

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on February 5, 2015

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

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 REGARDING PETITION FOR REHEARING

(Issued and Effective February 10, 2015)

BY THE COMMISSION:

INTRODUCTION

We issued an order setting rates for United Water New York Inc. (UWNY or the Company) in this proceeding on June 26, 2014 (the June Rate Order).¹ On July 28, 2014, the Municipal Consortium (Consortium or Petitioner) filed a petition seeking rehearing and/or clarification (Petition) of the June Rate Order, pursuant to Public Service Law (PSL) Section 22. Petitioner seeks rehearing on five provisions and rehearing or clarification with respect to several other provisions. On August 12, 2014, Staff of the Department of Public Service (Staff), UWNY and the Department of State's Division of Consumer Protection, Utility Intervention Unit (UIU) filed responses to the Petition.² The County of Rockland (County) submitted a

¹ Case 13-W-0295, United Water New York Inc. - Rates, Order Establishing Rates (June 26, 2014).

² 16 NYCRR §3.7(c).

response on August 13, 2014.³ Staff thereafter filed a motion requesting that two arguments presented by UIU, in response to the Consortium's Petition, be disregarded as untimely requests for rehearing.⁴ UWNY in turn filed a letter supporting Staff's motion.⁵

In accordance with State Administrative Procedure Act (SAPA), notice of the rehearing petition was published in the State Register on August 13, 2014.⁶ One individual submitted comments on the Petition, expressing support for a prudence investigation of UWNY.

Under our Rule 3.7(b),⁷ a party may seek rehearing of a Commission order only on the limited grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. As discussed below in this order, we find no error of law or fact or new circumstances that would support a modification of the June Rate Order. Consequently, we reject all of the claims raised by the Consortium and UIU. We do, however, provide the requested clarification regarding the rights of parties to participate in

³ The County is a member of the Consortium. It is not appropriate for a party to respond to its own petition; consequently, the County's filing is not discussed herein and was not considered in our analysis.

⁴ DPS Staff Motion to Deny (dated August 14, 2014).

⁵ On October 10, 2014, the Consortium supplemented its petition for rehearing in response to United Water's termination of Michael Pointing, alleging that his dismissal provided new grounds for the relief requested, and UWNY responded. In general, we have addressed the issues surrounding Mr. Pointing's termination elsewhere, see Matter 14-02068 and Transcript of Session, November 13, 2014 (oral report), and therefore we will not address those allegations in this order.

⁶ SAPA No. 13-W-0295SP3.

⁷ 16 NYCRR §3.7(b).

further activities required in compliance with the June Rate Order.

DISCUSSION

Below we address each of the Consortium's claims and those of the other parties in response in the course of our discussion and resolution of each issue.

1. UWNY Management

In the June Rate Order, we determined that UWNY's annual base revenues should be increased by \$9.8 million, or 13.3%. We noted that this rate allowance, while a significant moderation of the Company's initial request for a 28.9% increase, was still substantial, but was due principally to increases in property taxes and necessary investments in infrastructure. In its petition for rehearing, the Consortium claims that we committed an error of law in granting a rate increase despite acknowledging that UWNY is not managed in an efficient and economical manner. According to the Consortium, the Commission's recognition of the UWNY management failures in the June Rate Order should have resulted in a denial of any rate relief. The Consortium devotes several pages to setting forth the rate increases received by UWNY since 1995, and asserts that the disparity between the allowed rate increases UWNY has received from 2007 to the present, compared to the Consumer Price Index (CPI) during that period, support its claim that rates should not be increased. The Consortium states that UWNY had the burden, under PSL §89-c(10)(h) and 16 NYCRR §61.1, to prove that the requested rate increase is just and reasonable and it failed to satisfy that burden.

Staff argues that the allegations of the Consortium should be dismissed for failure to comply with the Commission's pleading requirements. The Commission's regulations require that a petition "separately identify and specifically explain

and support each alleged error or new circumstance said to warrant rehearing."⁸ Staff notes that, although the Consortium quotes extensively from the Commission's June Rate Order, Petitioner did not identify any specific legal or factual errors in the Commission's reasoning.

UWNY, like Staff, asserts that the Petitioner failed to identify and specifically explain the alleged error or new circumstance warranting a different determination. UWNY says that the Consortium's arguments regarding the prior revenue requirements or inflation rates are irrelevant. The only relevant factor, it says, is whether absent rate relief UWNY would have sufficient revenue to continue to provide safe and reliable service. Moreover, it states, there is no record support for the Consortium's claim that UWNY is not being managed economically and effectively.

We agree with Staff and UWNY that the Consortium has not articulated any basis for reversal of our prior decision. It has not articulated an error of fact or law or any new information that would justify a change in outcome. It does not assert, nor could it, that our rate-setting process must be determined by the CPI, and it does not otherwise establish the relevance of the arguments in its petition for rehearing. In fact, the June Rate Order clearly establishes our close scrutiny and adjustment of the expenses forecast by UWNY for the forecast rate year, in order to establish reasonable rates that would provide the Company with funds adequate for the provision of service. There is no misapplication of the burden of proof during this ratemaking process and no error of law.

⁸ 16 NYCRR §3.7(b).

2. M&S Fees

UWNY is associated through its parent with a separate subsidiary, United Water Management & Services Company Inc. (UWM&S). UWM&S provides services, including tax, accounting, treasury, communications, asset management, engineering, information technology, environmental health and safety, internal audit, technical services, human resources, procurement, accounts payable, payroll, legal, regulatory business, as well as other general management and administration, to UWNY and other regulated and unregulated United Water subsidiaries. Payment for these services by UWNY is through an agreement between the Company and UWM&S. In its rate filing, the Company sought to establish a rate year M&S expense level of \$4.272 million. Instead, we adopted the recommendation of the ALJs in their Recommended Decision to set the M&S fee allowance at \$3.0 million, based on an escalation of the allowance set in the Company's last rate plan. We also adopted the proposals, advanced by several parties including the Consortium, to require an audit of the M&S charges, as part of a broader examination of the Company's management. We rejected the proposals of UIU and the Consortium, which had been raised both before the ALJs and to us on exceptions to the Recommended Decision, to set 50% of the Company's rates temporary and subject to refund, while the audit is undertaken. In doing so, we stated that the inherent denial in our decision of 30% of the claimed charges, on a permanent basis, was adequate protection for ratepayers.

Petitioner now reasserts the request that the Commission make the revenue requirement associated with 50% of the M&S fees temporary and subject to refund to protect UWNY's ratepayers while the M&S audit is underway, and claims that the Commission committed an error of law in not doing so. UIU

supports Petitioner's argument that the Commission erred legally by not setting a portion of rates attributable to M&S charges as temporary rates subject to refund. It states that such approach departs from the Commission's past practice of setting rates as temporary while an audit of expenditures is pending. UIU further submits that the Commission has committed a factual error because it assumes the historic levels of M&S charges were appropriate. UIU states that it agrees with the Consortium that making rates temporary is administratively easy and would afford ratepayers complete protection from paying unjust and unreasonable rates.

Staff argues that the errors claimed by the Consortium should be dismissed for failure to comply with the Commission's requirements for specificity in, and support for, the alleged error. It argues that the Petitioner failed to identify the legal requirements or identify the errors it alleges the Commission made. In response to UIU, Staff's Motion to Deny argues that UIU's allegation of factual error goes beyond the scope of the Consortium's Petition for Rehearing and therefore should be denied as an untimely petition for rehearing.

UWNY argues there is no legal or factual error that would justify rehearing to consider the recommendation to set 50% of the M&S fees as temporary and subject to refund. UWNY notes that the Petitioner repeats arguments it made in its Initial Brief nearly verbatim and that the Commission should deny rehearing on this issues for the same reasons the Commission initially rejected the arguments. UWNY also distinguishes the National Grid case referenced by the

Consortium⁹ and asserts the Commission did not commit any error of law or fact warranting rehearing.

Here, the Petitioner and UIU point to no legal or factual error or to any new facts as grounds for us to reverse our decision to proceed without temporary rates. Instead, the Petitioner repeats the arguments it made in its briefs, first to the ALJs and thereafter on exceptions to the Commission, arguments that have thus already been fully considered and rejected. The decision was fully within our informed discretion, and the June Rate Order clearly articulates why we exercised that discretion to impose a significant, permanent reduction in the allowance for the fees rather than employ the temporary rate process.

Moreover, both Petitioner and UIU err in stating that our allowance for M&S charges was set by escalating "historic" levels. The June Rate Order makes clear that we established an allowance based on the allowance set in the prior rate case, rather than the actual historic test year level of M&S fees paid by UWNY to its M&S affiliate, which we found to be unjustified on the record. Therefore, even if UIU's comment had been timely filed and procedurally proper, we would deny it on the merits.

3. Non-Revenue Water

NRW is water usage for which the Company does not or cannot charge. It results from leaks or failures of the physical distribution system, billing errors, inaccurate meters, theft, or unbilled but authorized water service, such as firefighting use of hydrants, among other causes. Commission regulations require water companies to report when NRW levels exceed 18% and include descriptions of events that impact the

⁹ Case 10-E-0050, Niagara Mohawk Power Corporation - Rates, Order Establishing Rates for Electric Service (January 24, 2011).

level and steps taken to reduce it.¹⁰ Because UWNY's NRW level averaged 21% in 2008 through 2012, the level was addressed by several parties, including Staff and the Consortium, in testimony before the ALJs, with the judges finding the level to be "unacceptably high" in their Recommended Decision. In the June Rate Order, the Commission dismissed that characterization as non-decisional, but we affirmed the recommendation of the ALJs that the Company prepare and submit a cost-benefit analysis of measures to reduce the level of NRW, comparing the costs to ratepayers to achieve the decrease with the projected revenue savings. We noted that UWNY has already undertaken a host of measures to reduce NRW. The June Rate Order rejected the proposal of the Consortium, which had been put forward in the case in chief and again on exceptions to the RD, to implement a specific financial incentive to reduce non-revenue water. The June Rate Order explains, "We do not believe that the record in this case contains sufficient information for us to conclude that through the Company's efforts it could reduce the NRW level to an acceptable threshold level and avoid triggering such an adjustment."¹¹

On rehearing, the Petitioner once again promotes its negative incentive proposal. At the same time, Petitioner also advocates for ratepayer funding of conservation programs under which UWNY would make investments (on which UWNY would earn a return) in pursuit of upgrading customers' water fixtures and appliances.

Staff again argues that the errors identified by the Consortium should be dismissed for failure to comply with the Commission's requirements for specificity in, and support for,

¹⁰ 16 NYCRR 503.8.

¹¹ June Rate Order at 43.

the alleged error. It argues that the Petitioner did not identify the error as being factual or legal and, in any case, the Petitioner fails to sufficiently explain or support its allegation.

UWNY states that the Commission appropriately rejected the Consortium's recommendation to implement a NRW incentive mechanism or negative revenue adjustment and committed no error of law or fact. It argues there is no record basis for the implementation of such a mechanism.

As UWNY and Staff note, Petitioner has not asserted any basis here for a finding of an error of law or fact in our June Rate Order. We previously considered and rejected its proposal for an incentive mechanism and explained our reasons for doing so, requiring instead a cost/benefit analysis of further programs designed to reduce the NRW level. The Consortium's petition for rehearing is not the place for it to be advancing a new proposal, only vaguely stated, that appears to propose subsidization of customers' water fixtures and appliances, a proposal that is not tied by any record evidence to the NRW issue.

4. Economic Obsolescence

The calculation of real property taxes begins in almost all circumstances with an assessment of the value of the real property to be taxed. The lower the assessed value, the lower, in general, the tax liability for the taxpayer. The assessment of utility property in the public right of way is made through a special franchise assessment provided by the New York State Office of Real Property Tax Services (ORPTS). In the context of this case, Economic Obsolescence refers to a program administered by ORPTS in which the special franchise assessment is reduced due to an impairment in the desirability or useful life of property as a result of factors external to the

property. In the course of responding to Staff discovery in this case as to why UWNY had not sought EO adjustments in prior periods, UWNY belatedly filed for and received an adjustment to its assessment based on Economic Obsolescence for tax years beginning in 2014. However, UWNY's filing contained significant errors, such that the EO adjustment awarded by ORPTS, 7%, was less than it should have been. Our June Rate Order sets the Company's revenue requirement for rate years beginning July 1, 2014 and thereafter based on the assumption that the Company seeks and obtains an Economic Obsolescence adjustment of 15.19%.

We rejected UIU's exception to the RD and upheld the RD's recommendation not to initiate a prudence investigation into UWNY's past failures to file for the EO adjustment. Instead, we concluded that the record did not include sufficient information to justify instituting an investigation at this time, and that the imputed EO level in rates provided adequate protection for ratepayers going forward. In its petition for rehearing, the Consortium asserts that the Commission erred in not initiating a prudence investigation.

Staff again asserts that the errors identified by the Consortium should be dismissed for failure to comply with the Commission's requirements for specificity in, and support for, the alleged error. It states that the Petitioner did not identify the error as being factual or legal and, in any case, the Petitioner fails to sufficiently explain or support its allegation. UWNY contends that there is no basis for the Commission to pursue a prudence investigation regarding Economic Obsolescence awards and that the Commission provided adequate protection for ratepayers in the June Rate Order.

Petitioner's claim is barred by Rule 4.10(d)(2): "A party's failure to except with respect to any issue shall constitute a waiver of any objection to the recommended

decision's resolution of that issue. If the commission adopts the recommended resolution, a party that has not excepted may not seek a different resolution of that issue on rehearing." Here, the ALJs recommended against the commencement of a prudence investigation in their RD, and the Petitioner failed to take exception to that recommendation. Therefore the Consortium has waived the right to raise this issue on rehearing.

Moreover, the Consortium has not raised any error of law or fact but rather has merely reasserted an argument (raised by UIU in the exceptions process) we have already considered and rejected. We properly exercised our discretion to reject this remedy in favor of an aggressive imputation of the EO adjustment level and the requirement of annual reporting, which we stated would provide adequate protection for ratepayers going forward. Nevertheless, we note that UWNY's property taxes from past years are subject to a reconciliation mechanism that was established in its prior rate plan, pursuant to which the forecasted amounts included in the rate plan are "trued up" to the actual amounts, with deviations credited either to the Company or ratepayers, as the case may be. DPS staff's audit of UWNY's proposed reconciliation of past periods is ongoing. If, in the course of that audit, DPS staff were to find that UWNY acted imprudently with respect to its taxes, DPS staff could recommend to the Commission that adjustments to the reconciliation be made to account for such imprudence or that further process be conducted to achieve that result, as necessary. Thus the reconciliation review will provide most, if not all, of the protections and remedies sought by Petitioner.

5. Lake Deforest Agreement

As we noted in our June Rate Order, since August 1954, the Spring Valley Water Company (the legal predecessor of UWNY) and the Hackensack Water Company (the legal predecessor of

United Water New Jersey (UWNJ)) have, by agreement, managed and benefited from the Lake DeForest Reservoir.¹² Under this agreement, UWNJ operates and maintains the reservoir and provides certain minimum flows to UWNJ, and UWNJ agrees to pay, pursuant to a formula, a portion of the costs of this operation and maintenance.

The original Lake DeForest Agreement would have expired in 1989, but for an amendment in 1989 which extended the agreement until 1993. The term of the agreement was extended in 1993 to 2013. In 2014, the parties to the agreement negotiated a further extension of the agreement, retroactive to 2013. The 2014 amendment made no change in the existing payment structure or in the responsibilities for operation and maintenance, and it extended the term of the agreement by an additional 25 years.

When UWNJ filed the instant rate proceeding in July 2013, it had not concluded the negotiations leading to the amendment. However, UWNJ's rate filing included \$1.7 million in projected revenues from UWNJ pursuant to the Lake DeForest Agreement, as well as, of course, UWNJ's costs to operate the facility pursuant to the agreement.¹³ Thereafter, pursuant to PSL §110, UWNJ filed the 2014 amendment with the Secretary on

¹² June Rate Order at 43.

¹³ In Exhibit 12, which is Exhibit Cdj-3 to the pre-filed direct testimony of the Company's witness Caryl Jersey, the Company's table of Other Revenues projects Rate Year revenues from the Lake DeForest Agreement of \$1.7 million. This entry in the Other Revenues table was explained at page 6 of the witness Jersey's pre-filed testimony, incorporated into the record at Tr. 359.

February 11, 2014.¹⁴ The evidentiary hearings in this case took place the same week, on February 13 and 14.

Our June Rate Order devoted several pages to the history and terms of the agreement. It further noted that Rockland County (a member of the Consortium) had provided comments and recommendations on the agreement on April 14, 2014, in which the County identified the benefit of a new "spill skimming" protocol contained in the amendment, the only material change to the agreement, but in which the County also asked the Commission to review the fundamental calculation and allocation of the annual operating charge (AOC) between UWNY and UWNJ to ensure that UWNY had no financial disincentive to maximize water use. We concluded:

We view the Amendment Agreement as providing UWNY with greater operational flexibility, in that it will be able to retain additional water resources for Rockland County's UWNY ratepayers with no detriment to UWNJ or its customers. We also did not find during our review of the calculation and allocation of the AOC and Amendment Agreement, any inherent defects or inequities in the agreement. Consequently, and based on our review, we accept the Amendment Agreement and recognize the approximately \$1.7 million in annual revenues provided by UWNJ to UWNY, under the Agreement Amendment cost sharing protocols, as Interdepartmental revenues.¹⁵

The June Rate Order went on to address what we characterized as misperception among the public on the subject of Lake DeForest, as reflected in the public comments received in writing and orally at Public Statement Hearings in this case. The June Rate

¹⁴ When contracts are filed with the Commission pursuant to PSL §110, there is no explicit requirement that the Commission will act to approve the contract. If, however, the Commission finds that the contract is not in the public interest, the statute explicitly authorizes the Commission to disapprove the agreement.

¹⁵ June Rate Order, p. 45.

Order goes to some length to address and find no evidence to support public criticism that water has been inappropriately diverted to UWNJ, to the detriment of UWNY, and to explain the benefits of the amendment to UWNY and its New York customers.

In its petition for rehearing, the Consortium asserts that it and the other parties to the proceeding were deprived of procedural and substantive due process by the introduction of the revised Lake DeForest Agreement into the June Rate Order. It complains that the Commission failed to give parties notice that the Lake DeForest Agreement would be considered in the context of the rate case. It alleges that there is nothing in the record of this proceeding discussing the merits of the agreement and thus no record in the case on which the Commission could base its decision.

In support of its claims, the Consortium cites to a prior Commission order which applied the three-step balancing test for procedural due process found in Mathews v. Eldridge.¹⁶ That test seeks to evaluate Government use of procedural safeguards by weighing the private interest that will be affected by official action against the Government's interest in the action and the fiscal and administrative burdens that would be imposed by additional or substitute procedural requirements.¹⁷ The Petitioner applies that test by saying the private interest - that of customers in what they must pay for and the quality of that water service - "is clear." Moreover, according

¹⁶ Mathews v. Eldridge, 424 U.S. 319 (1976), cited in Case 96-E-0898, Rochester Gas & Electric Corporation -- Plan for Electric Rate/Restructuring, Order Denying Petition for Rehearing (November 8, 2001), quoted in the Consortium's Petition for Rehearing (cited in footnotes as MC Petition), p. 21.

¹⁷ Case 96-E-0898, Order Denying Petition for Rehearing, *supra*, quoted in MC Petition, p. 21.

to the Consortium, "The risk of an erroneous deprivation of that interest through the lack of notice is also clear."¹⁸ Finally, it asserts that the value of an additional notice is "abundant" and that there would be virtually no fiscal or administrative burden to the Commission to include a notice in the rate case to the parties that the Commission sought comment on the Lake DeForest Agreement Amendment. The Consortium's petition does not mention any actual infirmity in the Amendment or otherwise comment on the substance of the Amendment.

In its response to the Consortium's petition, UIU supports the assertion that the Commission erred in accepting the Lake DeForest Agreement allegedly without a record basis and without notification to the parties in the case of the agreement and alleges that the June Rate Order violated the due process rights of intervenors. It urges the Commission to withdraw its acceptance of the Lake DeForest Agreement and give parties the opportunity to file comments and testimony on the Agreement.

Staff argues that the Petitioner has failed to prove its due process claims. Staff notes that the Commission is not required to approve the Lake DeForest Agreement pursuant to PSL §110(3). Staff argues that the Lake DeForest Agreement was effective upon filing and that nothing prevents the Commission from disapproving the agreement in the future. Both Staff and UWNY address each prong of Petitioner's Mathews v. Eldridge analysis and conclude that the Consortium has failed to establish a due process violation. In response to UIU, Staff's Motion to Deny argues that UIU's further request for relief goes beyond the scope of the Consortium's petition for rehearing and is therefore procedurally improper and should be denied on that basis.

¹⁸ MC Petition, p. 22.

Petitioner's argument must fail because it did have actual notice and an opportunity to be heard regarding the Amendment, insofar as it is relevant to this case. As noted, UWNY included the projected revenues from the Agreement in its initial filing. The costs of operating the Lake DeForest facility were included with all other costs of the Company presented in testimony or exhibits. Other testimony referred to the amount of water allowed to be drawn from Lake DeForest by UWNY on an annual basis.¹⁹ Counsel for the Consortium participated in a discussion of the revenue effects of the Lake DeForest Agreement at the August 27, 2013 Procedural Conference.²⁰ Following the procedural conference, the Consortium sought a conference call among all parties in which the Consortium could advance its views concerning the Lake DeForest Agreement and the associated revenues, and the Administrative Law Judges accommodated this request on September 19, 2013.

Throughout the proceeding, the Consortium had full rights to inquire about the sharing of Lake DeForest's costs, revenues, or water between UWNY and UWNJ through discovery or cross examination at the hearing, and the full ability to air any views regarding these issues in its own testimony, in post-hearing briefs to the ALJs, and in briefs on exceptions to the Commission. It is clear that the Petitioner, through counsel, was well aware of and actually participated in all phases of

¹⁹ Prefiled testimony of UWNY witness Pointing: "Energy cost control is always managed with an awareness of the availability of our water resources and permit conditions. Lake DeForest is permitted for an annual average of 10 MGD. Accordingly, UWNY's strategy is to take 10 MGD as an annual average from Lake DeForest with the remainder of the water being supplied from the Company's remaining sources." Tr. 152.

²⁰ Procedural Conference, Tr. 62, 65-66.

this case. Even if Petitioner could identify a shortcoming in the notice provided concerning the Lake DeForest Agreement, Petitioner's actual participation would obviate any claim of defective notice.²¹ This is particularly so where Rockland County, a lead member of the Consortium, filed comments on the Agreement itself with the Commission, apart from this rate proceeding.

Moreover, as Staff notes, PLS §110 does not require a hearing or the input of other parties when a utility files an intercompany agreement.²² The statute does not require any action by this Commission but merely affords us the opportunity to take action if it appears warranted. In this rate case, we had a full, litigated record, with full participation of the Consortium, regarding the costs and revenues associated with Lake DeForest. Our June Rate Order decides nothing more. If the Consortium wishes to petition us to take some other action with respect to the Amendment, it remains free to do so, but a petition for rehearing of the June Rate Order is not the proper procedural vehicle to raise objections to the Amendment.²³ In light of the process already conducted and of the procedural vehicles provided to the Petitioner as this case progressed, any claim that our process lacked sufficient notice or did not afford a forum to litigate the claims must be rejected.

²¹ Fleet Mortgage Corp. v. City of Watertown, 192 A.D.2d 1087 (4th Dept. 1993).

²² Consequently, UIU's request for such process, improperly raised in its response to Petitioner, has no legal basis. As discussed here, there are also no practical or policy reasons to grant the request.

²³ Petitioner has yet to voice a substantive complaint about the terms of the Agreement, so we remain unaware what objection it may have.

6. Clarification Request

The June Rate Order directed the Company to undertake several initiatives or to make filings on specified topics within a specified period after the issuance of the order. The Petitioner, seeking to participate in several specific ways in the development or review of five of these compliance efforts, requests "clarification" regarding its participation rights. The compliance efforts of concern to the Petitioner are:

- an examination of the Company's management practices, including an audit of fees charged to UWNV by the affiliated M&S Company (Management Study and M&S Audit) (Ordering Clause 6). Petitioner seeks clarification that all parties be allowed to participate in the scoping of the Management Study and M&S Audit.
- the Company's specification of the cost/benefit criteria to be applied to programs to reduce non-revenue water (NRW Cost/Benefit Criteria) (Ordering Clause 7). Petitioner seeks clarification that all parties should receive a copy of the criteria and be given an opportunity to provide comments to Staff.
- the Company's study of class revenue allocations and rate design (Class Revenue and Rate Design Study) (Ordering Clause 8). Petitioner requests the study be provided to all parties.
- the Company's report concerning certain tax law changes (Tax Law Report) (Ordering Clause 9). Petitioner requests the Tax Law Report be provided to all parties and that the parties be made aware of any proceedings that would make such potential tax reduction a permanent part of rates.
- the Company's plan to improve its public communications and relationships with stakeholders (Public

Communications Plan) (Ordering Clause 10). Petitioner requests such plan be provided to all parties with an opportunity to comment.

UIU supports the Consortium's request for clarification. UIU asserts that the Commission's exclusion of party participation from several directives is contrary to the Commission's interest in improving the relationship between UWNY and its ratepayers.

Staff argues that the requests for clarification made by the Petitioner and supported by UIU are really requests for the Commission to modify the June Rate Order's ordering clauses. Staff supports providing documents that are required to be filed with Staff to be provided to the parties. However, it argues that the request to allow parties to participate in reviewing and commenting on documents directed to be submitted to Staff should be denied. Staff argues that parties do not have a right to participate in implementation of the Commission's decision and that parties have no right to further provide input to the regulatory process. With regards to documents that are required to be filed with the Secretary, Staff notes that copies of the filings will be served electronically on all parties.

UWNY, like Staff, argues that while it has no objection to providing copies of documents to the parties, it opposes the requests for parties to participate in the implementation of the Commission's decisions. Therefore, UWNY opposes the request to allow parties to participate in scoping of management practices pursuant to Ordering Clause 6, the ability to comment on the cost/benefit measurement criteria for any planned new programs to reduce NRW pursuant to Ordering Clause 7 and the ability to comment on UWNY's plan to improve communications pursuant to Ordering Clause 10.

As the parties note, for two of the identified items, the Class Revenue and Rate Design Study and the Tax Law Report specified in Ordering Clauses 8 and 9, respectively, the Petitioner merely asks for assurance that the documents required to be filed will be provided to it. The June Rate Order requires the documents to be "filed," a term of art under our Rules which refers to the formal submission of documents to the Commission Secretary for inclusion in the public record. Such filings are now generally made electronically and in any event will be posted in the Commission's Document and Matter Management System on our website, available to the parties and the general public. We can clarify here that, as filings in the case, these filings must, under our rules, be served on all parties, including the Petitioner.²⁴

The June Rate Order also required the Company to "file" a comprehensive management audit, including an audit of M&S fees, in Ordering Clause 6, and Petitioner will similarly be served with the final, completed audit report. That clause required the Company to first "coordinate the scope of the examination with the staff of the Department of Public Service" without mandating involvement of other parties. Petitioner seeks to participate in the scoping for this Study and Audit. The scope of this Study and Audit is well described in the June Rate Order, and Staff's oversight is intended to assure that the focus we have already described is addressed. Further involvement by the parties in the scoping phase is not necessary, and the time frame allotted was not designed to accommodate such participation. In response to Petitioner's request for clarification, we therefore clarify that we did not

²⁴ 16 NYCRR §3.5(e)(1).

intend to grant it or other parties the right to participate in reviewing the scope of the audit.

Ordering Clause 7 did not require the filing of cost/benefit criteria for any planned new programs to reduce non-revenue water but rather directed the Company "to submit [them] to DPS staff." The Petitioner seeks a copy of the submission and the opportunity to provide comments on the proposed criteria to Staff. We clarify that the June Rate Order did not intend to provide for participation from parties such as Petitioner in the review of that criteria. Likewise, Ordering Clause 10 required UWNY, not "to file" but rather "to submit for DPS staff review" its plan to improve public communications and relationships with stakeholders, and thus it was not intended to provide a role for Petitioner.

To the extent documents have been or will be provided to DPS Staff pursuant to the June Rate Order, they are by definition public records available upon request under the State's Freedom of Information Law (FOIL).²⁵ Consequently, upon receipt of a request for the submissions discussed in the Consortium's petition for rehearing, we would likely provide the requested documents, unless UWNY has claimed an exemption from public release pursuant to FOIL. Here, we can assume Petitioner is making such a request. In the interest of administrative efficiency, we therefore will arrange for the Department's Records Access Officer to provide the submitted information to Petitioner in accordance with FOIL.

7. Staff Motion to Deny

After UIU responded to the Consortium's petition, Staff filed a Motion to Deny, arguing that it was procedurally improper for UIU 1) to make a new allegation of a factual error

²⁵ Public Officers Law, Article 6.

allegedly justifying rehearing regarding our resolution of M&S fees and 2) to seek a new form of relief with regard to the Lake DeForest Agreement. Staff, supported by UWNY, argues that these points go beyond the scope of the Consortium's Petition for Rehearing and should be deemed untimely petitions for rehearing and denied. We agree. The arguments raised by UIU exceed the scope of the petition and were not timely raised as an independent petition for rehearing before the deadline for such petitions to be filed. Notwithstanding that the discussion in this order effectively addresses and rejects the merits of UIU's arguments, we deny them on the procedural grounds set forth in Staff's motion.

CONCLUSION

With the exception of the response of Rockland County and the two improper points raised by UIU, we have otherwise fully considered the arguments set forth in the Petition for Rehearing and/or Clarification of the Municipal Consortium and responses to it. Based on that consideration as well as the full record in this proceeding, Commission policy, and applicable law, we deny all the grounds raised by the Consortium for rehearing, grant the requested clarification, and grant Staff's Motion to Deny.

The Commission orders:

1. To the extent the Petition for Rehearing and/or Clarification on Behalf of the Municipal Consortium dated July 28, 2014 seeks modification or reversal of any aspect of the Commission's June 26, 2014 Order Establishing Rates in this case, the Petition is denied.

2. To the extent the Petition for Rehearing and/or Clarification on Behalf of the Municipal Consortium dated July 28, 2014 seeks clarification of certain aspects of the

Commission's June 26, 2014 Order Establishing Rates in this case, clarification is provided as set forth in the body of this order.

3. Staff's Motion to Deny is granted.
4. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary