

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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

Water Board's  
March 30, 2018  
Motion to Renew or Reargue

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

November 27, 2018

**Petitioners.**

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

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**Proceedings**

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. In rulings dated April 26, 2017 and February 9, 2018, I determined that the Commissioner has the authority to adjudicate disputes about the rate for entitlement water pursuant to Administrative Code § 24-360(b), as well as the authority to review the rates charged for excess water. These rulings were not appealed.

By email dated March 2, 2017, I authorized the parties to commence discovery, as provided by title 6 of the Official Compilation of Codes, Rules, and Regulations (6 NYCRR) § 624.7, with respect to entitlement rates. In addition, I authorized the use of interrogatories (*see* CPLR 3102), as provided by 6 NYCRR 624.7(c)(2).

Subsequently, Petitioners served the Water Board with the following discovery requests. First, by email dated March 7, 2017, Petitioners served *Upstate Water Users' Coalition's First Set of Interrogatories and Requests for Production of Documents*. The first set of discovery demands is numbered 1 to 68. Second, by email dated March 15, 2017, Petitioners served *Supplemental First Set of Interrogatories and Requests for Production of Documents*. The supplemental interrogatories are numbered 1 and 2. Then, by email dated July 24, 2017, Petitioners served *Upstate Water Users' Coalition's Second Set of Interrogatories and Requests for Production of Documents*. The second set of discovery demands is numbered 69 to 105.

(*See* Exhibit A to Water Board's February 1, 2018 letter.) The Water Board stated that it responded to all of Petitioners' discovery demands served to date without objection (*see* Water Board's February 1, 2018 letter at 1; Water Board's March 30, 2018 letter at 3).

On May 23, 2017, the Water Board served Petitioners with its first set of interrogatories and document requests (May 23, 2017 Discovery Demands). The May 23, 2017 Discovery Demands are numbered 1 to 25 (*see* Exhibit B to Water Board's February 1, 2018 letter). A copy of the May 23, 2017 Discovery Demands is attached as Appendix A.

With a letter from Ms. Ash dated February 1, 2018, the Water Board moved for an order to compel disclosure of its May 23, 2017 Discovery Demands. The Board acknowledged that it received responses from the Village of Scarsdale and the City of Yonkers, and enclosed copies of them with the March 30, 2018 motion (*see* Exhibit A [Village of Scarsdale] and Exhibit B [City of Yonkers] to Water Board's February 1, 2018 letter). In addition, the Board noted that in January 2018, Suez Water Westchester Inc. provided a compact disk (CD) that included the prefiled testimony and exhibits that Suez Water Westchester Inc. had presented in a rate case before the New York State Public Service Commission. The Water Board argued, however, that the information on the CD is not responsive to the May 23, 2017 Discovery Demands. (*See* Water Board's March 30, 2018 letter at 1, n 1.) As of February 1, 2018 (*id.* at 2), the Water Board said that it had not received responses from the other Petitioners.

With a letter from Mr. Dichter dated March 5, 2018, Petitioners responded to the Board's February 1, 2018 motion, and asserted that the Board's May 23, 2017 Discovery Demands seek information that is not relevant to the review of the entitlement water rates. 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 was available. Petitioners refuted the Board's argument that the information on the CD from Suez Water Westchester, Inc. was not responsive to the Board's May 23, 2017 Discovery Demands. (*See* Petitioners' March 5, 2018 letter at 1-2.)

In a ruling dated March 7, 2018, I granted the Water Board's motion, in part, and denied the motion, in part. The March 7, 2018 ruling provided a schedule for Petitioners to respond to the Water Board's May 23, 2017 Discovery Demands Nos. 1, 2, 5, 6, and 22. A copy of the March 7, 2018 ruling is attached as Appendix B.

With a letter from Ms. Ash dated March 8, 2018, the Board objected that I did not provide the Board with the opportunity to reply to Petitioners' March 5, 2018 response before issuing the March 7, 2018 ruling. The Board requested leave to file either a reply or a motion for reconsideration.

By letter dated March 16, 2018, I denied the Board's request to file a reply.<sup>1</sup> Citing 6 NYCRR 624.6(c), I noted that parties may file motions at any time during the proceeding without leave from the ALJ.

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<sup>1</sup> See 6 NYCRR 624.6(c)(3).

Subsequently with a letter dated March 30, 2018 from Ms. Ash, the Water Board filed a motion requesting me to reconsider the March 7, 2018 ruling. In a letter dated April 6, 2018, I set April 20, 2018 as the return date for responses from Petitioners and Department staff, and April 25, 2018 as the date to file requests for leave to reply. In addition, I suspended the schedule outlined in the March 7, 2018 ruling that required Petitioners to respond, in part, to the Water Board's discovery demands.

On behalf of Petitioners, I received a response from Mr. Dichter dated April 19, 2018. Department staff responded with a letter from Mr. London dated April 20, 2018.<sup>2</sup>

In a letter from Ms. Ash dated April 20, 2018, the Water Board requested leave to reply. I granted this request in a letter dated April 26, 2018, and set May 18, 2018 as the return date for the Water Board's reply. With a letter from Ms. Ash dated May 15, 2018, the Water Board replied.

### **Discussion and Rulings**

#### **I. Scope of Discovery prior to the Issues Conference**

Discovery is authorized pursuant to 6 NYCRR 624.7. Prior to the issues conference, discovery is limited to what is afforded under 6 NYCRR part 616 (Access to Records). The administrative law judge, however, may grant petitions for further discovery prior to the issues conference under certain circumstances. (*See* 6 NYCRR 624.7[a].)

Prior to the issues conference, the disputed factual issues that will be considered during the adjudicatory phase of the public hearing have yet to be identified. The rule limiting discovery prior to the issues conference contemplates this circumstance. Subsequent to the issues conference, the ALJ will specify the issues for adjudication in a ruling (*see* 6 NYCRR 624.4[b][5]). After considering any duly filed appeals from the ALJ's issues ruling, the Commissioner will designate the issues for adjudication, and the parties then have the right to serve discovery demands upon the other parties (*see* 6 NYCRR 624.7[b]).

Given the 2011 amendments to Environmental Conservation Law (ECL) article 15, title 15,<sup>3</sup> the April 26, 2017 ruling resolved the legal question about whether the Commissioner had retained the authority to review the rates for entitlement water and, if necessary, fix fair and reasonable rates for entitlement water after a hearing. At this point in the proceeding, the factual

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<sup>2</sup> Department staff support the Board's March 30, 2018 motion. According to staff, I should direct Suez Water Westchester, Inc., Westchester Joint Water Works, the City of White Plains, and the Town of Greenburgh to respond to the Water Board's May 23, 2017 Discovery Demands. In addition, Department staff supported the Water Board's request to re-serve Nos. 17-21, 23-25 upon Petitioners after discovery about excess water rates is authorized.

<sup>3</sup> *See* L 2011, ch 401, effective February 15, 2012.

disputes about what the Board considered when it calculated the three entitlement rates under consideration here (*i.e.*, FYs 2015, 2016 and 2017) have yet to be determined.

Nevertheless, I authorized discovery to commence with respect to the entitlement rate based on Petitioners' request. In an email from Mr. Dichter dated February 21, 2017, Petitioners stated, in pertinent part that:

there is no dispute as to the jurisdiction of the Commission [sic] as to entitlement water rates....

Petitioners accordingly sought leave to prepare initial data requests and interrogatories as provided by 6 NYCRR 624.7(c). After noting that I had not received any objections from either the Board or Department staff, I authorized discovery to commence in an email dated March 2, 2017. Given Petitioners' request, the authorization was limited to discovery concerning the entitlement water rates.

After the disputed factual issues for adjudication are identified and finalized, a more in-depth level of discovery is authorized pursuant to 6 NYCRR 624.7(b), and its scope is broad (*see* CPLR 3101; *West v Aetna Cas. and Sur. Co.*, 49 Misc 2d 28, 29 [1965], *mod* 28 AD2d 745 [1967]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The rules for discovery provide further that a party against whom discovery is demanded may move for a protective order in general conformance with CPLR 3103 (*see* 6 NYCRR 624.7[d][1]). In addition, when 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 624.7[d][2].)

Contrary to the Board's claim (*see* Board's May 15, 2018 reply at 1-2), no party must demonstrate a right to discovery. The burden of proof is immaterial to a party's right to discovery. As provided for by 6 NYCRR 624.7(b), any party has the right to serve discovery demands (*see also* CPLR 3101[a]). Petitioners' decision not to move for a protective order is not a waiver of their rights to respond to the Board's motion to compel. The circumstances here are distinguishable from those in *Matter of William Wolf* (Chief ALJ's Ruling on Amended Motion to Compel Disclosure, April 28, 2011, at 3), where respondent did not respond to Department staff's notice of discovery and, subsequently, Mr. Wolf neither raised a timely objection to staff's discovery demands nor responded to staff's motion to compel.

## II. Motions to Reargue or Renew

In the March 30, 2018 motion, the Board requested reconsideration of the March 7, 2018 ruling concerning the Board's February 1, 2018 motion to compel Suez Water Westchester, Inc., Westchester Joint Water Works, the City of White Plains, and the Town of Greenburgh to

respond to its May 23, 2017 Discovery Demands. The Water Board explained that it drafted the May 23, 2017 Discovery Demands to address issues related to the rates charged for both entitlement and excess water. According to the Board, Nos. 17-21, and 23-25 from the May 23, 2017 Discovery Demands relate to excess water rates. The Water Board explained further that the parties had agreed not to respond to the discovery demands related to excess water rates until after the jurisdictional issue was resolved. The Board intends to re-serve the demands related to excess water rates upon Petitioners after discovery concerning excess water rates is authorized. (*See* Water Board's March 30, 2018 letter at 2.)

Petitioners denied the Board's claim that the parties had agreed to, first, serve discovery demands related to both entitlement and excess water rates and, then, hold in abeyance those responses related to excess water rates pending a ruling about the scope of jurisdiction. Petitioners noted that, when initially served, the Board had not distinguished which of the May 23, 2017 Discovery Demands relate to entitlement water rates, which relate to excess water rates, and which relate to both entitlement and excess water rates. Petitioners stated that the Board has not yet responded to their demands, which in the Board's view, relate to excess water rates. Since issuance of the February 9, 2018 ruling concerning the Commissioner's jurisdiction over excess water rates, Petitioners have asked the Board to respond to the demands. According to Petitioners, the Board is considering their request to respond. If responses are not forthcoming, Petitioners asked me to direct the Board to respond. (*See* Petitioners' April 19, 2018 letter at 1.)

With respect to its May 23, 2017 Discovery Demands Nos. 1-16, inclusive, the Water Board offered the following. The Board argued that inquiries such as, what rates are charged by Petitioners to their customers, and how the Petitioners determine those rates are relevant to this proceeding. According to the Water Board, No. 3 seeks more specific information about how Petitioners set rates, and No. 4 seeks information about whether Petitioners' customers have challenged rates and, if so, the bases for any such challenges. (*See* Water Board's March 30, 2018 letter at 2.)

According to the Board, Nos. 7-9 seek information about whether Petitioners purchase water from wholesalers other than the Water Board, whether Petitioners sell water to other customers and, if so, what are the rates associated with the wholesale purchases and sales. The Water Board stated that No. 10 inquires whether Petitioners rely on tiered rates to recover costs related to the distribution of entitlement water and excess water within their respective service areas. (*See* Water Board's March 30, 2018 letter at 2-3.)

The Board contended that Nos. 8-10 relate to both entitlement rates and excess rates. The Board requested an order compelling disclosure from Petitioners with respect to the entitlement water rates. However, the Board requested leave to re-serve these demands with respect to excess water rates. (*See* Water Board's March 30, 2018 letter at 2, n 2.)

With respect to its May 23, 2017 Discovery Demands Nos. 11-16, the Board contended that it seeks information about how upstate communities treat property taxes and capital costs in their respective rate calculations. The Board observed that Petitioners' discovery demands included inquiries about the capital costs associated with the New York City water supply

system. The Board contended, however, that the focus of Nos. 11-16 is comparatively more narrow. (*See* Water Board's March 30, 2018 letter at 3.)

To further support its motion, the Water Board referenced the responses provided by the Village of Scarsdale to the May 23, 2017 Discovery Demands Nos. 13-15. According to the responses, the Village of Scarsdale has defeased bonds, refunded bonds, and used cash to finance construction, the costs of which the Village passed on to its customers through the water rates. (*See* Water Board's March 30, 2018 letter at 3, n 3, and Exhibit A.)

In addition to the May 23, 2017 Discovery Demands Nos. 1, 2, 5, 6, and 22 already identified in the March 7, 2018 ruling, the Boards requested that I direct Suez Water Westchester, Inc., Westchester Joint Water Works, the City of White Plains, and the Town of Greenburgh to respond to Nos. 3, 4, and 7-16, which are relevant to the entitlement rate. With respect to its May 23, 2017 Discovery Demands Nos. 17-21, and 23-25, the Board contended that these demands relate to excess water rates. The Board requested that I exclude these discovery demands from this motion. The Board intends to re-serve these demands after I authorize discovery with respect to excess water rates. The Board noted that its May 23, 2017 Discovery Demands Nos. 8-10 relate to both entitlement water rates and excess water rates. (*See* Water Board's March 30, 2018 letter at 2-3; Water Board's May 15, 2018 reply at 3-4.)

Petitioners oppose the Board's March 30, 2018 motion to reconsider the March 7, 2018 ruling. According to Petitioners, the arguments outlined in the Board's March 30, 2018 motion are essentially the same as those presented in the February 1, 2018 motion. Petitioners noted that the Board did not cite any statutory authority or case law to support its arguments to compel disclosure. According to Petitioners, most of the Board's May 23, 2017 Discovery Demands are irrelevant to the proceeding. Therefore, Petitioners contended that preparing responses to them would be burdensome. (*See* Petitioners' April 19, 2018 letter at 1.)

Petitioners concluded that the March 7, 2018 ruling properly balances the interests of the Water Board to conduct discovery without overburdening upstate communities to provide irrelevant data. Petitioners argued that I should deny the Board's March 30, 2018 motion to reconsider. Finally, Petitioners noted that the City of White Plains and Westchester Joint Water Works have prepared responses consistent with the March 7, 2018 ruling, and are prepared to deliver them to the Board. (*See* Petitioners' April 19, 2018 letter at 3.)

Part 624 of 6 NYCRR is silent about the procedures for the reconsideration of an ALJ's ruling. Reconsideration may be appropriate, however, when the ALJ overlooked or misapprehended the facts or law, or for some other reason mistakenly arrived at a decision. (*See Matter of Charles Pierce, Sr.*, Ruling of the Commissioner on Motion for Reconsideration, June 9, 1995, at 1, *citing Mayer v National Arts Club*, 192 AD2d 863 [1993].) In *Mayer* (192 AD2d 865), the court referenced Civil Practice Law and Rules (CPLR) § 2221, which provides for motions for leave to reargue (*see* CPLR 2221[d]) or to renew (*see* CPLR 2221[e]). In the absence of an express rule for reconsideration in 6 NYCRR part 624, I will refer to CPLR 2221 as guidance here, based on the Commissioner's determination in *Pierce* (Ruling at 1).

A motion to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. The motion may not include any matters of fact not offered on the previous motion. (*See* CPLR 2221[d][2].)

In the March 30, 2018 motion, the Board did not identify any matters of fact or law that I overlooked or misapprehended in considering whether the May 23, 2017 Discovery Demands were relevant to, or would lead to relevant information about, determining the rates for entitlement water as set forth in Administrative Code § 24-360(c). As noted above, the March 7, 2018 ruling was made prior to the final designation of the disputed factual issues (*see* 6 NYCRR 624.7[b]). In addition, the Board offered new arguments, not initially presented in the February 1, 2018 motion. For example, the Board advised in the March 30, 2018 motion that a portion of the May 23, 2017 Discovery Demands related to excess water rates. Accordingly, I deny any motion to reargue.

A motion to renew must be based on either new facts not previously offered that would change the initial ruling, or a change in the law that would change the previous ruling. In addition, the movant must provide a reasonable justification for not presenting the facts in the prior motion. (*See* CPLR 2221[e][2 and 3].)

The arguments presented in the Board's March 30, 2018 motion do not meet the standards for a motion to renew. The formula in Administrative Code § 24-360(c) for determining the entitlement water rate has not changed subsequent to the March 7, 2018 ruling. In addition, the rules with respect to discovery in the Department's hearing regulations (*see* 6 NYCRR 624.7) have not changed. The Board offered new information that some of the May 23, 2017 Discovery Demands related to entitlement water rates (Nos. 1-7, and 11-16), excess water rates (Nos. 17-21, and 23-25), and both entitlement and excess water rates (Nos. 8-10). The Board also stated that the March 30, 2018 motion excluded discovery demands related to excess water rates. The Board did not explain why it offered the distinctions among the discovery demands in the March 30, 2018 motion and not in the initial motion dated February 1, 2018. Accordingly, I deny any motion to renew.

## **Order**

### **I. Entitlement Water Rates**

Petitioners' advised in their April 19, 2018 letter (at 3) that the City of White Plains and Westchester Joint Water Works have prepared responses consistent with the March 7, 2018 ruling, and are prepared to deliver them to the Board. Therefore, I direct that that the City of White Plains and Westchester Joint Water Works to deliver their responses to the Board within 10 business days from receipt of this ruling.

It appears that the information on the CD provided to the Board by Suez Water Westchester, Inc., may not be responsive to the Board's May 23, 2017 Discover Demands Nos. 1, 2, 5, and 6. In addition, I found nothing in the papers about the status of responses from the Town of Greenburgh. Accordingly, I direct Suez Water Westchester, Inc. and the Town of

Greenburgh to respond to the Board's May 23, 2017 Discover Demands Nos. 1, 2, 5, and 6 within 60 business days from receipt of this ruling.

I deny the Water Board's request for an order to compel disclosure with respect to the May 23, 2017 Discovery Demands Nos. 3, 4, 7, 8-10 (as they relate to the entitlement water rates), and 11-16.

## II. Excess Water Rates

The Board stated that the May 23, 2017 Discovery Demands Nos. 8-10, 17-21, 23 and 24 relate to excess water rates. The Board advised that it intends to re-serve these discovery demands upon Petitioners after I authorize discovery with respect to excess water rates. (*See* Water Board's March 30, 2018 letter at 2.)

In addition, Petitioners advised that the Board has withheld responses to a portion of their demands, which the Board considers relevant to excess water rates. Subsequent to the February 9, 2018 ruling concerning the Commissioner's jurisdiction over excess water rates, Petitioners stated that they have requested the responses, but the Board has not delivered the responses to Petitioners. (*See* Petitioners' April 19, 2018 letter at 1.) In an email from Mr. Dichter dated November 6, 2018, Petitioners requested leave to commence discovery with respect to excess water rates.<sup>4</sup>

As noted above, discovery is limited prior to the issues conference (*see* 6 NYCRR 624.7[a]). Given the unique nature of these water rate cases, I had authorized discovery about entitlement water rates prior to the issues conference. However, I would prefer to convene the issues conference to determine whether any additional upstate communities want to participate in these proceedings before authorizing any additional discovery concerning entitlement water rates, as well as any discovery related to excess water rates. Therefore, I deny the requests to commence discovery about excess water rates until after the issues conference is convened.

## III. Issues Conference

I am available to convene the issues conference. Prior to convening the issues conference, a notice of issues conference will be published in the Department's *Environmental Notice Bulletin* and in a newspaper having general circulation in the upstate counties served by the New York City water supply system. Publication of the notice must be at least 21 days prior to the date of the issues conference. (*See* 6 NYCRR 624.3[a].)

To prepare the notice of issues conference, I will need the following information. I request that the Water Board provide me with a list of its upstate customers and their contact

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<sup>4</sup> On November 19, 2018, Petitioners' re-sent the November 6, 2018 email.

information. After the notice of issues conference is prepared, my office will send copies of the notice of issues conference to the upstate customers by regular mail.

In the meantime, I request that Petitioners reserve a date and location for the issues conference. I am available for the issues conference during the weeks of January 14 and 28, 2019. Except for the week of February 18, 2019, I am available in February 2019. I anticipate that we will need one day for the issues conference. In determining the hearing date, Petitioners' counsel shall confer with the Board's counsel. Petitioners are advised that they are responsible for the costs associated with the hearing (*see* Administrative Code § 24-360[b]; ECL 70-0119[3], 6 NYCRR 603.9, 624.2[d], and 624.11).

I am available in December 2018 to convene a telephone conference call with representatives from the Petitioners and the Water Board to work out the details for the hearing notice.

Subsequent to the issues conference and the identification of the factual issues for adjudication with respect to the entitlement and excess water rates, discovery may commence consistent with 6 NYCRR 624.7(b and c).

\_\_\_\_\_/s/\_\_\_\_\_  
Daniel P. O'Connell  
Administrative Law Judge

Dated: November 27, 2018  
Albany, New York

To: Attached Preliminary Service List revised February 27, 2018

Appendix A – The Board's May 23, 2017 Discovery Demands  
Appendix B – Ruling dated March 7, 2018

**NYC Water Board First Set of Interrogatories and Requests for Production of Documents to Upstate Petitioners -- May 23, 2017**

RE: Joint Petition of the Village of Scarsdale et al, OHMS No. 201671203

1. For each upstate water supply customer of the City of New York (hereinafter, "upstate customer"), specify the water rates charged to customers served by year from July 1, 2010 to the present (June 30, 2016). Please produce the rate schedules and specify all classes of rates and ratepayers.
2. Identify any pertinent statutory or regulatory sections or court or administrative orders that affect how each upstate customer sets rates.
3. For each upstate customer specify: a) the basis on which rates are set, including whether rates are set on a cash-needs approach, a utility approach, or on some other basis and b) whether the revenues from water rates charged are sufficient to cover the total cost of water service in each year or if not, c) the percentage of costs covered by water rate revenues and whether the local community's general fund or other sources of revenue pay for a portion of the total cost of water service (i.e., all water service costs include, but are not limited to, water purchases, treatment, distribution, meters, billing, capital improvements, debt service, etc.), specifying the sources of revenue and the percentage of costs covered by that source of revenue.
4. Have there been any challenges to the retail rates of upstate customers from July 1, 2010 to the present? Identify each upstate customer, and the date, basis and outcome for each challenge.
5. Provide a copy of each rate study performed for each upstate customer from July 1, 2010 to the present.
6. If rate studies have not been performed from July 1, 2010 to the present, please describe the origins, for each upstate customer, for the rate structure being used and the basis for the rates, and modifying the rates charged in each year.
7. State whether each upstate customer purchases water wholesale from a supplier other than NYC. If so, identify the supplier, specify the wholesale rate for such water from July 1, 2010 to the present, and specify, for each month if available and if not, annually, how much water was purchased from that supplier and from NYC. Include and separately identify any water supplied by wells in the response, and any costs associated with obtaining such water.
8. State whether each upstate customer sells water on a wholesale basis or on a retail basis outside of their municipal or utility boundaries. Identify the

purchaser and specify the wholesale rate or retail rate for such water from July 1, 2010 to the present, and specify how much water was purchased annually.

9. If rates are higher for users outside of the community's boundaries, please explain why, specify how that rate is determined, and provide any studies or analyses supporting that determination. For example, specify how it was determined that Village of Scarsdale users should be charged a base rate of \$2.50 per unit (100 cubic feet) for the first 50 units and users outside the Village should be charged a base rate of \$3.43.
10. Identify the basis for any retail water rate blocks and specify how the usage levels were set for each tier and how the rates were set for each tier for local water rates for each upstate customer that uses a multi-tier rate structure.
11. State whether each upstate customer pays property taxes, payments-in lieu-of-taxes, or any other form of payment, tax or fee to the general fund or other fund of the communities served, as well as to the applicable County government or New York State. Specify the upstate customer, the type of payments, the recipients and the amounts paid by year from July 1, 2010 to the present. For those upstate customers that pay property taxes on their water system assets, describe the method that is used to calculate the annual property taxes.
12. For each upstate customer, describe the capital costs incurred from July 1, 2010 to the present for their water system; in what amount and for what purpose; and how such costs were paid for (i.e., cash-financed, through the proceeds of loans, notes or bonds, or other means, such as property tax receipts). Provide the percentage of capital funds from each source. If loans, notes or debt were used, provide the term (number of years for repayment), and the manner in which principal is being repaid (e.g., equal principal payments on an annual basis, the amount of principal being repaid increases each year, or another basis). Provide the current bond ratings for each issuer of debt for each upstate customer. Please provide this information for the capital costs incurred by any County or other governmental entity for the benefit of any upstate customer.
13. Specify whether any upstate customer or County or other governmental entity on behalf of any upstate customer has defeased bonds, and specify when, which bonds, in what amount, how that defeasance was paid for, and whether and how it affected water rates or property taxes.
14. Specify whether any upstate customer or County or other governmental entity on behalf of any upstate customer has refunded outstanding bonds, and specify when, which bonds, in what amount, how that refunding was paid for, and whether and how it affected water rates or property taxes.

15. Specify whether any upstate customer or County or other governmental entity on behalf of any upstate customer has used cash to finance construction as opposed to debt financing, and specify when, which projects, in what amount, how that cash was provided and whether and how it affected water rates or property taxes.
16. Specify the book value and the outstanding debt for water system assets of each upstate customer as of the later of 2016 or the most recent published reports, and provide such reports.
17. Specify conservation investments made by each upstate customer from July 1, 2010 to the present; identify the type of investment, when the investment was made, the amounts paid and the water savings achieved. Conservation investments by an upstate customer refer to moneys spent and/or discounts offered to retail customers to achieve water conservation and would include, but are not limited to the following: rebates to retail customers to replace water-using fixtures or appliances with more efficient models; installation or expansion of wells to reduce the use of NYC water; and leak detection and distribution system repairs or replacement to reduce water losses.
18. Specify all partnerships or other means of cooperation between each upstate customer and environmental organizations to pursue water conservation. Specify the actions that are being taken under such associations and the results achieved to date. Identify long-term water conservation expectations from such associations.
19. For those upstate customers that elected to participate in the offer of consulting assistance from the New York City Water Board to identify opportunities to achieve water conservation, specify the actions that are being taken under this program, the results achieved to date and actions to be taken in the future. Identify water conservation expectations from this initiative, including long-term expectations.
20. Specify all other conservation initiatives (beyond those included under investments, environmental organizations and the Water Board consulting assistance above) or other strategies undertaken by each upstate customer (for example, public outreach and education) to reduce water consumption from July 1, 2010 to the present; identify the type of initiative or strategy, when the initiative or strategy was undertaken, the cost of each initiative or strategy and the water savings achieved.
21. Specify the steps taken by each upstate customer to reduce seasonal peak usage of water.
22. For each upstate customer, state the percentage of the total cost of water service that is attributable to the cost of purchasing NYC water. Please also state the percentage of total cost of water service attributable to the cost of

purchasing excess water. Is the total cost of purchasing NYC water recovered from water rate revenues? Is the total cost of purchasing excess water recovered from water rate revenues? If not, please state the percentage of each recovered from water rate revenues.

23. For each upstate customer, state whether and how a NYC water supply rate increase is passed through. For example, is a rate increase passed through to users? Property owners? How is it paid for? Specify whether a water supply rate increase is paid for by all users, certain users, taxpayers or the municipality or county. If the upstate customer purchases water wholesale from a supplier other than NYC, please answer the question with respect to those purchases.
24. For each upstate customer state the quantity of water actually sold to retail customers by year from July 1, 2010 to the present, broken down into usage by residential, commercial, governmental and other classes where such class information is available. Identify the percentage of unbilled water for each upstate customer (i.e., the difference between the total quantity of water purchased from the City and other sources (if any) and the quantities actually sold to customers) by year from July 1, 2010 to the present.
25. Provide any orders, rulings or correspondence to upstate customers relating to unbilled water and/or water distribution system leakage from the New York State Public Service Commission (PSC), the New York State Department of Environmental Conservation or the New York State Department of Health or other federal, state or local regulatory agency from July 1, 2010 to the present. Provide the PSC terms and conditions applicable to Suez Water relative to unbilled water, distribution system losses and the purchase water adjustment.

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Village of Scarsdale, Suez Water Westchester, Inc.,  
Westchester Joint Water Works, City of White Plains,  
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March 7, 2018

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**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).<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup> On May 23, 2017, the Water Board served Petitioners with its first set of interrogatories and document requests (May 23, 2017 Discovery Demands).<sup>3</sup> 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.

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<sup>2</sup> See Exhibit A to the Board's February 1, 2018 correspondence.

<sup>3</sup> 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