dlapiper.com

Attorneys For United Water New York Inc.