

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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.

STAFF RESPONSE TO THE PETITION FOR REHEARING AND/OR
CLARIFICATION ON BEHALF OF THE MUNICIPAL CONSORTIUM

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I. INTRODUCTION

On June 26, 2014, the Commission issued an Order¹ resolving the current United Water New York, Inc. (UWNY) rate proceeding. On July 28, 2014, the Municipal Consortium (MC), a party to the rate proceeding comprised of municipalities and schools served by UWNY, filed a "Petition for Rehearing and/or Clarification on Behalf of the Municipal Consortium" (Petition) challenging various elements of the Order and requesting clarification of other elements pursuant to 16 NYCRR §3.7(a). Pursuant to 16 NYCRR §3.7(c), Department of Public Service Staff (Staff) submits this response to the Petition.

II. SUMMARY OF PETITION

The Petition is divided into three parts. The first part enumerates four alleged errors as bases for rehearing, the

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

first two of which are characterized as legal errors (the latter two are not characterized):

- The granting of a rate increase despite poor management of UWNY;
- Not making half the revenue requirement associated with UWNY's Management and Service Fees (M&S Fees)² temporary;
- Not providing financial incentives to reduce UWNY's Non-Revenue Water (NRW); and
- Not initiating a prudence investigation into UWNY's failure to request Economic Obsolescence³ (EO) adjustments.

The second part of the Petition alleges that the MC and other parties were denied procedural and substantive due process by the Commission's approval of a revised agreement between UWNY and its corporate parent United Water New Jersey, Inc. (UWNJ) allocating costs for the operation of UWNY's Lake DeForest Reservoir (Agreement). The Petition argues that parties were denied the opportunity to comment on the Agreement, which was not formally introduced into the rate case, and requests as a remedy 30 days to review and comment on the Agreement before the Commission renders a final decision.

The Petition's third part seeks clarification that all parties should be "involved in the implementation of the various directives, e.g., rate design and management studies, that are

² These fees are for administrative services provided by an affiliated company. During the rate case, UWNY was unable to explain or justify significant increases in the fees. The Commission ultimately rejected UWNY's requested amount and allowed only inflation over the prior year's allowance for M&S Fees.

³ A utility that is not earning its authorized return may make annual requests to adjust the assessment of its special franchise real property, which may result in a reduction in its property taxes. Staff discovered that UWNY had failed to make such filings and sought a reduction in the company's property tax allowance.

contained in the Order and not just Staff.⁴” The Order directs WUNY to coordinate with or submit filings to Staff while addressing the issues indentified in the Order. The MC argues that all parties should participate in these processes, which would allow WUNY to improve its relationship with its ratepayers, which, the Petition claims, is “at an historic low.⁵”

III. STAFF RESPONSE

A. Four Enumerated Errors

Under Commission regulations, a rehearing may only be sought on one of three grounds: an error in fact, an error in law or new circumstances warranting a different outcome. A petition must “separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.⁶”

The Petition should be dismissed as it relates to the four enumerated errors because it fails to comply with the Commission’s requirements for specificity in and support for alleged errors.⁷ Regarding the two alleged legal errors (rate increase and M&S Fees), the Petition fails to identify the legal requirement in the former and fails to support its alleged error (which is arguably legal) in the latter. The two remaining alleged errors (the Commission’s treatment of NRW and failure to institute a prudence investigation regarding EO Adjustments) are

⁴ Petition at 3.

⁵ Ibid. at 25.

⁶ 16 NYCRR §3.7(b)

⁷ The Petition does not allege any new circumstances warranting rehearing.

not identified as being factual or legal and the Petition does not sufficiently explain or support either allegation.

1. Rate Increase

The MC cites 16 NYCRR §61.1 and Public Service Law (PSL) §89-c(10)(h) for the proposition that a utility bears the burden of proof when proposing a rate increase. The Petition does not allege that the Commission violated these provisions and does not provide support for the proposition that the provisions were violated. The MC quotes extensively from the UWNY Order, but does not identify a specific error in the Commission's reasoning. Since the MC fails to indentify and support an error in the Order, the Petition, as it relates to the rate increase, should be dismissed.

2. M&S Fees

The MC argues that the Commission's reliance on the M&S Fee allowance from the 2010 Rate Order is in error because it assumes that the past level of M&S Fees were reasonable, but does not identify the legal requirement or standard that was violated.

Contrary to the MC's claim, the record provides sufficient support for the Commission's decision. The Commission was clearly focused on the significant increases identified in the present case⁸ and relied largely on Staff's position to render its decision.⁹ Staff in turn, proposed an M&S Fee allowance based on the final year of the prior rate case

⁸ Order at 16 (noting, "There was a drastic increase in M&S fees between the Company's \$2.919 million allowance in the last year of the most recent rate plan and the actual test-year expense level").

⁹ Order at 13.

because of the subsequent unexplained increase in M&S Fees.¹⁰ It is therefore reasonable for the Commission to use the past level as a basis for its determination. Based on its failure to support its alleged error, and the support in the record for the Commission's position, the Commission should reject this argument.

3. NRW

While the MC disagrees with the Commission's decision ("The Order fails to see....the Order misses the point...¹¹"), The Petition fails to identify whether it alleges a factual or legal error regarding the Order's treatment of NRW, and fails to support either theory, which justifies dismissal.

4. EO

As with NRW, beyond a statement that the Commission's conclusion "is not entirely accurate,¹²" the MC fails to allege an error and simply disagrees with the Commission's decision not to institute a prudence investigation regarding EO adjustments. Having failed to identify and support a legal or factual error with specificity, the MC has failed to meet the required standard for rehearing on the subject of EO adjustments.

B. Agreement

The MC argues that the Commission' treatment of the Agreement "violates elementary notions of both procedural and substantive due process,¹³" by not providing parties an

¹⁰ Case 13-W-0295, supra, Staff Initial Brief (filed March 4, 2014), pp 7-8.

¹¹ Petition at 17.

¹² Ibid. at 18.

¹³ Ibid. at 20.

opportunity to comment. The Petition argues that the Commission's determination that Agreement was free of "any inherent defects or inequities,"¹⁴ was not supported by the record.¹⁵ The MC states that the Commission should provide parties 30 days to submit comments on the Agreement. The MC's request for additional time to comment should be denied because, as demonstrated below, the MC fails to prove its due process claims.

The Petition cites New York's standard for due process review as that set forth in Mathews v. Eldridge,¹⁶ which consists of three elements: the private interest in question, the risk of error given the procedures used and the potential benefit of additional or alternative procedures, and the government's interest (cost, administrative efficiency).

1. Private Interest

The Petition states that UWNY's customers, while not having a property right in water rates, have an interest in "what they must pay for and the quality of that water service."¹⁷ Staff argues that what customers "must pay" are rates, which the Petition disclaims as a property right. Staff also argues that the Petition's lack precedent or support for a property interest in quality of water service leaves the MC without a valid property interest as required by Mathews.

¹⁴ Order at 45.

¹⁵ The MC ignores the fact that the Commission may "exercise its independent judgment..., by basing its analysis on data that was not part of the record ..." (Rochester Gas & Electric Corp. v. Public Service Com., 135 A.D.2d 4, 10 (3d Dep't 1987)).

¹⁶ 424 US 319 (1976) (Mathews).

¹⁷ Petition at 22.

2. Risk of Error

The Petition then states that, "The risk of an erroneous deprivation of that interest through the lack of notice is also clear. The value of an additional notice is abundant,¹⁸" but does not support these conclusory statements.

The MC greatly exaggerates the Commission's actions and their effect on ratepayers. The Order states that the Commission, "accept[s] 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."¹⁹

The MC states that it believes, "both the Commission and the New Jersey Board of Public Utilities must approve the agreement before it can become effective."²⁰ This is incorrect. Under PSL §110(3), "a management, construction, engineering or similar contract" made with an affiliated company is not effective "unless it shall first have been filed with the commission." While the Commission may disprove any contract not in the public interest, there is no provision for approving a contract. The Agreement states, "The Amended Agreement shall be subject to the approval of the NYSPSC and the NJBPU, if such approval is necessary, and shall have an effective date of September 25, 2013,"²¹ since no Commission approval is required by the PSL, the Agreement was effective upon filing. The Commission acceptance of the filing, therefore, had no legal

¹⁸ Id.

¹⁹ Order at 45.

²⁰ Petition at 19.

²¹ Matter 14-00290, United Water New York, Inc. - Lake DeForest Agreement, Lake DeForest Reservoir Cost Allocation Agreement Amendment (filed September 11, 2014), p 3.

significance beyond determining the accounting treatment of payments under the Agreement and would not prevent the Commission from disapproving the Agreement in the future.

The limited nature of the Commission's acceptance of the Agreement demonstrates that, and the MC's failure to articulate a potential harm requiring additional process demonstrate the MC's failure to satisfy Mathew's second element.

3. Government Interest

The MC's failure to satisfy the first two elements of the Mathews standard renders the third element, government interest, moot. The MC's due process argument should be dismissed because of its failure to demonstrate a legitimate property interest and the danger to that interest due to the lack of process.

C. Requests for Clarification

The Petition makes several requests to modify the Order's ordering clauses, which it characterizes as clarifications. Specifically, the MC requests that:

- Order Clause 6's instruction to UWNY to coordinate the scope of its M&S Company examination with Staff be clarified to include all parties;
- Order Clause 7's instruction to UWNY to submit to cost/benefit material to Staff be clarified to include all parties and provide an opportunity for comment;
- The documents to be filed under Ordering Clauses 8 and 9 be provided to all parties and that parties be notified of any proceedings resulting from the filings (these requests are not characterized as clarifications); and
- Ordering Clause 10's instruction to UWNY to submit a plan to improve public relations for Staff's review include all parties and an opportunity for comment (this request is not characterized as a clarification).²²

²² While the Petition requests clarification on the terms of Ordering Clauses 6 and 7, given the lack of ambiguity in the

The requests regarding Order Clauses 7 and 10 should be granted in so far as they seek access to UWNY's submission to Staff. New York State has a strong policy in favor of access to public documents, and the parties would, assuming no claim of confidentiality, be able to access the submissions through freedom of information requests regardless of the Commission's response to the Petition. Granting the MC's request will harm no party's interests and will reduce the administrative burden by eliminating the need for the MC to file requests for the documents.

The Petition should be rejected in so far as it seeks to modify Ordering Clauses 6, 7 and 10 by interjecting the parties into the regulation of UWNY. As an arm of the State of New York government, Staff, unlike other parties, has a statutory role in the regulation of utilities. While outside parties have a right to participate in rate proceedings and present arguments for the Commission's consideration, they do not have a right to participate in implementation of the Commission's decision. The Order embodies the Commission's disposition of the arguments raised in the rate case, and the MC and other parties have no right to further input in the regulatory process.

The requests regarding Ordering Clauses 8 and 9 should be dismissed as moot. These clauses concern documents that will be filed with the Secretary to the Commission, as opposed to being submitted to Staff, and all parties to the case will be served electronically at the time of filing. Furthermore, any

clauses' language, all four of these items are properly characterized as requests for reconsideration.

case commenced as part of the filing, will be publicly noticed. Since the MC's requested relief is already in effect, these requests should be dismissed.


IV. CONCLUSION

The Petition's four allegations of error are largely instances in which the MC simply disagrees with the Commission's decisions and should be dismissed for failing to meet the regulatory requirement to "separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing."

The Petition's due process arguments regarding the Commission's approval of the Agreement should be dismissed because the MC did not demonstrate a property interest at risk, or a benefit from additional process.

Finally, the Petition's request for clarification regarding access to UWNV's submissions to Staff should be granted. However, the request to participate in Staff's regulation of UWNV should be dismissed as unjustified. The remaining requests should be rejected as moot.

Respectfully submitted,



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Albany, New York