STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway, 14th Floor
Albany, New York 12233-1010

In the Matter

- of -

a Petition to fix the water rates charged to upstate communities for the rate year July 1, 2004 by the New York City Water Board, pursuant to Section 24-360 of the Administrative Code of the City of New York, Environmental Conservation Law Article 15, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 603

-by-

Village of Scarsdale,
Westchester Joint Water Works,
City of White Plains,
United Water New Rochelle, and
Aquarion Water Company,

Petitioners.

INTERIM DECISION OF THE ACTING COMMISSIONER

December 1, 2010

INTERIM DECISION OF THE ACTING COMMISSIONER

This proceeding addresses challenges to the rate that the New York City Water Board ("Board") charges to communities north of New York City ("City") that take and receive water from the City's water supply system.

Pending before me is an appeal by the Village of Scarsdale, Westchester Joint Water Works, the City of White Plains, United Water New Rochelle, and the Aquarion Water Company ("Upstate Communities") from the December 8, 2008 issues ruling ("2008 Issues Ruling") of Administrative Law Judge ("ALJ") Daniel P. O'Connell concerning the water supply rate that the Board established effective July 1, 2004.

Upstate Communities also appeal from the January 13, 2006 ruling of ALJ O'Connell, in which the ALJ ruled that the Upstate Communities (a) had waived their right to appeal from his dismissal of the petitions that Westchester County had filed challenging the rates that the Board implemented on July 1, 1996, July 1, 1997, July 1, 1998 and July 1, 1999, and (b) were barred from the filing of petitions challenging the rates that the Board implemented on July 1, 2000, July 1, 2001, July 1, 2002 and July 1, 2003.

I hereby affirm the 2008 Issues Ruling, as modified below. With respect to the January 13, 2006 ruling, I have determined to accept late-filed appeals from the Upstate Communities pursuant to the schedule that I am establishing in this Interim Decision.

BACKGROUND

The Water Supply Act of 1905, as amended and now codified in section 24-360 of the Administrative Code of the City of New York, authorizes communities located north of the City to take and receive water from the City's water system. As set forth in section 24-360(c), the charges or rates for the water that is taken and received:

> "shall not, however, exceed the charges or rates now charged by the city to persons using water in that city. Such fair and reasonable charges or rates shall

> be determined on the basis of the actual total cost of the water to the city after deducting from the total cost all construction costs and expenses of operation, maintenance and carrying charges incurred within the corporate limits of the city in connection with the distribution and delivery of the water within such limits" (emphasis added).

Thus, as set forth in the Administrative Code, the Board is authorized to charge a rate based on the actual total cost of the water to the City, less all costs associated with distributing the water within the City. By resolution, the Board sets the rate, based on data and projections related to the costs of providing water supply. This rate, which becomes effective on July 1 of each year, is required to be fair and reasonable, that is, "grounded in either known and measurable changes, or well-considered estimates of future expenses" (see Matter of Westchester County, Hearing Report of the ALJ, at 7, adopted by Decision of the Commissioner, November 9, 1995).

Westchester County and the Upstate Communities filed petitions challenging the various water supply rates established by the Board. Specifically, Westchester County filed petitions challenging the July 1, 1996, July 1, 1997, July 1, 1998, and July 1, 1999 water rates. Upstate Communities filed a petition challenging the water rate that the Board established on July 1, 2004 (for the period July 1, 2004 through June 30, 2005).

Although no petitions were filed challenging the rates established on July 1, 2000, July 1, 2001, July 1, 2002, and July 1, 2003, Upstate Communities expressed interest in challenging those rates. Because the challenges and potential challenges for the different rate years generally address similar issues, all have been assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell. Each petition, however, is the subject of a separate proceeding.[1]

[1] Various of the papers refer to these time periods as fiscal years (for example, the period July 1, 1996 to June 30, 1997 is referred to as fiscal year 1997; similarly, the period July 1, 2004 to June 30, 2005 is referred to as fiscal year 2005). In addition to the time periods referenced above, letters have been filed on behalf of various upstate communities challenging the water supply rates established on July 1, 2005, July 1, 2006, July 1, 2007, and July 1, 2008. Those matters are currently on hold pending the resolution of this proceeding. On September 30, 2010, Administrative Law Judge Daniel P. O'Connell received a letter dated September 23, 2010 from Kathy Lane, Esq., on behalf of the Upstate Communities, stating that the

January 13, 2006 Ruling

As noted, on January 13, 2006, ALJ O'Connell ruled on the Board's motion to dismiss the petitions of Westchester County challenging the rates the Board implemented annually from July 1, 1996 to July 1, 1999. The ALJ also addressed a notice from Upstate Communities indicating that they may challenge rates implemented annually on July 1 from 2000 to 2003.

With respect to the Westchester County petitions, the ALJ held that Westchester County timely filed petitions challenging the rates that became effective on July 1, 1996, July 1, 1997, July 1, 1998 and July 1, 1999. The ALJ noted that, by letter dated March 18, 2005, Westchester County withdrew all of its petitions, but subsequently, by letter dated May 9, 2005, requested that the ALJ reinstate its petitions. Westchester County expressed the concern that, if its petitions were withdrawn, Upstate Communities would not be entitled to challenge the water rates established for that time period (July 1, 1996 through July 1, 1999). The ALJ, for purposes of his review, assumed that Westchester County had not withdrawn its petitions. However, he concluded that Westchester County failed to timely pursue the matter and that this extended delay prejudiced the Board. Accordingly, the ALJ ruled that the petitions should be dismissed.

With respect to the rates established on July 1, 2000, July 1, 2001, July 1, 2002 and July 1, 2003, the ALJ stated that no petitions challenging the rates had been filed, but that communities north of New York City had expressed interest in filing petitions challenging those rates. The ALJ held that a reasonable period to file a petition was one year from the date the Board implements a change to the water rate. Accordingly, because no petitions challenging the rates that became effective on July 1, 2000, July 1, 2001, July 1, 2002, and July 1, 2003 were filed during the relevant one year time frames, the ALJ ruled that Upstate Communities were barred from challenging those water rates.

Upstate Communities were in discussions with the Board with respect to the water rates referenced in earlier correspondence from ALJ O'Connell)(rates implemented on July 1, 2005, July 1, 2006, July, 1, 2007, and July 1, 2008).

2008 Issues Ruling

The 2008 Issues Ruling addressed a petition dated July 20, 2004 that Upstate Communities filed, challenging the water rate effective for the period July 1, 2004 to June 30, 2005. An issues conference was conducted on October 23, 2008, during which Upstate Communities and the Board stipulated that two issues would be adjudicated in this proceeding:

(1) Consumption issue: "[d]id the Board's regression analysis forecasting consumption for fiscal year 2005 result in a fair and reasonable rate? What type of regression analysis, if any, should be used to forecast consumption for the rate year effective July 1, 2004, or should the Board use the latest actual consumption data available at the time of the report? When actual consumption data for that rate year becomes available should consumption data be 'trued-up' in a following report adding a charge or credit depending upon what the data show?" (2008 Issues Ruling, at 4);[2] and

(2) Debt service issue: "[d]oes the Board's calculation on debt service on Authority bonds result in a fair and reasonable rate for fiscal year 2005?" (id., at 5).

Upstate Communities proposed three additional issues relating to (1) imputed revenues from hydroelectric generation facilities; (2) debt service costs arising from uncollected revenues or bad debts; and (3) the quality and methods of the Board's recordkeeping. The ALJ ruled that Upstate Communities' additional issues were not adjudicable.

Upstate Communities appealed from the 2008 Issues Ruling ("appeal"). On their appeal, Upstate Communities raised an initial threshold issue: whether it was appropriate for the ALJ

[2] By letter dated January 14, 2009 ("January 2009 Letter"), the Board informed the ALJ and Upstate Communities that actual consumption data was available for the period July 1, 2004 through June 30, 2005. The Board stated that it would stipulate to the use of the actual system-wide consumption number in the hearing for purposes of calculating the water supply rate. According to the Board, the use of the actual consumption number should "moot the question" whether a "true up" of consumption is required (see January 2009 Letter, at 2). Upstate Communities have not responded to the Board's assertions, and this issue is still subject to adjudication. Nevertheless, I direct the parties to advise ALJ O'Connell whether adjudication of this issue is still necessary.

to hold an issues conference pursuant to part 624 ("Part 624") of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") in a water supply rate proceeding. Upstate Communities contended that the procedures established in 6 NYCRR part 624 should not have been used in determining the adjudicability of their proposed issues. In addition, Upstate Communities maintained that two of the three issues that they had raised but which were rejected by the ALJ (imputed revenues from hydroelectric generation facilities and debt service costs arising from uncollected revenues or bad debts) should be adjudicated (see Appeal, at 3).

The Board filed a response dated March 25, 2009 in which it contended that the 2008 Issues Ruling should be affirmed ("Board Response").

DISCUSSION

Applicability of 6 NYCRR Part 624

Where an upstate customer challenges the rate adopted by the Board as too high, 6 NYCRR part 603 requires the New York State Department of Environmental Conservation ("Department") to conduct an administrative hearing on the rate. The hearing is required to be on notice to the parties and on the record (see 6 NYCRR 603.7; 6 NYCRR 603.8; see also ECL 15-0903; Administrative Code of City of NY § 24-360[b]).

The ALJ applied the Part 624 permit hearing procedures to conduct the required hearing in this proceeding. Upstate Communities argue, however, that Part 624 is not applicable and should not be used. Upstate Communities maintain that no authorization exists to conduct an issues conference in a water supply rate proceeding (as was done here), because 6 NYCRR 603 does not specifically authorize the use of an issues conference. Accordingly, Upstate Communities claim that they were entitled to an adjudicatory hearing on any and all issues that they proposed. Upstate Communities argue that, by using an issues conference to narrow or resolve disputed issues of fact and to define the scope of adjudicable issues, the ALJ improperly excluded certain of their issues and thereby denied them their right to an adjudicatory hearing on those issues.

I reject Upstate Communities' argument that Part 624 does not apply to water supply rate proceedings and, consequently, that it was improper to conduct an issues conference in this proceeding. As an initial procedural matter, Upstate Communities are raising this issue for the first time on appeal, and their challenge to the use of Part 624 may be rejected on this ground alone (see, e.g., Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5). The hearing notice in this proceeding, which was circulated to the participants and subject to their comment, included notice of an issues conference (see, e.g., letter dated September 2, 2008 [corrected date] from ALJ O'Connell to the Board, Upstate Communities, and Department staff with an attached draft hearing notice for review and comment). Accordingly, Upstate Communities were fully informed early in the process that Part 624 would be applied and that an issues conference would be held. Upstate Communities made no objections to the use of an issues conference, or the Part 624 regulations, at that or any subsequent time before the ALJ.[3] Accordingly, Upstate Communities' attempt to raise the issue now is untimely.

Moreover, Upstate Communities' challenge to the use of Part 624 is rejected on the merits. Since at least 1984, the Department has conducted adjudicatory hearings on water supply rate disputes pursuant to Part 624 (see, e.g., Matter of Westchester County, Decision of the Commissioner, Nov. 9, 1995 [concurring with ALJ hearing report that stated that procedures provided in 6 NYCRR part 624 were used for the administrative rate making hearing and that an issues conference was held]; Matter of Westchester County, Interim Decision of the Commissioner, Nov. 22, 1993, at 1 [noting that the procedures in Part 624 are used as guidelines in water rate cases]; Matter of City of Utica Bd. of Water Supply, Decision of the Commissioner, July 16, 1984).

Regulatory revisions to 6 NYCRR part 624 that were filed in December 1993 added language (effective January 9, 1994) explicitly stating that the Part 624 regulations are applicable to hearings conducted by the Department relating to water supply rate disputes. Other references to water supply rate

[3] I note also that Upstate Communities have relied on 6 NYCRR part 624 in procedural matters (see, e.g., letter dated February 24, 2006 from counsel to Upstate Communities specifically referencing 6 NYCRR 624.8[d][6] in discussing their appeal rights).

proceedings appear in part 624 (see, e.g., 6 NYCRR 624.5[a] [municipalities involved in a water supply rate proceeding are mandatory parties]). The regulations further provide that, in the case of water supply rate disputes, the ALJ may issue directives modifying any incompatible provisions of Part 624, consistent with the spirit and intent of the regulations (see 6 NYCRR 624.8[b][xvii]).

Part 624 is appropriately applied to these proceedings. Where, as here, a Departmental determination is required by law to be made on a record and after an opportunity for a hearing (see Administrative Code § 24-360[b]; ECL 15-0903; 6 NYCRR 603.7; 6 NYCRR 603.8), the State Administrative Procedure Act requires an agency to conduct an adjudicatory proceeding consistent with article 3 of that act (see State Administrative Procedure Act ["SAPA"] § 102[3]; Matter of Asman v Ambach, 64 NY2d 989, 990 [1985] [adjudicatory hearing required where statute provided that the licensee may present evidence or sworn testimony, a stenographic record must be made, and the review committee's decision must be limited to the record]). Part 624 sets forth the Department's adjudicatory hearing procedures in the non-enforcement context to satisfy the requirements of SAPA article 3 and due process.

Consequently, the conduct of an issues conference in a Part 624 proceeding does not deprive the parties of any procedural rights to which they are entitled by SAPA article 3 or due process. The purpose of the issues conference, among other things, is to narrow or resolve disputed issues of fact without resort to taking testimony, to determine whether disputed issues of fact require adjudication, and to hear argument on and decide legal issues, the resolution of which are not dependent on facts that are in substantial dispute (see 6 NYCRR 624.4[b][2]). That purpose was fully satisfied here.

Additional Adjudicable Issues Proposed by Upstate Communities

On appeal, Upstate Communities challenge the ALJ's rulings that, for purposes of calculating the water rate, no adjudicable issues exist with respect to (a) the City's bad debts or uncollectibles; and (b) imputed revenues from hydroelectric plants within the water supply system.

Pursuant to the regulations, a petitioning party in a water supply rate dispute shall be the applicant for purposes of the

proceeding (see 6 NYCRR 624.2[d]). Accordingly, Upstate Communities, as the petitioning party, is designated as the applicant.

Part 624 sets forth the standard for adjudicable issues with respect to an applicant. An issue is adjudicable if "it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit" (6 NYCRR 624.4[c][1][i]). In water supply rate cases, the municipal entity (here, the Board) establishing the rate is substituted for "department staff" for purposes of this standard (see 6 NYCRR 624.8[b][xvii]). Department staff, however, remains as a participant in the proceeding.

The argument of Upstate Communities that all the issues that they propose must automatically proceed to adjudication is rejected. For an issue to be adjudicated in a water supply rate case, it must relate to a substantial term or condition and be material (see DEC Office of Hearings Comments/Response Document on Part 622 and Part 624, Dec. 1993, at 17 [applicant's right to challenge "significant" condition]).

--Bad debt (uncollectibles)

Upstate Communities argue that the uncollected revenues due to the City from in-City users who have not paid their water bills ("bad debt" or "uncollectibles") must be considered with respect to any impact on the water rate. Upstate Communities propose to adjudicate the following:

> "What is an appropriate bad debt policy and the ultimate effect of same on the cost of running the water system and its rates, and to what extent should the upstate communities bear the burden of higher debt costs resulting from the City's failure to timely collect overdue bills and/or bad debt of in-city customers?" (see Letter dated October 30, 2008 from Kathy Lane, Esq. of Newman Dichter LLP to ALJ O'Connell ["Lane Letter"], at 1).

On their appeal, Upstate Communities argue that evidence should be heard regarding the effectiveness and appropriateness of the Board's collection practices. They contend that the poor quality of collection efforts results in higher costs, and that

if more delinquent payments were collected, the Board would be able to reduce its long-term debt resulting in lower costs to the overall system. Upstate Communities also claim that the ALJ erred in relying on the fact that uncollected debts become liens on the properties receiving the water. Upstate Communities contend that much of the amount owed to the City is never collected due to poor recordkeeping.

In its reply, the Board argues that it is speculative to contend that additional revenues could be realized, that the revenues would be used on capital projects, and that the revenues would, as a result, reduce the water rate charged to Upstate Communities. The Board contends that Upstate Communities' claims with respect to what the Board's improved collection rate might be, and how much of that collected cash would be substituted for long-term debt are not supportable (see Board Response, at 10). Furthermore, the Board states that only "actual costs" should be considered in rate making, and not hypothetical revenues.

The ALJ ruled that this proposed issue was not adjudicable. He noted that the City has in place a mechanism to collect delinquent water payments from in-city customers, and that the efficacy of the Board's collection practices were outside of the scope of this hearing. The ALJ also concluded that the presumption asserted by Upstate Communities that the additional cash revenues that the Board should have collected from delinquent in-city water customers would have been used to finance capital expenditures (and reduce long term debt costs) was speculative (see 2008 Issues Ruling, at 11-12).

The Administrative Code of the City of New York establishes that rates are to be determined based on the "actual total cost" of the water to the city after deducting from the total cost all construction costs and expenses of operation, maintenance, and carrying charges incurred within the corporate limits of the city in connection with the distribution and delivery of the water within such limits. The Board's consultant states that no costs are included in the water supply cost of service calculations relating to bad debt (see, Rebuttal Report Prepared in Response to the Teumim Analysis of New York City Water Board Rates, Vol 1, December 2006, at 11, n 11).

Upstate Communities, however, contend that, as a result of an improved collection rate of "bad debt," more capital

expenditures would be funded by cash, thereby reducing bonding and bond service costs with respect to the system.

It is unclear, on the record before me, the extent to which the payment of overdue water payments and satisfaction of related property liens are utilized in the calculation of the water rate formula. Furthermore, it is also unclear whether the monies collected from overdue accounts and liens are applied to water-related expenditures or to other City obligations.

I determine that certain aspects of the "bad debt" issue are to be adjudicated. The proposed issue, as defined by the Upstate Communities is too broadly written, however. I also decline to accept the alternative language that the Board offers in the event an issue is found on this "bad debt" matter.

For the purposes of this adjudication, the Board is to address, for the rate established on July 1, 2004, the extent to which monies received from the payment of overdue water accounts or from the satisfaction of liens relating to overdue water accounts are a component in the calculation of the water rate and whether "bad debt" should be considered as an "actual cost" for purposes of the regulations establishing rate calculation. As part of consideration of this issue, the Board is to address whether an improved collection rate relative to overdue water accounts and liens would result in any lowering of the rate charged to the Upstate Communities. In this regard, the Board is to address whether it would use any such monies received as a substitute for long term debt financing, and whether this would result in a lowering of the rate charged.

--Hydroelectric Revenues

With respect to the hydroelectric revenues issue, Upstate Communities proposed to adjudicate the following:

> "As the upstate communities share in the cost of the water supply system, should the City be required to credit upstate customers with imputed revenues or benefits that the City, but not the Upstate Customers, receives from the contracts relating to the use of the water supply system to produce hydroelectric power?" (Lane Letter, at 1).

Eight hydroelectric power plants located within the water tunnels of the City water system are operated by third parties (see Issues Ruling, at 5). These plants have a capacity of 51,000 kilowatts (id., at 5-6; Analysis of New York City Water Board Rates to the Upstate Communities for the 2005 Rate Year by Phillip S. Teumim LLC, Vol I, at 8-9).

Upstate Communities assert that the manner in which the Board receives the revenues and the reduced costs of electricity from these plants is not accurately accounted for. They contend that the difference between the market value of the electricity and the dollar benefits received ("differential revenue") should be imputed to the Board as revenue and included in the miscellaneous revenue category, thereby reducing the rate that the Upstate Communities pay.

Upstate Communities acknowledge that the Board did not receive the differential revenue, but argue that the revenue should be imputed because the City received economic benefits from this electricity that were not shared with the Upstate Communities (see Appeal, at 9-11).

The Board argues that these unrealized revenues are not actual costs. It contends that the use of the market value of the electricity produced neglects the operating and maintenance costs associated with the power plants, including real estate taxes and routine capital improvements, and the complex regulatory environment for power companies.

The upstate water rate must be based on the actual total cost of the water to the City less all costs associated with distributing the water within the City's limits (see Administrative Code § 24-360[c]). The Board does not receive the imputed revenues to which Upstate Communities refer, nor has there been any negotiation for those amounts (see Hearing Transcript, at 20). Simply put, it is a revenue offset that is non-existent and cannot be measured.

The ALJ, based on his analysis of the arguments of the parties, determined that imputed revenues related to the referenced hydroelectric generating facilities are not actual costs and, accordingly, no adjudicable issue has been raised (see Issues Ruling, at 8-9; see also Matter of Westchester County, Decision of the Acting Deputy Commissioner, April 7, 1997 [adopting ALJ Hearing Report which concludes that benefits

from "avoided costs" are not to be included in the upstate water rate because such benefits are not precisely known or measurable]). I concur with the ALJ's analysis. As a matter of law, no issue has been raised.

Appeals related to Petitions Challenging the Rates that were Established on July 1, 1996, July 1, 1997, July 1, 1998 and July 1, 1999

In his January 13, 2006 ruling, the ALJ determined that Upstate Communities could not use the petitions of Westchester County to challenge the water supply rates established on July 1, 1996, July 1, 1997, July 1, 1998, and July 1, 1999. The ALJ noted that, because Westchester County had not diligently pursued these petitions, the Board would be prejudiced if he allowed the challenges to proceed at that time. Accordingly, based on the doctrine of laches, the ALJ dismissed the petitions challenging the rates established on July 1 of the years 1996 through 1999 (see January 13, 2006 ruling, at 14).

In addition, the ALJ addressed Upstate Communities' announced intention to file petitions challenging the water supply rate for the period from July 1, 2000 through June 30, 2004. He noted that no upstate water user had formally commenced a proceeding as provided for by section 24-360 of the City's Administrative Code, article 15 of the Environmental Conservation Law and 6 NYCRR part 603 to challenge any rate implemented annually on July 1 from 2000 to 2003 (see January 13, 2006 ruling, at 8). The ALJ ruled that a reasonable amount of time to file a petition was one year from the Board's implementation of a change to the rate. Because more than one year had elapsed since the establishment of the rates on July 1, 2000, July 1, 2001, July 1, 2002 and July 1, 2003, the ALJ ruled that the doctrine of laches also barred Upstate Communities from filing petitions for those years (see id., at 12).

The ALJ established a schedule for parties to appeal from the January 13, 2006 ruling: appeals were due by February 17, 2006 and replies were due by March 17, 2006. No appeals were filed in that time period.

By letter dated February 24, 2006, counsel for Upstate Communities informed the ALJ that his client would not appeal the January 13, 2006 ruling at that time, but rather would raise the issue with the Commissioner after the hearing in the

proceeding involving the water rate implemented on July 1, 2004 was completed, specifically referencing 6 NYCRR 624.8(d)(6).

In a memorandum dated March 16, 2006 (entitled "Memorandum limiting the scope of the hearing to the basis for the rate implemented by the Board on July 1, 2004" ["2006 Memorandum"]), the ALJ stated:

> "The January 13, 2006 ruling establishes, as the law of the case, that the scope of the forthcoming adjudicatory hearing will be limited to the basis for the upstate water rate implemented on July 1, 2004. Although upstate communities may wait until after the adjudicatory hearing to appeal from the January 13, 2006 ruling as provided by 6 NYCRR 624.8(d)(6), I will not accept evidence or offers of proof during the proceeding that are not relevant to the water rate implemented on July 1, 2004" (2006 Memorandum, at 2).

Subsequently, in a memorandum dated February 9, 2009, the ALJ held that the January 13, 2006 ruling had disposed of, with finality, the petitions filed by Westchester County challenging the upstate water rates implemented annually on July 1 from 1996 to 1999 (February 9, 2009 Memorandum, at 5). The ALJ further held that the failure to timely appeal from the January 13, 2006 ruling constituted a waiver of the right to appeal the dismissal of those petitions (see id.).

On their present appeal, Upstate Communities contend that the ALJ's determination that Upstate Communities had waived their right to appeal from the January 13, 2006 ruling dismissing petitions challenging water rates implemented annually on July 1 from 1996 to 1999 was in error (see Appeal, at 3, 11-12). Upstate Communities argue that, in light of the perceived inconsistencies in the ALJ rulings and memoranda, their right to appeal the January 13, 2006 ruling should be preserved.

In its response, the Board argues that the Upstate Communities cannot appeal from the February 9, 2009 Memorandum because it is not a ruling and because their appeal is not timely.

Based on my review of the January 13, 2006 ruling and relevant memoranda and other documents, I conclude that, on the

merits, the ALJ's determination that Upstate Communities waived their right to appeal from the January 13, 2006 ruling was correct.[4]

Nevertheless, given the apparent confusion concerning the appropriate appeal procedures and based on the circumstances of this proceeding, I am hereby providing that Upstate Communities may appeal from the January 13, 2006 ruling, insofar as that ruling dismissed the petitions challenging the rates established on July 1 from 1996 to 1999 in accordance with the following schedule and procedure.

The original and two copies of any appeal from the ALJ's January 13, 2006 ruling must be received by Acting Commissioner Peter M. Iwanowicz by close of business (4:30 p.m.) on Wednesday, December 29, 2010, at the following address: Acting Commissioner Peter M. Iwanowicz (attn: Louis A. Alexander, Assistant Commissioner), NYSDEC, 625 Broadway (14th Floor), Albany, New York 12233-1010. Upon receipt, the two copies will be forwarded to ALJ O'Connell and Chief Administrative Law Judge James T. McClymonds. One copy must also be filed with each party on the service list in the same manner and at the same time that the submittal is sent to the Commissioner. Service of papers by e-mail is permitted, as long as hard copies are mailed on the same date. Any party serving its papers by e-mail transmission is directed to contact the recipients on the date of transmission to confirm receipt. No papers may be submitted by facsimile transmission.

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[4] Although proceedings for each rate year challenged were being conducted jointly for the sake of judicial economy, each petition challenging an individual annual rate commences a separate proceeding under Part 624. Thus, when the ALJ dismissed the four petitions challenging the rates established on July 1 from 1996 to 1999, respectively, the ALJ terminated four separate proceedings. Because the proceedings on the 1996 through 1999 rates were dismissed, no further hearing was to be held on those rates. Thus, the provisions of Part 624 allowing a party to await the conclusion of the hearing to appeal from interim rulings of an ALJ were not available to Upstate Communities (see 6 NYCRR 624.8[d][1], [6]).

Instead, the time to appeal from the January 13, 2006 ruling dismissing the petitions challenging the rates established in 1996 through 1999 was as provided for in the ALJ's schedule set forth in the 2006 ruling (see 6 NYCRR 624.6[e][1], [g]). Thus, the ALJ correctly ruled that by failing to file appeals within the period established in the January 13, 2006 ruling, Upstate Communities waived their right to appeal (see 2009 Memorandum, at 5).

An original and two copies of any response to an appeal must be received by the Acting Commissioner no later than close of business (4:30 p.m.) on Wednesday, January 26, 2011. One copy of the response must be filed with each party on the service list in the same manner and at the same time that the submittal is sent to the Commissioner. If no appeals are filed, the ALJ's January 13, 2006 ruling shall be the final disposition of the matters addressed therein. If an appeal is filed, it will not be a basis to delay the pending proceeding addressing the water rate that the Board established for the period July 1, 2004 through June 30, 2005.

CONCLUSION

The matter challenging the water supply rate for the period of July 1, 2004 through June 30, 2005 is remanded to the ALJ for further proceedings consistent with this decision.

FOR THE NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

/s/

By: _____
Peter M. Iwanowicz
Acting Commissioner

Albany, New York
December 1, 2010