

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

<hr/> In the Matter of Staff’s Investigation into United Water’s Accounting Irregularities	:	Matter 14-02068
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<hr/> 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
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<hr/> Verified Petition of United Water New York Inc. for Implementation of a Long-Term Water Supply Surcharge, And Related Tariff Amendment	:	Case 13-W-0246
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<hr/> Proceeding on Motion of the Commission to Examine United Water New York Inc.’s Development of a New Long-Term Water Supply Source	:	Case 13-W-0303
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**OPPOSITION OF UNITED WATER NEW YORK INC., UNITED WATER NEW
ROCHELLE INC., AND UNITED WATER WESTCHESTER INC.
TO THE OMNIBUS MOTION OF JOHN J. TORMEY III**

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Dated: November 6, 2014

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TO THE OMNIBUS MOTION OF JOHN J. TORMEY III**

United Water New York Inc. (“UWNY”), United Water Westchester Inc., and United Water New Rochelle Inc. (collectively, the “Companies” or “United Water”) respectfully submit this response in opposition to John J. Tormey III’s “Omnibus Motion.” Mr. Tormey’s Omnibus Motion is comprised of 23 separate motions that address various and sundry topics across four separate proceedings before the Public Service Commission (“Commission”) and the Department of Public Service (“Department”). Mr. Tormey’s motions generally fall into three broad categories: (1) Mr. Tormey seeks consolidation of 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* (“Surcharge Case”), 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* (“Rate Case”), 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*

(“Continuing Need Proceeding”), and Matter 14-02068, *In the Matter of Staff’s Investigation into United Water’s Accounting Irregularities* (“Accounting Investigation Matter”); (2) Mr. Tormey seeks rehearing/reopening of the Commission’s June 26, 2014 order in the Rate Case; and (3) Mr. Tormey seeks to control and direct Department staff’s (“Staff”) management of the Accounting Investigation Matter.¹ For the reasons discussed below, each of the 23 motions comprising Mr. Tormey’s Omnibus Motion must be denied in all respects.

The 23-part Omnibus Motion is but the latest in a series of enigmatic papers filed by Mr. Tormey in these matters that are improperly laden with off-base and negative opinions, conjecture, and invective directed towards United Water and its employees. Mr. Tormey included “wide-ranging and irrelevant contentions” in his filings on the draft protective order in the Surcharge Case, as recognized by ALJ Kevin J. Casutto in the March 5, 2014 Ruling on Confidential Materials.² Then on March 7, 2014, Mr. Tormey filed his first motion to consolidate the Surcharge Case, the Rate Case, and the Continuing Need Proceeding in the form of a 47-page single-spaced brief that held forth on an astonishing array of extraneous subjects, including the functionality of the Commission’s website, the lyrics of Bruce Springsteen, the writings of Lewis Carroll, Woodrow Wilson, the state motto, and Mr. Tormey’s aversion to air

¹ United Water has not separately addressed each of the 23 motions that comprise Mr. Tormey’s Omnibus Motion. The 23 motions are addressed individually where necessary but in some instances are addressed collectively.

Certain of Mr. Tormey’s motions – such as his request for a “plenary forensic audit” (Motion Q) and his request for a prudence hearing (Motion R) – have previously been made by other parties and/or decided by the Commission or the presiding Administrative Law Judges (“ALJs”), as previously addressed by United Water in its recent response to the numerous motions filed by the Town of Ramapo and the Municipal Consortia. *See* Case 13-W-0295 *et al.*, Response of United Water New York Inc., United Water New Rochelle Inc., and United Water Westchester Inc. to the Filings of the Municipal Consortium, at 6-8 (October 20, 2014). United Water incorporates by reference the relevant arguments it has previously articulated on these subjects.

² Case 13-W-0246, Ruling on Confidential Materials, at 3 n.1 (March 5, 2014).

travel.³ Similarly, Mr. Tormey’s instant Omnibus Motion does not cite to a single piece of pertinent legal authority (*e.g.*, a relevant Commission decision, a controlling statute or regulation) in support of his 23 motions but instead discusses Gilligan’s Island, perseverates on the misspelling of one individual’s name, and makes repeated inflammatory and unfounded accusations against United Water, such as accusing the Companies of a “Low-Life Ponzi Scheme.”⁴

Still more egregious, Mr. Tormey’s latest papers make factual misrepresentations to Staff and the Commission. For the sole purpose of lodging a gratuitous, completely baseless, and nonsensical attack against Robert Gerber, United Water Inc.’s General Counsel, Mr. Tormey references a federal criminal case in Indiana in which Mr. Gerber, together with lead outside counsel, represented United Water Environmental Services Inc. (“UWES,” an entity which has nothing to do with these matters).⁵ Attached as Exhibit A to the Omnibus Motion are transcript pages from the Indiana matter that Mr. Tormey evidently printed off the federal Public Access to Court Electronic Records (“PACER”) system. But while Mr. Tormey repeatedly mentions the 2011 federal indictment in the Indiana matter, he fails to disclose that on November 9, 2012, UWES and the other defendants were acquitted on all charges – a fact that is readily apparent from the same PACER webpage where Mr. Tormey obtained Exhibit A to his Omnibus Motion.⁶

³ Case 13-W-0295 *et al.*, Notice of Motion to Consolidate Three (3) Cases, Into One (1) Case (March 7, 2014); *see also*, Case 13-W-0295 *et al.*, United Water New York Inc.’s Opposition to John J. Tormey III’s Motion to Consolidate, at 12-13 (March 17, 2014).

⁴ Omnibus Motion at 4-5, 7, 8, 12.

⁵ Omnibus Motion at 6-7.

⁶ *See* Judgment of Acquittal filed in *U.S. v. United Water Environmental Services, Inc., et al.* (N.D. Ind. November 9, 2012) (attached hereto as Exhibit 1).

This sort of practice is a textbook example of conduct prohibited from members of the bar such as Mr. Tormey under 22 NYCRR § 130-1.1(c)(3).⁷

Other individuals and organizations with positions contrary to United Water have intervened in the Surcharge Case, the Rate Case, the Continuing Need Proceeding, and the Accounting Investigation Matter. United Water generally has professional relationships with all parties aggressively pursuing their positions in these matters. However, Mr. Tormey's habitual filing of patently improper papers – which are uniformly replete with *ad hominem* attacks and burdensome, irrelevant, and immaterial matters – create unwarranted demands on the resources of United Water, the Commission, Staff, and other parties. Given his history, and the specific content of his October 23, 2014 request for party status in the Accounting Investigation Matter, it is difficult to discern how Mr. Tormey's participation is “likely to contribute to the development of a complete record or is otherwise fair and in the public interest” under 16 NYCRR § 4.3(c)(1).

Mr. Tormey's Omnibus Motion is a wholly unauthorized aggregation of 23 separate motions that are procedurally improper and substantively devoid of merit. Mr. Tormey essentially seeks to wrest control of the Accounting Investigation Matter away from Staff and the Commission while also seeking to consolidate and/or reopen several of the Companies' proceedings based on inflammatory accusations and conclusions that are not supported by the record in any of the underlying proceedings. Based on the foregoing, and those reasons articulated more fully below, Mr. Tormey's Omnibus Motion should be denied in its entirety.

BACKGROUND

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

⁷ See, e.g., *Red Apple Child Dev. Ctr. v. Cmty. Sch. Dists.*, 299 A.D.2d 274, 274 (1st Dep't 2002).

and its proposed revenue reconciliation surcharge filing. A subsequent United Water investigation revealed that revenues for the Companies were overstated in 2010 and 2011. This overstatement of revenues, which was reported to the Commission and the Department after being discovered, led to the termination of three United Water employees.

Despite the misuse of the term “misappropriation” in an unattributed blog post in the local media, United Water’s internal investigation has not found any evidence or allegations of funds being misappropriated – and the Companies have been forthright and clear in responding to Staff inquiries on the subject. United Water has 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-0731.⁸ PwC has commenced this evaluation, the cost of which will be paid by United Water’s shareholder, not the Companies’ customers. The Companies will provide the results of the PwC evaluation to Staff when it is completed.

On October 17, 2014, Commission Chair Audrey Zibelman sent a letter to United Water President David Stanton that read, in part, as follows:

At my request, the Department of Public Service Staff has initiated an investigation into the circumstances surrounding the recent termination of United Waterworks, Inc.’s General Manager of its New York Division, along with two other employees, to ascertain if the events that appeared to give rise to the terminations have any effect on rates charged by United Water’s New York utilities... The investigation seeks to determine if any action is required to protect the interest of United Water’s New York ratepayers. I understand that United Water has already briefed Staff and provided several responses to Staff’s

⁸ 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.*

inquiries, and I expect the Company will continue to fully cooperate with Staff's investigation.

Later on October 17, David Stanton, President of United Water, sent a responsive letter to Chair Zibelman that read, in part, as follows:

I want to assure you that United Water shares the same goal as the Commission: ascertaining whether any actions by three of its former employees have any effect on rates charged to United Water's New York utilities (United Water New York Inc., United Water New Rochelle Inc., United Water Westchester Inc., and United Water Owego-Nichols Inc.). United Water discovered the matters under investigation through its own internal controls and promptly commenced its own internal investigation into the matters....

United Water has indeed briefed Staff and provided several responses (including documents) to Staff inquiries *and will continue to cooperate fully with the investigation.*

(Emphasis supplied.)

As part of the Accounting Investigation Matter initiated at Chair Zibelman's request, Staff has served two sets of interrogatories/document requests (IRs TC-1 and TC-2) upon United Water; and United Water submitted documents and written responses to those IRs on October 6, October 14, and November 3, 2014.

On October 22, 2014, Staff released a memorandum regarding the Accounting Investigation Matter that noted: "While there is no evidence of harm to ratepayers at this time, the Commission is, in an abundance of caution, investigating the situation and has established Matter Number 14-02068."

ARGUMENT

I. MR. TORMEY’S MOTIONS FOR CONSOLIDATION SHOULD BE DENIED WITH PREJUDICE BECAUSE THEY ARE PROCEDURALLY PROHIBITED AND MR. TORMEY HAS NOT MET (OR EVEN ARTICULATED) THE STANDARD FOR CONSOLIDATION UNDER CPLR § 602(a) OR COMMISSION PRECEDENT

Motions A and F of the Omnibus Motion seek consolidation of the Surcharge Case, the Rate Case, the Continuing Need Proceeding, and the Accounting Investigation Matter. Mr. Tormey concedes that his arguments for consolidation are “comparable to those already set forth in my prior March 7, 2014 Motion to Consolidate filed in the Rate Case, Need Case, and Surcharge Case.”⁹ On March 17, 2014, United Water and Staff filed papers in opposition to Mr. Tormey’s earlier motion to consolidate, and that earlier motion remains pending before ALJ Casutto in the Surcharge Case. Mr. Tormey’s current motions to consolidate are procedurally prohibited and remain as devoid of merit as his previous (and pending) motion seeking the same relief.

A. Mr. Tormey’s Current Motion for Consolidation Cannot be Granted While His Previous Motion for Consolidation Remains Pending

Motion practice before the Commission is governed by 16 NYCRR § 3.6. Section 3.6 contains no provision allowing a party to file a motion while that party’s previous motion for the same relief remains pending. The absence of such a provision in the Commission’s rules is consistent with the well-established principle in New York law that while “a prior motion is pending, a subsequent motion for the same relief cannot be granted.” *Polokoff v. Polokoff*, 34 Misc.2d 414, 416 (Sup. Ct. Queens Cty. 1962) (citing *Hoover v. Rochester Printing Co.*, 2 A.D. 11 (4th Dep’t 1896)); 2 Carmody-Wait 2d § 8:11 (“A court should not entertain and dispose of a motion while another motion for the same purpose is pending undetermined in the same court”).

⁹ Omnibus Motion at 11.

Here, Mr. Tormey filed a motion to consolidate the Surcharge Case, the Rate Case, and the Continuing Need Proceeding on March 7, 2014, and that motion remains pending before ALJ Casutto in the Surcharge Case. Because Mr. Tormey's previous motion to consolidate remains pending and undetermined before ALJ Casutto, his instant motions seeking the same relief are procedurally improper and must be denied. *See Hoover*, 2 A.D. at 11; *Polokoff*, 34 Misc.2d at 416.

B. Mr. Tormey Has Not Met the Standard for Consolidation Under CPLR § 602(a) or Commission Precedent

United Water filed papers in opposition to Mr. Tormey's previous motion to consolidate on March 17, 2014, and United Water re-adopts and incorporates herein the arguments contained in those papers by reference.

CPLR § 602(a) provides that consolidation of multiple actions may be appropriate "to avoid unnecessary costs or delay" when the actions involve "a common question of law or fact."¹⁰ *See also, e.g.,* Case 09-W-0824, *In re United Water New Rochelle Inc.*, Ruling on Schedule and Motion for Consolidation, at 1 (March 9, 2010) (consolidation appropriate where "cases have overlapping subject matter" and consolidation "would use resources efficiently"). Motions to consolidate "are addressed to the sound discretion" of the presiding official (*e.g., Gov't Emps. Ins. v. Uniroyal Goodrich Tire Co.*, 242 A.D.2d 765, 766 (3d Dep't 1997)),¹¹ but the party moving for consolidation bears the initial burden of establishing the existence of common questions of law and fact. *Beerman v. Morhaim*, 17 A.D.3d 302, 303 (2d Dep't 2005).

¹⁰ While not controlling, the CPLR "serves as guidance" in Commission proceedings. Case 13-W-0295, Ruling on Confidential Materials and Party Status (August 19, 2013), at 2 n.5; *see* Case 97-G-0801, *In re LILCO*, Order Extending Filing Date and Denying Motion to Bifurcate (July 24, 1997), at 3 n.1 (referencing CPLR § 602).

¹¹ *See also, e.g.,* Cases 99-E-0933 and 99-E-0935, *In re Niagara Mohawk, New York State Electric & Gas and AmerGen Energy*, Ruling Consolidating Cases (October 8, 1999), at 3 ("...administrative agencies have substantial discretion to decide whether to consolidate any of the proceedings before them").

Here, as in his previous motion to consolidate, Mr. Tormey has failed to satisfy his burden on these motions by identifying any common questions of law or fact to be decided in the Surcharge Case, the Continuing Need Proceeding, the Rate Case, and the Accounting Investigation Matter. Mr. Tormey does not articulate the relevant legal standard or make any effort to satisfy that standard.

As previously articulated by United Water, there are no common questions of law or fact between the Surcharge Case, the Rate Case, and the Continuing Need Proceeding.¹² And Mr. Tormey has not and cannot articulate any common questions of law or fact between those cases and the Accounting Investigation Matter because no such common questions exist.

“Even where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter.” *Abrams v. Port Auth. Trans-Hudson Corp.*, 1 A.D.3d 118, 119 (1st Dep’t 2003) (citing *F & K Supply v. Johnson*, 197 A.D.2d 814, 814-815 (3d Dep’t 1993) (“substantial prejudice” resulting from the “delay in the trial of another action is sufficient reason to deny consolidation even in situations where common questions of law or fact exist”)); *Stephens v. Allstate Ins. Co.*, 185 A.D.2d 338, 339 (2d Dep’t 1992) (consolidation properly denied where it would cause delay, which is prejudicial to the non-moving party).

Here, all four matters are at “markedly different procedural stages.” The Continuing Need Proceeding and the Surcharge Case are ongoing matters awaiting decision. The Commission issued an Order Establishing Rates in the Rate Case on June 26, 2014. The Accounting Investigation Matter was initiated just last month. The markedly different

¹² Case 13-W-0295 *et al.*, United Water New York Inc.’s Opposition to John J. Tormey III’s Motion to Consolidate, at 14-18 (March 17, 2014).

procedural postures of the four matters render consolidation completely unworkable and contrary to all Commission precedent on the subject.

Accordingly, there is no basis to consolidate the cases and Mr. Tormey's motions must be denied.

II. MR. TORMEY'S MOTIONS SEEKING REHEARING OF THE COMMISSION'S ORDER IN THE RATE CASE ARE UNTIMELY AND UNJUSTIFIED

Motions G and H from Mr. Tormey's Omnibus Motion request "re-assessment" and reopening of the Rate Case "towards a reduction of any rate-increase previously therein accorded by this Commission."¹³ Mr. Tormey's motions are tantamount to requests for rehearing of the Commission's Order Establishing Rates in the Rate Case that must be denied as untimely and unjustified.

Public Service Law ("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." Similarly, pursuant to the Commission's regulations, requests for rehearing must be made "within 30 days of service of the order." 16 NYCRR § 3.7(a). The Commission's Order Establishing Rates in Case 13-W-0295 (the Rate Case) was issued on June 26, 2014. 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. Mr. Tormey's motions seeking rehearing of the Commission's Order Establishing Rates in the Case 13-W-0295 must be denied as untimely.

Even assuming *arguendo* that the time for rehearing has not passed (which it has), Mr. Tormey's motions fall far short of the standard necessary to support rehearing under 16 NYCRR

¹³ Omnibus Motion at 11.

§ 3.7. The Commission’s rehearing 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 NYCRR § 3.7(b).

Mr. Tormey’s papers do 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). Mr. Tormey’s error-riddled discussion of the events leading to the Accounting Investigation Matter does not meet the error of law or fact or new circumstances threshold sufficient to support rehearing in the Rate Case. Mr. Tormey does not cite to the Commission’s standard for rehearing articulated in Section 3.7(b) or demonstrate how or why the alleged events described in the Omnibus Motion meet the standards set forth in the Commission regulations or PSL § 22.

Mr. Tormey’s motions seeking rehearing of the Commission’s Order Establishing Rates in Case 13-W-0295 must thus be denied with prejudice.

III. MR. TORMEY’S MOTIONS ATTEMPTING TO USURP CONTROL OF THE ACCOUNTING INVESTIGATION MATTER FROM STAFF AND THE COMMISSION MUST BE DENIED

The majority of the remainder of the 23 motions comprising the Omnibus Motion amount to an impermissible attempt by Mr. Tormey to usurp control of the Accounting Investigation Matter from Staff and the Commission. Mr. Tormey’s motions attempt to direct the following with respect to the Accounting Investigation Matter: the subject matter and timeframe of the investigation (Motions S and T); referral to the Commission (Motion B); assignment of an ALJ (Motion C); assignment of a case number (Motion A); mandatory party status or compelled testimony by certain individuals and entities (Motions I, J, and U); the format of public participation (Motions M and N); and disclosure and confidentiality of information/documents

related to the investigation (Motions D, E, and W). There is no basis in law or logic for Mr. Tormey's various and sundry attempts to wrest control of the Accounting Investigation Matter from Staff and the Commission via motion practice. Mr. Tormey's motions seeking to install himself as the private manager of the Department's investigation must be denied in all respects.

Commission precedent has recognized that the intervention of private parties into an investigation conducted by Staff may be counterproductive if the entry of those other parties "will not enhance Staff's ability to conduct the fact-based investigation."¹⁴ Mr. Tormey's efforts to externally control numerous facets of the Accounting Investigation Matter will likely "not enhance Staff's ability to conduct" its "fact-based investigation" and should be denied. This conclusion is underscored by the nature of so many of Mr. Tormey's submissions in these matters, including the Omnibus Motion itself. In addition to the burdensome, irrelevant, and immaterial matters that have been an unfortunate hallmark of so many of Mr. Tormey's earlier submissions, the Omnibus Motion includes misrepresentations regarding the UWES matter in Indiana federal court (discussed above) in the context of lodging wanton and absurd attacks against Mr. Gerber, a practice proscribed by 22 NYCRR § 130-1.1(c)(3). Mr. Tormey also fails to cite to any Commission precedent, statutes, regulations, or other legal authority in support of his various motions.

Mr. Tormey's efforts to control the Accounting Investigation Matter are also unnecessary. Notwithstanding the erroneous information in the highly speculative blog posts and local media reports, it was the Companies that identified the accounting irregularity through their own internal controls. United Water then promptly commenced its own investigation, took

¹⁴ Case 11-G-0221, *Proceeding on Motion of the Commission Investigating the Acts and Practices Involving the Staking and Clearing of the Site of a Major Utility Transmission Facility in the Town of Sanford, Broome County Before the Obtaining of a Certificate of Environmental Compatibility and Public Need*, Ruling on Request for Party Status, at 4 (July 11, 2011).

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 Mr. Tormey's Omnibus Motion, which will contribute nothing to the resolution of Staff's investigation and will only serve to detract from Staff's investigatory process, should be denied.

CONCLUSION

Based on the foregoing, the 23 motions comprising Mr. Tormey's Omnibus Motion should be denied in all respects with prejudice.

Dated: November 6, 2014

Respectfully Submitted,



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Exhibit 1

UNITED STATES DISTRICT COURT

Northern

DISTRICT OF

Indiana

UNITED STATES OF AMERICA

JUDGMENT OF ACQUITTAL

V.

UNITED WATER ENVIRONMENTAL
SERVICES, INC.

CASE NUMBER: 2:10 CR 217

The Defendant was found not guilty. IT IS ORDERED that the Defendant is acquitted, discharged, and any bond exonerated.

s/Philip P. Simon

Signature of Judge

Philip P. Simon, U.S. District Court Judge

Name and Title of Judge

November 9, 2012

Date