

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Case 11-W-0472 In the Matter of the Joint Petition, :
pursuant to Public Service Law Section 89-h, by Aqua :
Utilities, Inc., Aqua New York, Inc. and American :
Water Works Company, Inc. for Approval of a Stock :
Purchase Agreement under which Aqua Utilities will :
sell And American Water Works :Company, Inc. will :
acquire 100% of the issued :and outstanding capital :
stock of Aqua New York, Inc. :
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OPPOSITION OF AMERICAN WATER WORKS COMPANY, INC. TO
MOTION TO CONSOLIDATE
FROM THE WILLOWS HOMEOWNERS ASSOCIATION, INC.

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Dated: February 9, 2012
Garden City, New York.

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I. INTRODUCTION

The Willows Homeowners Association, Inc., ("the Willows") has moved to consolidate this case with Case 10-W- 0652. By this motion the Willows is seeking, *inter alia*, 1) to consolidate two completely different matters, 2) in a clear effort to "end run" a pending petition for rehearing, 3) in a way that seeks to divest the Commission's jurisdiction over that petition, 4) for a purpose that is calculated clearly to gain a tactical advantage in the acquisition case and 5) thus upset the rate result reached by the Commission only two months ago bypassing the very petition for rehearing which it brought. Such a transparently baseless motion should not be entertained.

II. BACKGROUND

This case, Case 11-W-0472, is a case under PSL § 89-h to consider American Water Works Company's ("American Water), proposed acquisition of Aqua New York, Inc. ("Aqua NY") and its water utility operating subsidiaries. Case 10-W-0652, is a case

under PSL § 89-i to consider the justness and reasonableness of the rates charged by Aqua NY in its Dykeer service area. The Willows brought Case 10-W-0652, claiming, primarily, that Dykeer's rate base was overstated and, hence, its rates were excessive.

On November 21, 2011, *only a little over two months ago*, the Commission issued an "Order Resolving Complaint" in Case 10-W-0652. That Order examined Aqua NY's rate base for the Dykeer service area, adjusted it, and found: "[t]he rates for Dykeer customers are adjusted prospectively and no refund is provided for amounts paid as a result of the 2008 Rate Order." Not content with that result, the Willows, on December 20, 2011, filed a Petition for Rehearing of the Commission's November 21st Order. *That Petition for Rehearing remains pending before the Commission.*

On the afternoon of February 8, 2012 - more than five months after Case 11-W-0472 was commenced and two months after the Willows sought party status in this case, the Willows belatedly and for clearly obstructive purposes, has moved to consolidate Case 10-W-0652 with this case, American Water's proposed acquisition of Aqua New York.

The Willows claims that "it is clear that the parties are the same, there are common questions of law and fact, consolidation is within the sound discretion of the Administrative Law Judge, no party will be prejudiced and the schedule will be unaffected." Motion at 2. The Willows then goes so far as to allege that "In fact, the failure to consolidate these cases at this time will prejudice The Willows [and that] "[c]onsolidation will streamline both cases, will avoid inconsistent results and reduce the burden on the Commission's scarce resources." *Id.* Nothing could be further from the truth.

The facts are 1) that the Willows has previously sought relief from the Commission (in the case it now belatedly seeks to consolidate with the acquisition case), 2) the Commission granted, in part, and rejected, in part the relief sought, 3) the Willows has a pending petition for rehearing of the Commission's decision rejecting the remaining relief sought by the Willows (which relief includes rate reductions and refunds) and 4) the Willows belated motion for consolidation here is intended solely to "end run" their petition for rehearing and induce delay in the acquisition case in order to advance its position. In fact, most of the Willows' Motion for Consolidation is simply a screed complaining about how the Willows was mistreated by Staff and the Commission in Case 10-W-0652, having no connection to the case to determine if American Water's acquisition of Aqua New York is in the public interest.

The Willows concedes that its "[c]omplaint concerning the water rates of Aqua New York (Case 10-W-0652) is presently pending via a petition for rehearing before the Commission." Motion at 2. That fact, alone, should be dispositive on the matter of the emptiness of the Willows' consolidation claim. The Willows then demonstrates that its purpose here is simply to reargue that petition, claiming that:

The allegations [in the petition for rehearing] are serious and specific. The rate base of the former Dykeer Water Company, merged into Aqua New York in 2007 in Case 07-W-0711, cannot be documented at the level used in setting the current rates. Accordingly the current rates are unjust and unreasonable. The Commission did provide a small measure of rate relief in its Order Resolving Complaint (issued and effective, November 21,2011). That Order disclosed that the rate base on which the current rates were set improperly included CIAC in the amount of order\$105,304. It is clear as a result of two FOIL requests and responses subsequent to the rate order that neither the Staff, the Company nor third party contractors in collaboration could furnish sufficient documentation to account for the rate base actually used to set the current rates. Accordingly, The Willows residents are due substantial refunds pursuant to Public Service Law §89-c(16).

Motion at 2-3. Therefore, nothing could be clearer than what the Willows is presenting as "Background" is nothing more than a diatribe on how the Commission's decision in Case 10-W-0652 was wrong and how the Willows was harmed as a consequence.

Although this presentation might be an interesting, if duplicative, addition to the Willows' Petition for Rehearing, it has nothing, whatsoever, to do with this acquisition case

III. COUNTER-ARGUMENT

The Willows' Motion is difficult to answer primarily because it is so self-evidently incorrect, misdirected and legally misguided.

First, although the Willows reasons that its motion is consistent with CPLR, Art. 6, (Motion p. 1), by the very terms of CPLR § 602(a), this motion is improper because no “common question of law or fact” exists between the two cases that the Willows is attempting to consolidate. Case 11-W-0472 is a merger case under Pub. Serv. L. § 89-h, while the Willows’ complaint under Case 10-W-0652 is seeking rate relief under Pub. Serv. L. § 89-i.¹ The Willows has not demonstrated what common questions of law or fact exist between the merger action and its action for rate relief that would warrant consolidation.

Second, it is not at all clear that the Administrative Law Judge in this case even has the power, acting alone, to consolidate these cases. The Commission's order in Case 10-W-0652 is valid and binding on Aqua NY and any successor company, as well as on the Willows, a party who originated that case with a complaint. The Commission has acted on the Willows complaint and, under Pub. Serv. L. § 23(1), “[e]very order of the commission shall take effect at a time therein specified and shall continue in force either

¹ As previously noted, the rate relief sought was already granted in the Commission’s November 21, 2011 “Order Resolving Complaint.”

for a period which may be designated therein or until changed or abrogated by the commission...." The ALJ in this case simply does not have the power to overrule an order of the Commission -especially one so recently issued and subject to a pending petition for rehearing - yet that is explicitly what the motion for consolidation would do. It is tantamount to asking the ALJ to divest the Commission of authority and arrogate to himself the rehearing power that is granted *only* to the Commission under PSL §22. If the Commission chooses to grant rate relief to the Willows, it will do so, or not, when it decides the petition for rehearing in the context of Case 10-W-0652, where the issue was fully aired.

Third, the rate issues raised in a PSL § 89-i complaint have no place in a case brought under PSL § 89-h. Moreover, even if the Willows could make a colorable claim that the rates of the companies to be acquired should be considered in an acquisition case, the Willows' complaint about the level of rates in the Dykeer service area was fully aired. The entirety of the Willow's Motion is directed to the very rate relief and rate base issues that were considered in Case 10-W-0652 - a § 89-i complaint - and are the subject of a petition for rehearing in that case.²

Fourth, the Willows advances a legally indecipherable argument, claiming that, without the relief requested, it would somehow be "irreparably harmed" because the filed rate doctrine would allegedly bar the Willows from receiving any refunds if the Commission revised the Dykeer rate base in the rehearing matter. Oddly, however, in its Petition for Rehearing in Case 10-W-0652, the Willows advanced just the opposite view -

² . The Willows charges, for example, that American Water and Aqua objected to discovery in Case 11-W-0472 concerning whether the Dykeer system in which the Willows is located was over-earning. This charge is false. The Willows requested and was provided with the information showing the earnings in all of the upstate systems owned by Aqua New York. If the Willows was dissatisfied with the response it need only have brought that matter to the ALJ. It did not do so.

that refunds in that case were not barred by the filed rate doctrine. Case 10-W-0652, Petition for Rehearing, pp. 11-16. More important, because the Commission determined that the Willows received all the relief to which it was entitled in Case 10-W-0652, then, as a matter of law, the Willows could not suffer any harm cognizable by law because it is the Commission that determines whether rates are just and reasonable and, having done so, any further claim to rate relief by the Willows is, at law, a nullity.

Fifth, and finally, the Willows' plaintive question asking if the acquisition can be in the public interest if the Willows is not given the relief sought in its petition for rehearing is dispositive of the matter of consolidation of these cases. The Willows' motion asks: "[h]ow can the public interest be served by approving a merger where the rate base of one of the operating companies cannot be documented and is very likely to continue to be overstated?" Motion at 4. Again, however, this is the *very* same issue that appears on page 9 of the Willows' Petition for Rehearing:

As was pointed out in the Complaint, the Department of Public Service was not able to document the Dykeer rate base used to set the rates. In short the rate base in the Order was overstated by at least \$128,321 based on the information that was produced pursuant to the FOIL request. See Exhibit G to the Complaint. Now in this Order, the Commission claims that the rate base used in the December 2008 order is correct notwithstanding that the Department of Public Service could not produce any records to confirm the expenditures that led to the rate base used.

Case 10-W-0652, Petition for Rehearing, p. 9. The Willows Motion should be seen for what it is - a transparent ploy to get "one more bite at the apple" than the law allows.

IV. CONSOLIDATION WILL PREJUDICE THE JOINT PETITIONERS

The Willows claims that "no party will be prejudiced and the schedule will be unaffected." This is a palpably incorrect and disingenuous claim. The Willows motion

appears, in fact, made for the express purpose of delay and to advance a position that is currently under consideration in its Petition for Rehearing. This is improper. If the Willows really believed that the cases should - against all reason - be consolidated, the Willows would have made the motion at the commencement of its involvement in this case. Clearly then, the Motion was made for the express purpose of delay and for bargaining advantage and *not* for the purpose of consolidating two completely dissimilar matters. Indeed, with the rehearing petition pending before the Commission, an agreement with the Willows to consolidate the two cases would be tantamount to the parties to this case seeking to divest the Commission of the pending Petition for Rehearing and arrogate to themselves the power to reverse the Commission.

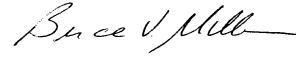
The fact is that this case is quite time sensitive and a consolidation of the very disparate matters would do nothing but delay the acquisition case. The Willows is well aware of this and is simply filing this Motion in a desperate effort to force the parties to fashion relief to the Willows that would reverse the Commission's decision in Case 10-W-0652. The Joint Petitioners in Case 11-W-0472 would be extremely prejudiced by any such consolidation and it should be rejected in the strongest terms.³

³ Federal Rule of Civil Procedure, Section 11 states, in relevant part:

b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;.

Using this case to attempt to try to second guess a Commission decision that is currently under review and then filing a motion to consolidate this case where the very same issue is pending before the Commission is frivolous and a waste of the time and resources of the parties and the Department of Public Service.

For all of the above reasons, the Willows' Motion to Consolidate should be denied.



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