BEFORE THE
NEW YORK STATE
PUBLIC SERVICE COMMISSION

Joint Petition of Village of Scarsdale, United Water Westchester, Inc, United Water New Rochelle, Inc, Westchester Joint Water Works, City of White Plains, City of Yonkers and Town of Greenburgh	Case No. 13-W-02274

Reply of Village of Scarsdale, United Water Westchester, Inc, United Water New Rochelle, Inc, Westchester Joint Water Works, City of White Plains, City of Yonkers and Town of Greenburgh to the Motion to Dismiss of the City of New York

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The NYC Water Board (hereinafter "the City" or the "Water Board") erroneously alleges that the Public Service Commission (hereinafter "PSC" or "Commission") does not have jurisdiction to review and fix the rates charged for water provided to Upstate Communities (Petitioners) in excess of the entitlement amount provided for in Administrative Code 24-360. Indeed, it is "[t]he primary mission of the New York State Department of Public Service . . . to ensure safe, secure, and reliable access to . . . water services for New York State's residential and business consumers, at just and reasonable rates." New York State Public Service Commission, **Mission Statement**, www3.dps.ny.gov. In fact, the caselaw leaves no question that once a municipal utility provides services outside of its municipal jurisdiction; it is acting as a private utility and should be treated as such. See, *Fraccola v. City of Utica Bd. of Water Supply*, 70 A.D.2d 768, 417 N.Y.S.2d 357 (Fourth Dept. 1979);*Oakes Mfg. Co. v. City of New York*, 206 N.Y. 22, 100 N.E.414 (1912);*City of Little Falls v. State of New York*, 198 A.D.488, 190 N.Y.S. 807 (Fourth Dept. 1921);*Layer v. City of Buffalo*, 274 N.Y. 135, 8 N.E. 307 (1937);*Heritage Co. of Massena v. Village of Massena*, 192 A.D.2d 1039, 597 N.Y.S.2d 214 (Third Dept. 1993).

Notwithstanding this, the City alleges that only two statutes apply to its provision of water to the Upstate Communities, Administrative Code 24-360 and PAL §1045-j(9) and that it can charge the Upstate municipalities (and their respective residents) a wholesale rate equal to the in-city retail rate. That is, a rate with a profit margin of over 200%.The City relies upon the Public Authorities Law §1045-j(9) to support its erroneous assertion that the Public Service Commission may not maintain jurisdiction over the Water Board or its rates. However, the Public Authorities Law, by its own terms, specifically excludes the within circumstance, i.e. "**except with respect to the supply of water or sewerage services to users outside the city. . .**..."Pub. Auth. Law §1045-j(9).

Over twenty years ago, the Department of Environmental Conservation addressed the issue of rate review over the excess rates and determined that ECL Article 15, Title 15 applies to the excess water provided by the City to the Upstate Communities.

> The City's argument that the Municipal Water Finance Authority Act [PAL 1045-j(9)] and ECL §15-0111 bar the Department from fixing rates for excess water supplied by the City to upstate communities is misplaced. As explained above, these statutory provisions limit the Department's jurisdiction with respect to the amount of water the City is required to supply the upstate communities. This interpretation is consistent with PAL 1045-j(9) and ECL 15-0111.

Matter of Westchester County, WSA # 8865 (Issues Ruling, August 9, 1993).

For years the Department of Environmental Conservation has relied upon and held that ECL §15-1521 governed its authority to fix the rates of the water provided by the City to the Upstate Communities, as well as other public water supply sales. "If there is a dispute about whether the upstate water rate is fair and reasonable, the Act and NYS Environmental Conservation Law (ECL) 15-1521 authorize the Commissioner of the Department of Environmental Conservation to conduct a hearing to determine the rate." *Matter of Westchester County, WSA #9475* (Decision of the Acting Deputy Commissioner April 7, 1997). With regard to other municipalities DEC has noted ". . . the Department has the responsibility for establishing municipal water rates under certain limited circumstances. See, ECL 15-1521 and In the Matter of the Village of Elbridge, WSA #9039 (Decision of the Commissioner, February 8, 1995); and see NYC Administrative Code 24-360 and Matter of Westchester County, WSA #8865 (Decision of the Commissioner, November 9, 1995)" *Matter of Poughkeepsie, WSA # 9329*, Decision of the Commissioner, October 16, 1996). Thus, it is readily apparent that ECL §15-1521 previously authorized the DEC to establish municipal water rates in the context of one public water supply serving another public water supply.

This has not been successfully contested by the City. The crux of *Vill. of Scarsdale v. Jorling*, 91 N.Y.2d 507, 515, 695 N.E.2d 1113, 1117 (1998) "centered on whether the Water Board may unilaterally set and implement a rate increase prior to review by the DEC, and whether the DEC has any oversight powers over excess water consumption rates." In fact, in *Jorling,* the City argued that the DEC had no power to review and set rates for the excess water that it supplied. The Court of Appeals explicitly "concluded otherwise."

> Although the Water Board agrees that the DEC has review powers over entitlement water rates, the Board argues that, inasmuch as the Administrative Code deals only with entitlement water, the DEC has no authority over excess water rates. We conclude otherwise. We agree with the Appellate Division that the DEC's authority over excess consumption rates is derived from the DEC's power to control, regulate and preserve the water resources of the entire State (*see,* ECL art. 15), which authority is not abridged by the Public Authorities Law (Public Authorities Law § 1045–bb).

*Id.*at 517.

Many residents of New York State are provided water by a private water utility or the municipality in which they reside. Thus, the provision of water by the City to the Upstate Communities is not the typical scenario within New York State. Given the uniqueness of these circumstances, the Court of Appeals' only opportunity to address this statutory interplay between the Administrative Code, the Public Authorities Law and the Environmental Conservation Law has been in *Jorling.* In discussing this issue, the Court reconciled the matter and explained that

> For non-City users, however, the effect of retaining the provisions of the Administrative Code is to preserve the role of the DEC as the final arbiter of rates. Neither section 1045 j(5) nor section 1045 j(9) expressly limits the Water Board's authority to set rates but merely acknowledges the DEC's role in rate setting for non City users. Thus, the effect of the two statutes is to give both the Water Board and the DEC a role in setting rates for non City users. This result is in accord with the legislative purpose of the Public Authorities Law which gives the Water Board the power to set rates for all users taking into consideration the expenses of the system including servicing of debt. At the same time, the authority of the DEC to set final rates for non City users is retained. *Id.* at 516.

Thus, in *Jorling*, the Court addressed the issue of whether the DEC had authority over excess rates and explicitly held that it did pursuant to ECL Article 15, Section 15 (the same statute that now grants the PSC jurisdiction over the within matter).

Therefore, the highest court in the State of New York has found that ECL Article 15 is applicable to excess consumption rates and that it is "not abridged by the Public Authorities Law." Id. It very clearly held, "DEC has the power to set the final rates for entitlement and excess water consumption by non City users by virtue of its authority under the Administrative Code and the Environmental Conservation Law." Id. at 518.

In 2011, ECL Article 15 was amended by the legislature with the knowledge and participation of the DEC. By that amendment, the rate review authority for water supplied to upstate communities was transferred from the Department of Environmental Conservation to the Public Service Commission. The Assembly memo states, "Section 6 of the bill would amend ECL S 15-1521 to provide that the Public Service Commission has jurisdiction to set the rates for the supply of water by one public water supply system to another and make technical and conforming amendments necessitated by other amendments to Title 15 made by the bill." Assembly Memo A05318.Given that it is the PSC that regulates reviews and sets rates for utility services, including water, it was a logical transfer of review and ratemaking authority. Consequently, the rate review authority over the excess rate previously with DEC (as determined by the Court of Appeals) now may be exercised by the PSC. Consequently, ECL§15-1521 is clear on its face and no other reading of these statutes, DEC caselaw or *Jorling* is plausible.

According to the language of ECL §15-1521, the permit application typically triggers the authority, or jurisdiction, under ECL 15-1521. Subsequent to the *Jorling* decision, a number of permit applications were submitted by the Upstate Communities eager to obtain rate review, and

hopefully relief, from paying the some 200% higher retail rates for its wholesale water. They are as follows: United Water New Rochelle, DEC App. Id: 3-5599-00059/00001; Village of Scarsdale, DEC App. Id: 3-5550-00074/00001; Mt. Vernon Water System, DEC App. Id: 3-5508-00320/00001; and Westchester Joint Water Works, DEC App. Id.: 3-5599-00053/00001. While these enumerated applications were submitted by the Petitioners eager to comply with *Jorling* and obtain a rate review, it appears that the City believes it should be the entity seeking a permit from DEC. Petitioners question the wisdom of the City's statutory interpretation. Under the City's premise the statutes would allow the Water Board to supply excess water and avoid any regulatory rate review while doing so. This runs contrary to the clear legislative intent to protect citizens supplied water by another municipality by having the rates set by the PSC at just and reasonable levels.

Indeed, the City argues that since Petitioners herein applied for the permits then ECL 15-1521and the concomitant PSC rate review would apply only if Petitioners were then selling the water to other takers. From the City's view it is an easy argument, as long as it continues, without a permit or without applying for a permit, to provide water to Petitioners in excess of the amount set forth in the Administrative Code it can charge Petitioners whatever amount it wants up to and equal to the in-City rate and Petitioners have **absolutely no recourse.** In effect, the City can say to Petitioners, "turn on the taps! take all you want! we can charge the highest amount, we won't apply for a permit and the Public Authorities Law says that scheme allows us not to ever have to answer to anyone!" Petitioners, on behalf of their respective constituents, are incredulous that the City proffers this argument that flies in the face of prior precedent and this clear legislative mandate for the PSC to set the rates for excess water supplied outside the City limits.

Notwithstanding the outrage of such an argument, it leads interestingly to the conclusion that the recent amendments to ECL 15-1521 and the Water Resources Protection Act of 2011 (which requires all persons withdrawing 100,000 gallons or more per day from any of the state's waters to obtain a permit) require the City to obtain a permit with regard to its on-going supply to the Upstate Communities with this excess water. Since excess water is already being supplied, the revisions in the permitting process in essence grandfather that usage and the City is automatically entitled to the permit amendment. Otherwise, the City would be mandated to apply for a new permit since it is supplying in excess of 100,000 gallons. However, as alluded to above, the omission or failure of the Water Board to obtain a permit for the supply of water in excess of that allowed by the Administrative Code should not result in a detrimental effect to its wholesale municipal customers, the Upstate Communities. Moreover, the City already holds numerous water supply permits from DEC pursuant to ECL Article 15 and therefore the rate for water supplied thereby is to be set by this Commission under the recent amendment. The reality is that the City is already supplying the excess water and thus it is incumbent upon this Commission to review the rates in accordance with its mission, the statutory mandate and prior caselaw.

Moreover, Section 621.4(b)(4) of the DEC implementing regulations provides that the maximum permit term for water withdrawal permits is ten years. Under the City's interpretation, if a permit is necessary then regardless of which party obtains the permits, the party contesting the rate could only do so once every ten years. While this is a wonderful argument for the City since it unilaterally imposes double digit rate hikes each and every single year, Petitioners cannot believe that this is the intention of the legislature.

In conclusion, the bottom line is that the City believes it enjoys a totalitarian freedom in setting the rate for its supply of water to Petitioners and doesn't want anyone to mess with it. So, it tries to hide behind the Public Authorities Law provisions though its own language unequivocally negates its argument. Next, it argues that the statute somehow applies only to resale by upstate communities and it is the one that has to file the permit application for sales to upstate communities. Lastly, carrying this flawed argument to its ultimate absurd conclusion, it tries to escape review forever by saying it simply won't file for a permit related to excess. All of this strained statutory reading ignores the obvious and clear intent behind the recent amendments to the ECL.

In sum, the practical reality is the City is supplying excess water to upstate communities by virtue of the State's wetland resources, which are already subject to permits issued by DEC under Article 15, Title 15. The City cannot so readily escape review of its rates and charges. The Legislature directs that when water is supplied by one municipality to another the rate charged is subject to review by this Commission. Any other interpretation would simply mean that the City could continue to invoke double digit annual increases applicable to upstate residents with absolutely no regulatory oversight.

The recent legislative changes were designed to simplify the process, not complicate it further as the City would have it for its own self-interest. Recognizing it is the PSC and not DEC that holds the rate-making expertise, the review of those sales is now with the PSC. It isn't all that complicated. As the DEC and the courts have repeatedly held the sales of so-called excess water by the City to upstate communities, including Petitioners, is subject to ECL Title 15. Per ECL 15-1521, the rate for such sales is now subject to review by this Commission. Simply put, pursuant to the Public Service Law and ECL §15-1521 the majority of the residents

of the State of New York are afforded the opportunity of a PSC review of rates to ensure such rates are just and reasonable. Here, the Petitioners are seeking, with regard to the excess water rates, the same benefit of the PSC's expertise. Accordingly, we respectfully request that an evidentiary hearing be commenced to review the charges by New York City to upstate communities for excess water.

RESPONSE TO FACTUAL CONTENTIONS

While this is a Reply in response to the City's motion to dismiss and there will be later opportunity to address the factual contentions of both parties, the Petitioners briefly respond to the City's assertions without waiving any rights to do so during discovery. Foremost, the City asserts "there is no logical reason why shifts in population and usage would render it [the WSA's framework for determining entitlement amount] antiquated." This is a bit of a red herring as it relies on the City's incorrect interpretation of the statutory scheme adopted by the Legislature and is mere dicta for purposes of this matter. As shown above, the regulation of excess consumption is subject to review by this Commission. Nevertheless, despite the City's argument to the contrary, when the Water Supply Act (WSA) was enacted in 1905 the area's population and land and water use were markedly different than today. In fact, the First Annual Report of the State Water Supply Commission of New York for Year Ending February 1, 1906 illuminates Petitioners contentions. For instance, when the report was issued in 1906 the population of New Rochelle was listed as 20,480 (currently approximately 78,000) and its average daily consumption per inhabitant was just 30 gallons per day. In contrast, the population of the Bronx was 271, 630 with the average daily consumption per inhabitant at 125 gallons per day and the population of Brooklyn was 1,358,686 (currently approximately 2,500,000) with an average daily consumption of 94 gallons per day. Also impacting the per capita usage at that time was

the wastewater services available, for instance in the Village of Bronxville the sewers for its 994 inhabitants were flushed once a week by a fire hose. According to the City's Conservation Report from 2005, the in-city per capita consumption was 138 gallons per day and the average for upstate demand was 123.7 gallons per day. Accordingly, although irrelevant to this petition, yes, Petitioners dare say shifts in population and usage have resulted in antiquation of the per capita computation set forth in the Administrative Code which is of course compounded by the City's after the fact calculations of excess consumption.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the City's motion to dismiss be denied it its entirety and the Commission exercise the jurisdiction so clearly granted to it pursuant to Environmental Conservation Law §15-1521 to review the charges by the City to Upstate communities for so-called excess consumption.

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