

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 16-W-0259 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York American Water Company, Inc. for Water Service.

RULING GRANTING AND DENYING MOTIONS TO STRIKE OR EXCLUDE
TESTIMONY AND DENYING THE REQUEST TO FILE SUR-REPLY

(Issued October 25, 2016)

ASHLEY MORENO, Administrative Law Judge:

On September 27, 2016, New York American Water Company, Inc. (NYAW or the Company) filed a motion seeking to exclude or strike the pre-filed rebuttal testimony of Long Island Clean Air Water and Soil, Ltd. (CAWS) witness Dave Denenberg. On October 5, 2016, CAWS filed a response to NYAW's motion and a cross-motion to strike certain rebuttal testimony filed by NYAW or, alternatively, requesting leave to file a sur-reply if the NYAW rebuttal testimony is not stricken. NYAW responded, opposing the CAWS motion on October 12, 2016.

NYAW argues that the Denenberg Rebuttal Testimony should be stricken because it is not proper rebuttal. The Company states that the Denenberg Rebuttal Testimony addresses NYAW's direct testimony and reiterates arguments CAWS previously presented in its case-in-chief. The Company asserts that CAWS had the opportunity to address NYAW's direct case when it filed its case-in-chief. To allow CAWS to augment that testimony, NYAW contends, would violate the established schedule and run the risk of breaking down the procedural schedule and process. NYAW avows that if Denenberg's Rebuttal Testimony is authorized to be entered into the evidentiary record, NYAW would be left without the procedural opportunity to respond, despite bearing the burden of proof in this proceeding.

CAWS opposes NYAW's motion arguing that inclusion of its testimony in the record would not prejudice NYAW because the Denenberg Rebuttal Testimony submitted no new evidence. CAWS further asserts that, even if the Denenberg Rebuttal Testimony may be considered untimely direct testimony, because the evidentiary hearing schedule has been delayed,¹ any untimeliness is inconsequential.

CAWS also requests that certain NYAW rebuttal testimony be stricken or, alternatively, if such testimony is not stricken, that the parties be authorized to file a sur-reply. CAWS contends NYAW revised its positions and arguments with regards to the Merrick Road Project in its rebuttal testimony, going beyond the scope of proper rebuttal, and such testimony should be stricken. CAWS did not specifically identify the portions of NYAW's rebuttal testimony it disputes. Alternatively, CAWS states that, if those portions of NYAW's rebuttal are not stricken, the parties should be given an opportunity to submit a sur-reply to NYAW's rebuttal testimony because that testimony provides new and/or revised evidence and arguments. CAWS asserts that parties may file a sur-reply as a right and that the Denenberg Rebuttal Testimony should be authorized to be included as part of a sur-reply, if it is not allowed as rebuttal testimony.

NYAW insists that CAWS's motion should be denied. It asserts that its rebuttal testimony, to the extent it may include revised positions, is nonetheless permissible because the testimony is responsive to the arguments and facts presented by Staff and the intervenors. NYAW also maintains that a sur-reply should not be authorized. NYAW takes issue with CAWS's characterization that a sur-reply is something parties may

¹ See Case 16-W-0259, Ruling Postponing Hearing (issued October 6, 2016).

"submit as a matter of right"² stating that CAWS has failed to cite any legal authority to make such a claim. NYAW argues there is no provision either in the Public Service Law or in the Department's regulations allowing a sur-reply as a matter of right. Moreover, notes NYAW, the adopted procedural schedule does not allow for such reply.

The schedule I adopted in this proceeding required Staff and intervenors to make their cases-in-chief in response to NYAW's rate filing and supporting testimony by September 2. Parties were authorized to file rebuttal testimony on September 23. In Commission rate proceedings, rebuttal testimony is an opportunity for the Company to answer or dispute the cases-in-chief of Staff and intervenors and for Staff and intervenors to answer or dispute each other's cases-in-chief, should they choose to. The Denenberg Rebuttal Testimony does not address any new testimony or facts; it addresses only the direct testimony of NYAW. Such testimony could have been properly filed by CAWS with its case-in-chief on September 2, 2016. Therefore, I find that the Denenberg Rebuttal Testimony is unauthorized supplemental direct testimony.

CAWS suggests that there is no prejudice to NYAW and that the untimeliness of the Denenberg Rebuttal Testimony is inconsequential because the evidentiary hearing schedule has been delayed. I find neither of these arguments persuasive. The procedural schedule indicated that Staff and intervenors were to submit testimony presenting their cases-in-chief on September 2. NYAW had the reasonable expectation that the testimony and evidence presented on September 2 represented the complete cases-in-chief of Staff and intervenors and it responded to those arguments on September 23. Allowing

² NYAW Opposition to Cross Motion, p. 2, citing CAWS Cross Motion, p. 1.

supplemental direct testimony would indeed prejudice the Company by allowing opposing parties to create a moving target for it to respond to. It would also create a situation whereby the Company has no procedural opportunity to respond to such testimony. Finally, it may encourage parties to disregard the procedural schedule and provide their arguments on a piecemeal basis, which would undermine the value of the procedural schedule and leave parties in Commission proceedings with faltering confidence in the process. For these reasons, I grant NYAW's motion to exclude the pre-filed rebuttal testimony of Mr. Denenberg from the evidentiary record.

CAWS's motion requests that portions of NYAW's testimony be stricken, arguing that those sections of the testimony go beyond the scope of proper rebuttal by providing revised positions and arguments with regards to the scope of its projects. However, CAWS has not sufficiently articulated the relief it seeks. It has failed to identify with any specificity the sections of testimony it alleges are improper. Without reference to page and line numbers identifying those portions of the testimony, I cannot evaluate CAWS's argument. Therefore, CAWS's motion to strike portions of NYAW's rebuttal testimony is denied.

Lastly, CAWS's motion requests authorization to submit a sur-reply to the portions of NYAW's testimony that it argues should be stricken or excluded. It also suggests that the Denenberg Rebuttal Testimony should be included in such sur-reply. For the reasons articulated above, the Denenberg Rebuttal Testimony would not be authorized to be included as part of a sur-reply. The procedural schedule adopted in this proceeding and the dates contained therein were established to bring this matter before the Commission on a timely basis in conformance with the Public Service Law. There is not

sufficient time in the existing schedule to allow for sur-reply. In any event, I am not convinced that there is a compelling reason to establish such a process in this proceeding. CAWS's motion to establish a sur-reply is denied.

(SIGNED)

ASHLEY MORENO