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CORRECTED COPY - VIA FAX: 1-518-486-6081, MAIL, and E-MAIL

Tuesday, November 18, 2014

Mr. Joseph (Joe) Lochner - Chief, Office Of Accounting, Audit And Finance
State Of New York Department of Public Service/New York State Public Service Commission
3 Empire State Plaza (Agency Building 3)
Albany, New York 12223-1350 USA

Re: Matter Master: 14-02068/Matter Number: 14-02068
"In The Matter Of Staff's Investigation Into United Water's Accounting Irregularities"

Dear Mister Lochner:

I am writing to request that you and Staff please issue and serve subpoenas in the United Water Accounting Irregularities Matter compelling the sworn testimony of, and production of documents from, the following twenty banks, lenders, and financial institutions:

1. Allstate
2. Bank of America
3. *BNP Paribas*
4. BNY Mellon
5. CIC
6. CITI
7. *Credit Agricole*
8. GenWorth
9. JP Morgan Chase
10. MetLife Insurance
11. New York Life Insurance
12. Northwestern Mutual
13. One America
14. Principal Life Insurance
15. Prudential
16. *Societe Generale*
17. Standard & Poor's
18. TD Bank
19. Thrivent
20. Wells Fargo

As I believe that you are already aware from reading my prior motions in the United Water Accounting Irregularities Matter, my name is Attorney John J. Tormey III, Esq., a private citizen and resident of the Hamlet of Pearl River, Town of Orangetown, County of Rockland, State of New York. I am an Intervenor-Party in the Accounting Irregularities Matter which appears to have been commenced *circa* October 17, 2014. I am also an Intervenor-Party in the United Water Surcharge Case, Rate Case, and Need Case ("Prior United Water Cases").

I understand that you are the Commission's Chief of Audit And Finance in PSC's Office Of Accounting. I just learned of your crucial role in the Accounting Irregularities Matter, for the first time, last Thursday in Albany. I appreciate your and the Commission's time in reviewing my filings, and the attention you spend on them. I am a media and entertainment lawyer who happens to live in Pearl River. I am not a utilities lawyer. I am not an accountant.

Last Thursday, November 13, 2014, you and all Commissioners were present, along with many others, for a Public Service Commission Session ("Session") on the 19th Floor of 3 Empire State Plaza (Agency Building 3). As you know, PSC decisions in the United Water Need Case and Surcharge Case were announced, with multiple results principally in favor of Rockland County rate-payers like myself. At this Session, you spoke to the Commissioners and all others present, watching and listening, to update all of us on the status of the recently-commenced PSC Investigation in the Accounting Irregularities Matter regarding: (A) United Water's accounting irregularities, (B) United Water's now-confessed overstated revenue, and (C) United Water's recent firing of three of its executives Michael Pointing, Michael Blake, and Michael Rolling possibly relating to (A) and (B).

From your Commission room table on Thursday, you indicated that the Investigation of United Water and Michael Pointing's activities was in its earliest stages - but that you and PSC Staff intended to investigate the overstated revenue, and Michael Pointing's United Water conduct dating as far back as 2003. That's eleven years ago. As you know, my prior Omnibus Motion in this Matter requested that the breadth and depth of the probe of United Water be expanded. To the extent that your "2003" remark last Thursday is an indication that such prong of my Omnibus Motion is *de facto* granted by PSC, then I appreciate that PSC indication. Additionally, you acknowledged that there was a pending motion in this Matter requesting that the PSC subpoena Michael Pointing, Michael Blake, and Michael Roling. That must have been a reference to my (Corrected) Supplementary Motion, since according to the Electronic Docket Sheet no other Party has yet moved for the same relief. I appreciate that comment, too.

The purpose of my letter to you today is to urge that you and the Commission Staff subpoena the twenty financial institutions ("Twenty Lenders") referenced in "United Water's Response To TC-1", October 22, 2014, Page 7, for certain of their documents, and for the testimony of responsible officers of those Twenty Lenders (collectively, "Bank Subpoenas"). According to your comments on Thursday, you and Staff are still actively seeking information demonstrating harm to us rate-payers. I believe it possible that information gleaned by the Bank Subpoenas will demonstrate that harm. I will explain why.

As you know, regulated utilities are unusual. Many other types of businesses might fear overstating their revenues on paper, because state and federal tax authorities might accordingly accept those higher numbers and then tax-assess the overstated revenue against the economic interests of the businesses. Yet for whatever reason prevailing at the time, United Water apparently had no such fear of taxes when overstating revenue to the extent of US\$2,500,000 to US\$3,000,000 every consecutive quarter for four years running from 2010 to 2014. Why? Well, for one thing, perhaps United Water fully intended to impose any resulting tax consequence - yes, even a tax consequence from overstated revenue they expected to be never otherwise detected - upon Rockland County rate-payers. As I understand it, the utility rate-making process allows companies like United Water to simply shift their tax liabilities upon us rate-payers, transmogrified into what are unfortunately ever-climbing utility rates. In my opinion that is a system-flaw, because among other problems it removes an otherwise-prevailing disincentive to companies thinking about lying and overstating their revenues. In fact, I would argue that the system-flaw actually rewards overstatements of revenue made by utility companies.

Therefore, with that unfortunate reality in mind, what would be United Water's specific tactical incentive to overtly lie and overstate its revenue, assuming that the utility was already intent on increasing my community's utility-rates? One possibility is contained within Staff's own "interest-rate arbitrage" argument assessed by Judge Casutto at Pages 17-19 and 28-33 of the November 13, 2014 Order Denying Surcharge in the Surcharge Case ("Order Denying Surcharge"). As you know, after reviewing Staff's "interest-rate arbitrage" argument, Judge Casutto thereupon denied somewhere between US\$5,000,000 and US\$6,000,000 of United Water's requested Surcharge - approximately one-tenth of the whole Surcharge that United Water had requested. This was a major impact-item component of the UW-requested and PSC-denied Surcharge. If I understand Staff's "arbitrage" argument correctly, United Water sought a utility-rate Surcharge from Rockland County rate-payers based in part upon an assumption that United Water would be paying market-rate interest-rates to financial institutions for loans. But notwithstanding what United Water apparently indicated to PSC in its Surcharge pursuit, United Water instead used "a large \$35 million low-cost financing vehicle to finance the Company's operations" ("Order Denying Surcharge", Page 34). Apparently this "vehicle" was driven by a more-than-favorable, significantly-below-market interest rate.

United Water somehow apparently thought it was appropriate that they feast on the differential, the "spread", between the two interest-rates, as a pecuniary reward for themselves. As best I can tell, that money likely would have ended up as salaries, bonuses, and additional dividends to the French corporate parent and shareholders, if that United Water scheme wasn't caught and halted. United Water management acted more like *arbitrageurs*, than a professional water company offering Rockland rate-payers reliable water service at just and reasonable rates per Commission mandate. In my view, United Water was playing these arbitrage games with what was essentially my rate-payer money, and would have continued to do so had not Judge Casutto and this Honorable Commission shut United Water's arbitrage game down on Thursday, November 13, 2014.

But how does this relate to United Water's overstated revenues, to which United Water has already admitted in this Accounting Irregularities Matter and Investigation? I believe that the

answer is already posted to the Electronic Docket Sheet in this Irregularities Matter. We know that United Water appropriated one or more below-market interest-rate loans for themselves. We believe that they did so from some or all of the within-listed Twenty Lenders. But has anyone at the Commission yet asked themselves how United Water actually did it?... How United Water was somehow able to do it? From the record, the answer appears to be "through the use of deception". United Water fooled the Lenders.

The clue is in the apparent twenty writings that United Water was required to issue, and now admitted that they issued, to the Twenty Lenders ("Written Admissions To The Twenty Lenders") once United Water's overstatement of revenue was exposed and made manifest. United Water's embarrassing written admissions to the Twenty Lenders read as follows:

“As a regulated utility, the Company follows Accounting Standards Codification topic (‘ASC’) 980, ‘Regulated Operations’. ASC 980 sets forth the accounting for the effects of certain types of regulation, including the recognition of regulatory assets and liabilities that are allowed by state regulators and are considered probable of recovery or refund. United Water New York Inc. uncovered an error in their calculation of the Revenue Recognition that was issued as part of a 2010 Rate Order. This Order requires United Water New York Inc. to recognize the authorized level of revenues in each year covered by the Rate Order. The revenues recognized were not properly calendarized and consequently caused incorrect revenue levels in certain periods. The Company has adjusted its financial statements for all periods presented and has also disclosed an opening equity adjustment at January 1, 2013 in the amount of \$1.759M which represents the impact of the correction through December 31, 2012”.

("United Water's Response To TC-1", October 22, 2014, Page 7.

We know that United Water didn't just provide the PSC incorrect overstated revenue numbers. United Water also provided the Twenty Lenders incorrect overstated revenue numbers, too. So for that matter, how do we know that quantification of the United Water overstatements is identical as between each of those twenty-one respective United Water submissions? We don't, yet, unless and until Staff makes the comparison, by first subpoenaing all loan and credit applications and all other materials which United Water submitted to the Twenty Lenders and all their affiliates when United Water sought short-term financing ("Order Denying Surcharge", Page 13 *et seq.*) and its "low-cost financing vehicle" (Order Denying Surcharge, Page 34). That's the relief that this letter of mine seeks. That's the request for subpoenas I am making of you and Staff. On the other hand it could be viewed as a failure in accounting procedures, at minimum, for the Commission to "take United Water's word for it" as to what numbers United Water did and did not submit to the Twenty Lenders - particularly given what we all now know about United Water's business practices. I urge you to please carefully consider my request.

Mister Lochner, I suggest that the most likely reason United Water overstated its revenues in materials submitted to the PSC, was to support, or otherwise appear "consistent" with, identical or comparable overstatements of its revenues United Water knew it either: (A) had made, (B) was about to make, or (C) would continue to make, to the Twenty Lenders. After all, once United Water submitted wrong revenue numbers the first time, United Water may have felt pressure to

keep its "story straight" and submit the same wrong numbers to others, up to at least twenty more times. Indeed, the United Water philosophy of "we needed to keep our stories straight" is the very mantra acknowledged by United Water's employee Bob Razcko before the Rockland County Legislature in Year 2007, in my aghast presence, when Mr. Razcko was trying to explain how United Water allowed unacceptable levels of arsenic in my drinking water right prior to that time-period. As you can tell, I have never forgiven United Water for that.

Yet why would United Water be motivated to mislead the Twenty Banks and overstate its own revenue? Perhaps because United Water believed that by making itself appear richer, it would thereby obtain a lower interest-rate from each lender from whom the company solicited and ultimately obtained loaned financing. Apparently, according to the "Order Denying Surcharge", Page 34, such a United Water approach may have even worked on the Twenty Lenders - which is not a great testimonial to the due-diligence capabilities of those Twenty Lenders, by the way.

Banks often base the interest-rate they offer on loans or credit, on the basis of risk, or on the basis of perceived risk. Therefore, for example, a rich investment-banker young retiree might be offered a US\$500,000 credit line at a 4% interest-rate from a credit card company, whereas the same credit card company might offer a poor working mother of four from New Rochelle a US\$10,000 credit line at a 14% interest-rate. Ironically, it is the rich people that don't really need the credit, who get the most credit. The same is often true with companies. The richer they are, or appear to be, the more credit and lower interest-rates they get, as a general rule. Of course, this dynamic also creates a huge potential for abuse, giving disingenuous loan-applicants great incentive to lie about their assets.

Of all currently plausible theories, I believe that the most likely theory as to why United Water overstated its revenues is this one: United Water engaged in a pattern and series of acts deceiving the Twenty Lenders into thinking the company was richer than it really was, thereby influencing the Twenty Lenders to loan money to United Water at significantly-below-market interest-rates. By this point in time, after all, United Water may have already intended to take the cheap loan money and play its interest-rate arbitrage game to the detriment of the rate-payer. See "Order Denying Surcharge", Pages 17-19, 28-33. Incidentally, if you find in your Investigation that the pattern and deception of the Twenty Lenders was purposeful on United Water's part, then the words "fraud", "conspiracy", and even "RICO" should come to mind. But whatever you currently know about United Water's intent in its miscommunications to the Twenty Lenders, you already know that United Water did not invent its interest-rate arbitrage scheme spontaneously without premeditation and, in my opinion, without *scienter*.

One may argue, even assuming that the foregoing theory is correct, there was no harm to the rate-payer because Staff and Judge Casutto caught and effectively halted the United Water interest-rate arbitrage game on Thursday, November 13, 2014. However, what about all the past rate-making, all the past United Water rates, and all the past rate orders prior to the June 26, 2014 Rate Order? What about all the rates and surcharges United Water obtained from the first date of its acquisition of Rockland County's water system, through this summer in Year 2014? Does Staff know for a fact that rate-payers did not get stuck with United Water's interest-rate arbitrage tab three years ago? Five years ago? Eleven years ago? For this reason, by the way, I am very

happy to learn that the Commission is examining and investigating the totality of Michael Pointing's actions back to Year 2003.

Moreover, just because United Water's interest-rate arbitrage activities were terminated by Staff and Judge Casutto on November 13, 2014, does not mean that United Water won't attempt to "re-bill" the corresponding dollar-amounts to Rockland County rate-payers like me in the months and years ahead - either by re-applying for up to US\$40,000,000 in Surcharge as the Commission suggests United Water can still do, or else by United Water embedding the numbers in some other sought charges to rate-payers overtly or covertly. The Commission should investigate and then expose the full extent of United Water's interest-rate arbitrage scheme, including United Water's past communications with the Twenty Lenders, so as to ensure that rate-payers never have to pay for that United Water scheme in the future, as well. As for the past, the rate-payers should be compensated for any such past United Water machination if it occurred, assuming that it can be lawfully collected in a manner consistent within any applicable limitations period.

The Commission's Investigation should include a careful examination of how if at all the Twenty Lenders reacted, are reacting, and will react, to United Water's Written Admissions To The Twenty Lenders. The loan documents exchanged between United Water and some or all of the Twenty Lenders may allow these Lenders: (A) to call the loans, (B) to default United Water on the loans, (C) to raise the interest-rate charged to United Water on the previously-loaned money, and (D) to otherwise economically-penalize United Water for the false information United Water provided those Lenders, among other possibilities. For that matter, how can the Commission currently be certain that some or all of the Twenty Lenders have not already reported United Water's overstated revenue to financial regulators and law-enforcement authorities, as possible financial crimes? That could have a devastating adverse effect on rate-payers - even though, as United Water's 2006 rigged radium tests on New Jersey drinking water revealed, criminal indictments are nothing new to United Water executives:

http://www.nytimes.com/2006/06/16/nyregion/16mbrfs-001.html?_r=0

In terms of protecting rate-payers, if hypothetically any of the Twenty Lenders raise United Water's interest-rate on the loaned financing because of United Water's past misrepresentation(s) on loan application documents, then that augmentation in interest-rate may have already been imposed, and in any event will likely be imposed in the future, on rate-payers, unless Staff and this Honorable Commission stops that from happening.

I will also add that United Water may have had additional motivations to overstate its revenue. For one thing, by overstating its revenue, United Water would also likely be overstating its claimed cash holdings, and therefore its claimed equity. Therefore as a consequence, United Water would presumably be overstating its "Equity Ratio" or "Equity[-To-Debt] Ratio" - otherwise referred to in the record as "Equity Capital Structure", or "Equity Level". (See Page 48 *et seq.*, "Order Establishing Rates", June 26, 2014, in the Rate Case; hereafter, "2014 Rate Order"). Utilities like United Water apparently seek rate-increases calculated upon, *inter alia*, its "ROE" which is an acronym for "Return On Equity". Therefore the rate-increase is at least in part calculated upon, if I understand correctly, the company's equity and its Equity Ratio.

Notwithstanding the size of its corporate parents, United Water New York is not huge, with a little more than one hundred employees. *See* Page 9, "2014 Rate Order". United Water New York has no real capital structure of its own, so PSC effectively creates one for rate-making purposes. *See* Page 49, "2014 Rate Order".

In the Rate case, as you know, Staff argued for a 44% Equity Ratio. The ALJ's opined that 46% was an appropriate Equity Ratio figure, up from 45% in a prior time-period. Then the Commission adopted the lower Staff Equity Ratio figure of 44% - which had the net effect of keeping Rockland's utility rates (somewhat) down. United Water had actually sought a 52% Equity Ratio figure determination in that Case, as consolidated with its corporate parent United Water of New Jersey. *See* Pages 48-50, "2014 Rate Order". United Water's 52% number was significantly divergent from that of Staff and of the ALJ's, and was also significantly divergent from the Commission's ultimately-decided figure. As for those that might dispute the use of the word "significantly", that eight-percentage-point differential from 44% to 52% had approximately a US\$2,000,000 impact (*see* Page 50, "2014 Rate Order") - something that United Water could have probably forecast in advance. Therefore, it is plausible that United Water overstated its revenues to try to lend additional support to its extremist 52% Equity Ratio figure - again, possibly in a United Water play for an extra US\$2,000,000 taken from rate-payers, in addition to the US\$5,000,000 to US\$6,000,000 impact of its interest-rate arbitrage scheme.

Naturally, the documents posted to the Electronic Docket Sheet of the Irregularities Matter already make it clear that there are multiple other likely or possible reasons why United Water may have purposefully - as opposed to accidentally - overstated revenue. Michael Pointing, Michael Blake, and Michael Roling all received money bonuses over multiple years based upon the false overstated United Water revenue numbers. Indeed, how many other of United Water New York's 100+ employees also received enhanced bonuses year-after-year because of the now-infamous US\$2,900,000 recidivist "stranded asset"? I trust that Staff's Investigation will examine the overstated revenue's impact on all bonuses, and not just the bonuses of Michael Pointing, Michael Blake, and Michael Roling. Additionally, the overstated revenue may have been the *sine qua non* allowing Pointing, Blake, and Roling to simply keep their respective jobs - which in my view means that the full extent of their salary, bonus, benefit, and compensation package all comprise ill-gotten gains resulting from the United Water-overstated revenue to the detriment of the rate-payer.

Also, it has been reported in recent years that United Water's corporate parent *Suez Environnement* is "loosening its ties" to the water business:

<http://online.wsj.com/articles/SB10001424127887324640104578161523779490116>

<https://www.euinvestor.com/news/2012/12/05/gdf-suez-to-loosen-ties-to-water-business/12157712>

Additionally, Rockland County officials have been considering the formation of Rockland's own water authority to the exclusion of United Water:

<http://www.lohud.com/story/news/2014/03/10/rockland-water-authority/6270765/>

In other words, United Water may be preparing to sell its claimed interest in the Rockland County water system either back to local government, or to a third-party - or at least preparing for

condemnation proceedings. Accordingly, United Water's overstated revenues could have been done with the intention of artificially driving-up the price in an ultimate sale.

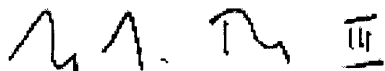
In conclusion, therefore, I am requesting that Staff please issue and serve subpoenas compelling the sworn testimony of responsible officers of, and production of documents from, the following Twenty Lenders:

1. Allstate
2. Bank of America
3. *BNP Paribas*
4. BNY Mellon
5. CIC
6. CITI
7. *Credit Agricole*
8. GenWorth
9. JP Morgan Chase
10. MetLife Insurance
11. New York Life Insurance
12. Northwestern Mutual
13. One America
14. Principal Life Insurance
15. Prudential
16. *Societe Generale*
17. Standard & Poor's
18. TD Bank
19. Thrivent
20. Wells Fargo

In my view, the documents subpoenaed should include, without limitation, all loan and credit applications and all other materials which United Water submitted to the Twenty Lenders and all their affiliates when United Water sought their short-term financing ("Order Denying Surcharge", Page 15 *et seq.*) and United Water's so-called "low-cost financing vehicle" ("Order Denying Surcharge", Page 34).

Thank you.

Respectfully submitted,



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cc:

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secretary@dps.ny.gov

Honorable Kathleen H. Burgess, Secretary to the Commission

Office of the Secretary

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Honorable Audrey Zibelman, Chair

Honorable Patricia L. Acampora, Commissioner

Honorable Garry A. Brown, Commissioner

Honorable Gregg C. Sayre, Commissioner

Honorable Diane X. Burman, Commissioner

Kimberly A. Harriman, General Counsel

Kathleen H. Burgess, Secretary

Parties in **Matter Master: 14-02068/Matter Number: 14-02068**

Parties in Case 13-W-0246

Parties in Case 13-W-0295

Parties in Case 13-W-0303