

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of a Joint Petition to Fix the Water Rates Charged to Upstate Communities for the Fiscal Years 2015, 2016 and 2017 by the New York City Water Board, pursuant to Section 24-360 of the Administrative Code of the City of New York, Article 15 of the Environmental Conservation Law of the State of New York, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York part 603, by

Village of Scarsdale, Suez Water Westchester, Inc.,
Westchester Joint Water Works, City of White Plains,
City of Yonkers, and Town of Greenburgh,
Petitioners.

(Village of Scarsdale 2016 Petition, OHMS Case No.: 201671203)

March 7, 2018

Proceedings

With a cover letter dated August 18, 2016 from Joel R. Dichter, Esq. (Dichter Law, LLC, Mount Kisco), the Village of Scarsdale, Suez Water Westchester, Inc., Westchester Joint Water Works, the City of White Plains, the City of Yonkers, and the Town of Greenburgh (Petitioners) filed a joint petition dated August 18, 2016 (Joint Petition) requesting a review of the rates charged by the New York City Water Board (the Water Board) to upstate customers for entitlement water and excess water for Fiscal Years (FYs) 2015, 2016, and 2017.

As discussed in a ruling dated April 26, 2017, I noted that the Water Board and Petitioners agreed that the Commissioner has the authority to adjudicate disputes about the rate for entitlement water pursuant to Administrative Code § 24-360(b).¹ Accordingly, Petitioners and the Water Board have exchanged discovery demands, and are in the process of preparing for a hearing to consider the entitlement water rates. Based on the discussion held during the May 17, 2017 telephone conference call, the issues conference will be scheduled after the discovery process continues further. (*See* Memorandum dated May 18, 2017 at 1-2.)

This order addresses a discovery dispute related to the rates charged by the Water Board to upstate customers for entitlement water for FYs 2015, 2016, and 2017. Discovery has not yet commenced with respect to the rates charged by the Water Board to upstate customers for excess water for FYs 2015, 2016, and 2017.

¹ By letter dated December 19, 2016 (at 1), Department staff took no position about whether the Commissioner has authority to review, and fix fair and reasonable rates for the entitlement water.

By email dated March 2, 2017, I authorized the parties to commence discovery, which the regulations provide for at title 6 of the Official Compilation of Codes, Rules, and Regulations (6 NYCRR) § 624.7. Petitioners served the Water Board with discovery requests via emails dated March 7 and 15, 2017, and July 24, 2017.² On May 23, 2017, the Water Board served Petitioners with its first set of interrogatories and document requests (May 23, 2017 Discovery Demands).³ With service of these discovery demands upon Petitioners, the Water Board sought responses from each Petitioner identified in the Joint Petition.

By letter dated February 1, 2018, the Water Board requested an order to compel disclosure. The Board acknowledged that it received responses to the May 23, 2017 Discovery Demands from the Village of Scarsdale (July 18, 2017), and the City of Yonkers (July 18, 2017). As of February 1, 2018, the Water Board said it has not received responses from the other Petitioners, however. Prior to filing the request for an order, the Board's counsel asked counsel for Petitioners about the status of the responses from the remaining Petitioners. According to the Board, the response that it received to its inquiry was that no other responses would be forthcoming without an order from me. Accordingly, the Board seeks an order compelling disclosure, and directing responses from the remaining Petitioners within 30 days.

With a letter dated March 5, 2018, Petitioners responded, and asserted that the May 23, 2017 Discovery Demands seek information that is not relevant to the review of the entitlement water rates. Petitioners noted that the Water Board is seeking information about how the upstate water authorities establish the retail rates for their respective customers, the capital investments made to local water distribution systems, and the finances of the upstate water authorities, among other things. Petitioners maintain that none of the requested information is relevant to the review of the rates charged by the Water Board to upstate communities for entitlement and excess water.

Petitioners explained further that the Village of Scarsdale and the City of Yonkers responded to the May 23, 2017 Discovery Demands, to the extent the information is available. In addition, with respect to Suez Water Westchester, Inc., Petitioners provided a compact disk (CD) with prefiled testimony and exhibits from the last rate case before the Department of Public Service. According to Petitioners, the information on the CD provides representative responses applicable to the other Petitioners.

Finally, Petitioners asserted that responding to the May 23, 2017 Discovery Demands would be burdensome. The upstate water authorities have limited resources and the information, which is not readily available, would have to be compiled. Petitioners noted that the Towns and Villages of Mamaroneck and Harrison, as well as portions of the Cities of New Rochelle and Rye obtain services from Westchester Joint Water Works, which has no rate-making authority. Rather, the member municipalities set their own, respective rates. Petitioners emphasized that the retail rates charged by upstate communities to their customers are not at issue in this proceeding.

² See Exhibit A to the Board's February 1, 2018 correspondence.

³ See Exhibit B to the Board's February 1, 2018 correspondence.

Discussion and Order to Compel Disclosure

Pursuant to the Department's Permit Hearing Procedures, discovery is authorized (*see* 6 NYCRR 624.7), and its scope is broad (*see* CPLR 3101; *West v Aetna Cas. and Sur. Co.*, 49 Mis 2d 28, 29 *mod* 28 AD2d 745 [1967]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). In addition, I authorized the use of interrogatories (*see* CPLR 3102), as provided by 6 NYCRR 624.7(c)(2).

A party against whom discovery is demanded may make a motion to the ALJ for a protective order in general conformance with CPLR 3103 (*see* 6 NYCRR 624.7[d][1]). If a party fails to comply with a discovery demand without making a timely objection, the proponent of the discovery demand may request an order to compel disclosure from the ALJ (*see* 6 NYCRR 624.7[d][2]). The ALJ may preclude the material demanded from the hearing record when any party does not comply with discovery after being directed to do so by the ALJ. In addition, the ALJ or the Commissioner may draw the inference that the material demanded is unfavorable to the non-complying party's position. (*See* 6 NYCRR 622.7[d][2]).

In part, I agree with Petitioners that some of the Water Board's May 23, 2017 Discovery Demands are not relevant, and that responding to them would be burdensome. Therefore, I grant the Water Board's motion to compel, in part, and deny it, in part.

With reference to NYC Water Board First Set of Interrogatories and Requests for Production of Documents to Upstate Petitioners – May 23, 2017, I grant the Water Board's request for an order to compel disclosure with respect to Nos. 1, 2, 5, 6, and 22. Accordingly, Suez Water Westchester, Inc., Westchester Joint Water Works, the City of White Plains, and the Town of Greenburgh must respond to the discovery demands identified above within 60 days from the date of this order.

I deny the Water Board's request for an order to compel disclosure with respect to the other requests enumerated in NYC Water Board First Set of Interrogatories and Requests for Production of Documents to Upstate Petitioners – May 23, 2017.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: March 7, 2018
Albany, New York

To: Attached Preliminary Service List revised February 27, 2018