

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the matter of petitions to fix the water rate charged to upstate communities by the New York City Water Board pursuant to Section 24-360 of the Administrative Code of the City of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 603 by

Westchester County

Ruling on the Board's Motion to Dismiss the County's Petitions concerning rates implemented annually on July 1 from 1996 to 1999, and Upstate Communities' notice to challenge rates implemented annually on July 1 from 2000 to 2003.

and

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

Petitioners.

January 13, 2006

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The Water Supply Act of 1905 and later amendments, now codified as section 24-360 of the Administrative Code of the City of New York (Administrative Code), authorizes various municipalities and water districts located north of the City of New York (the City) to take water from the City's water supply system. For this water, the New York City Water Board (the Board) may 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's limits. If there is a dispute about whether the upstate water rate is fair and reasonable, Administrative Code § 24-360, Environmental Conservation Law (ECL) article 15, title 9, and 6 NYCRR part 603 authorize the Commissioner of the New York State Department of Environmental Conservation (the Department) to conduct an administrative hearing to determine the rate.

Petitions to fix water rates

On the following dates, Westchester County (the County) filed the following petitions with the Commissioner, pursuant to 6 NYCRR part 603, to commence proceedings to determine a fair and reasonable rate for the water taken from the City's water supply system:

- (1) Petition dated May 30, 1997 concerning the rate implemented by the Board on July 1, 1996;

(2) Petition dated April 30, 1998 concerning the rate implemented by the Board on July 1, 1997;

(3) Petition dated May 10, 1999 concerning the rate implemented by the Board on July 1, 1998; and

(4) Petition dated July 13, 2000 concerning the rate implemented by the Board on July 1, 1999.

With respect to each of the four above-referenced petitions, the County requested that adjudicatory hearings not be held until the County had completed its review of the reports prepared by the Board's consultant, which the Board relied upon to fix the respective water rates.

In a letter dated July 20, 2004, Joel R. Dichter, Esq., (Klein, Zelman, Rothermel & Dichter, LLP, New York) filed a petition with the Department on behalf of the Village of Scarsdale, Westchester Joint Water Works, the City of White Plains, United Water New Rochelle, and the Aquarion Water Company (Upstate Communities) to commence a proceeding challenging the upstate water rate implemented by the Board on July 1, 2004. Consistent with my request, Upstate Communities provided additional information with a cover letter dated November 22, 2004.

On March 2, 2005, I convened a telephone conference call at the request of Upstate Communities. I distributed a memorandum on March 7, 2005 that outlined the substance of the March 2, 2005 conference call. Upstate Communities subsequently advised, for the first time, in a letter dated March 15, 2005 that they intended to challenge the water rates implemented annually on July 1 from 2000 to 2003.

In their March 15, 2005 letter, Upstate Communities contended that the four-year statute of limitations in Public Authorities Law § 1045-g applies to commencing the proceedings before the Department. As a result, Upstate Communities argued that they are not time barred from challenging water rates implemented annually on July 1 from 2000 to 2003.

With a cover letter dated March 7, 2005 to County officials, I enclosed a copy of the March 2, 2005 memorandum for the County, and asked the County to provide a status report about its petitions concerning the water rates implemented annually on July 1 from 1996 to 1999.

As requested, Carol F. Arcuri, Esq., Sr. Assistant County Attorney, responded in a letter dated March 18, 2005 for the County. The County stated that:

[a]fter due deliberation and consideration, it has been and remains the position of the County not to pursue its challenge to the wholesale water rates implemented annually on July 1, 1996 through and including July 1, 1999. Accordingly, the County hereby withdraws the above-referenced petitions.

The Board's motion to limit the hearing to the rate implemented on July 1, 2004

By letter dated April 28, 2005, Gail Rubin, Esq., Chief, Affirmative Litigation Division, Law Department, City of New York, responded on behalf of the Board to Upstate Communities' March 15, 2005 letter. The Board objected to Upstate Communities' plan to challenge the water rates implemented annually on July 1 from 2000 to 2003, and moved to limit the subject matter of any hearing to the rate implemented on July 1, 2004.

The Board argued that Upstate Communities' reliance on the four-year statute of limitations provided by Public Authorities Law § 1045-g is misplaced. According to the Board, section 1045-g was not intended to address system-wide rate challenges because those rates are established through the process outlined in section 1045-j. Section 1045-g, the Board contended, allows individual customers, rather than wholesale users such as the County or Upstate Communities, to challenge a particular bill.

As an alternative to the statute of limitations in Public Authorities Law § 1045-g, the Board argued that the four-month statute of limitations provided in CPLR 217 would be a reasonable time for upstate water users to commence proceedings challenging the water rates implemented annually on July 1 from 2000 to 2003.

The Board argued further that proceedings challenging the rates implemented annually on July 1 from 2000 to 2003 would deny the Board its right to a hearing within a reasonable time as provided by State Administrative Procedure Act (SAPA) § 301(1), and violate the agreement provided by Public Authorities Law § 1045-t. According to the Board, section 1045-t is a pledge that the state will not alter or limit any agreement intended to benefit bond holders.

Finally, the Board argued that the equitable doctrine of laches bars Upstate Communities from commencing proceedings to challenge the water rates implemented annually on July 1 from 2000 to 2003. With reference to several cases, the Board argued that when a party neglects to act within a reasonable period, that action can be barred by laches (see *Matter of Agoado v Board of Educ. of City School Distr. of City of NY*, 282 AD2d 602, 603 [2d Dept 2003]; *Matter of Blue v Commissioner of Social Servs.*, 306 AD2d 527, 528 [2d Dept 2003]; *Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4<sup>th</sup> Dept 1999]).

#### County's request for reinstatement

By letter dated May 9, 2005, the County asked me to reinstate the petitions dated May 30, 1997, April 30, 1998, May 10, 1999, and July 13, 2000 concerning the rates implemented annually on July 1 from 1996 to 1999. The County expressed concern that if it withdrew these petitions, then Upstate Communities could not challenge the water rates implemented annually on July 1 from 1996 to 1999. Once these petitions are reinstated, the County stated further that Upstate Communities would participate in the hearings concerning them.

#### ALJ's request for clarification

In a memorandum dated May 16, 2005, I sought clarification from the County about its request to reinstate its petitions related to rates implemented annually on July 1 from 1996 to 1999. In the May 16, 2005 memorandum, I noted that the County's request did not identify any legal authority for its request. I directed the County to:

1. Provide additional argument and identify the legal authority or authorities that can be relied upon to reinstate the petitions dated May 30, 1997, April 30, 1998, May 10, 1999 and July 13, 2000; and
2. Provide additional argument and identify the legal authority or authorities that would allow Upstate Communities to be consolidated with the County assuming that the petitions dated May 30, 1997, April 30, 1998, May 10, 1999 and July 13, 2000 can be reinstated.

The May 16, 2005 memorandum provided a schedule for the participants to reply, which was subsequently revised with the parties' consent.

Clarification from the County

In a response dated July 11, 2005, the County argued there is no dispute that it timely filed petitions with the Department, thereby commencing proceedings to fix upstate water rates implemented annually on July 1 from 1996 to 1999. The County argued further that it duly served these petitions upon the Board and, as a result, the Board has been on notice of the County's position with respect to the relevant rates. According to the County, the Board would not be prejudiced if other upstate water customers participated in hearings concerning the County's petitions.

The County asserted that its petitions may be reinstated because I did not officially recognize that the County had withdrawn them in the first instance. The County asserted further that reinstating the petitions would be within the interests of justice and a proper exercise of my discretion. Though expressly requested in my May 16, 2005 memorandum, the County did not identify any authority to support these assertions.

Arguments from Upstate Communities

Upstate Communities filed a letter dated July 20, 2005. With their letter, Upstate Communities included copies of letters by officials from the Village of Scarsdale (the Village) to the Board dated June 7, 1996; June 4, 1997; April 24, 1998; May 28, 1999; May 12, 2000; May 24, 2001; May 31, 2002 and May 27, 2003.

Upstate Communities noted that the Village, as well as other upstate water customers participated in the administrative hearings concerning water rates implemented on July 1 in 1992 and 1994. Upstate Communities also noted that in a letter dated September 22, 1997, Mr. Dichter, on behalf of the Village, asked me to add the Village to the service list concerning the County's May 30, 1997 petition related to the rate implemented on July 1, 1996. Based on these circumstances, Upstate Communities argued that they are interested parties as that term is used in Administrative Code § 24-360(b) and, therefore, have a right to challenge the water rates implemented annually on July 1 from 1996 to 1999.

Like the County, Upstate Communities argued that I did not terminate the proceedings concerning the water rates implemented annually on July 1 from 1996 to 1999 after the County informed me that it withdrew the related petitions. Citing SAPA §§ 301(5)

and 307(1), Upstate Communities contended that once a proceeding is commenced, it may not be unilaterally withdrawn, especially when other interested parties have appeared. In order to terminate the proceedings related to the water rates implemented annually on July 1 from 1996 to 1999, Upstate Communities argued that I needed to issue a ruling before the County moved to reinstate the petitions.

According to Upstate Communities, the Board and its bond holders would not be prejudiced if the County's petitions are reinstated, and if hearings are held concerning the water rate implemented annually on July 1 from 2000 to 2003. With respect to the first set of petitions (rates implemented annually on July 1 from 1996 to 1999), Upstate Communities argued that the Board is not prejudiced because it has had notice of these challenges with service of the related petitions.

With respect to water rates implemented annually on July 1 from 2000 to 2003, Upstate Communities provided copies of letters by officials from the Village which comment about the Board's proposal to increase the water rates from 1996 to 2004. Upstate Communities contended that "the statutory limitations period permits such a challenge and thus claims of laches or prejudice have no legal effect." Upstate Communities, however, identified no authority to support this contention.

#### The Board's response

The Board responded with a letter dated August 1, 2005. The Board maintains that the County's and Upstate Communities' challenges are time barred, and argued that the petitions related to rates implemented annually on July 1 from 1996 to 1999 should not be reinstated. According to the Board, the County "has slept on its rights" with respect to its petitions dated from 1996 to 1999, and withdrew them after "due deliberation and consideration." Though repeatedly promised, the Board noted that the reports from the County's consultant reviewing the data that the Board relied upon as the bases for the Board's proposed rate changes have not been forthcoming. As a result, the Board contended that it has been denied its right to a hearing within a reasonable time (see SAPA § 301[1]).

The Board argued further that Upstate Communities are inappropriately attempting "to ride on the coattails of the County's petitions" challenging the rates implemented annually on July 1 from 1996 to 1999. The Board distinguished the various comment letters it received from Village officials about proposed

water rates prior to their implementation on July 1, from petitions that commence the administrative proceedings authorized by Administrative Code §24-360, the ECL and 6 NYCRR part 603. The Board noted that no upstate community, who takes water from the City's water supply system, commenced a proceeding by petitioning the Department for a hearing to fix water rates implemented annually on July 1 from 2000 to 2003.

#### Department Staff's response

In an e-mail message dated August 3, 2005, Mark D. Sanza, Esq., Associate Counsel, stated that Department staff was not submitting a response.

#### Discussion and Ruling

The parties present two issues for consideration. The first is whether Upstate Communities are barred from commencing proceedings to challenge rates implemented annually on July 1 from 2000 to 2003. The second issue relates to the status of the County's petitions concerning rates implemented annually on July 1 from 1996 to 1999.

##### I. Rates implemented annually on July 1 from 2000 to 2003

According to Upstate Communities, the correspondence from Village officials dated May 12, 2000, May 24, 2001, May 31, 2002, and May 27, 2003 concerning proposed water rates subsequently implemented on July 1 from 2000 to 2003 put the Board on notice that the Village would be challenging these water rates. Furthermore, Upstate Communities asserted there are no statutes of limitations in Administrative Code § 24-360, ECL article 15, title 9, and 6 NYCRR part 603, and argued that the four-year statute of limitations provided in Public Authorities Law § 1045-g should apply to their water rate challenges.

To the contrary, the Board argued that Upstate Communities are barred from challenging the rates implemented annually on July 1 from 2000 to 2003 for several reasons. According to the Board, it is entitled to a hearing within a reasonable time pursuant to SAPA § 301(1). Rather than the four-year statute of limitations provided in Public Authorities Law § 1045-g, the Board argued further that the four-month statute of limitations in CPLR 217 applies. Finally, the Board argued that future hearing requests from Upstate Communities challenging rates implemented annually on July 1 from 2000 to 2003 would be time barred by the doctrine of laches.

Preliminarily, I note that no upstate water user has formally commenced a proceeding as provided for by Administrative Code § 24-360, ECL article 15 and 6 NYCRR part 603 to challenge any rate implemented annually on July 1 from 2000 to 2003. I find that the Village's correspondence to the Board dated May 12, 2000, May 24, 2001, May 31, 2002, and May 27, 2003 are not petitions consistent with the requirements outlined in 6 NYCRR part 603. Therefore, I find that Upstate Communities have not yet commenced any proceedings to challenge rates implemented annually on July 1 from 2000 to 2003.

I find further that the Board's reliance on SAPA § 301(1) is misplaced for the following reasons. First, SAPA § 301(1) does not provide a statute of limitations for commencing a proceeding. Second, no proceeding, subject to SAPA, has been commenced with respect to any rate implemented annually on July 1 from 2000 to 2003.

With respect to the arguments concerning statutes of limitations, the parties have correctly noted that Administrative Code § 24-360, ECL article 15, and 6 NYCRR part 603 provide no statute of limitations for commencing a proceeding to challenge upstate water rates. Absent an express statute of limitations for commencing water rate hearings before the Department, I turn to the limitations proposed by the parties.

Before the Board may modify the rate it charges upstate water users, the Board is required to provide notice of the proposed rate change, and hold public hearings (see Public Authorities Law § 1045-j[3]). The Board, however, is not authorized to conduct adjudicatory hearings about the upstate rates it proposes to implement. Rather, as noted above, upstate communities must commence an administrative proceeding before the Department to challenge the Board's determination. After the administrative hearing before the Department, the Commissioner determines the fair and reasonable water rate, which may be reviewed by the courts pursuant to CPLR article 78. Therefore, whatever the applicability of Public Authorities Law § 1045-g(4) to the proceedings authorized by section 1045-j(3), I do not accept Upstate Communities' argument that the statute of limitations provided by section 1045-g(4) should apply to proceedings commenced pursuant to Administrative Code § 24-360, ECL article 15 and 6 NYCRR part 603 given the administrative process that the Board must follow in Section 1045-j(3) before the Board may modify the rate it charges upstate water users, and the subsequent opportunity for judicial review of the Commissioner's determination pursuant to CPLR article 78.



For similar reasons, I reject the Board's assertion that the four-month statute of limitations in CPLR 217 should apply to when upstate water users must commence the administrative proceeding authorized by the Administrative Code, the ECL, and applicable regulations to challenge the water rate that the Board charges upstate communities. The applicability of CPLR 217 is specific, and does not contemplate the administrative hearing before the Department.

Although no statute of limitations precludes Upstate Communities from commencing the administrative proceedings authorized by Administrative Code § 24-360, ECL article 15 and 6 NYCRR part 603 to challenge the rates implemented annually on July 1 from 2000 to 2003, I conclude that the doctrine of laches may apply when, as here, an allegedly aggrieved party does not proceed promptly and make a formal demand for the relief available to it (see *Matter of Agoado*, 282 AD2d at 603; *Austin v Board of Higher Educ.*, 5 NY2d 430, 442 [1959]; *Matter of Civil Serv. Empls. Assn. v Board of Educ.*, 239 AD2d 415, 416 [2d Dept 1997]). To bar Upstate Communities from commencing proceedings to challenge water rates implemented annually on July 1 from 2000 to 2003 based on the doctrine of laches, the Board must show that the undue delay has resulted in prejudice (see *Feldman v. Metropolitan Life Ins. Co.*, 259 AD 123, 125 [1<sup>st</sup> Dept 1940]).

A. Undue delay

To determine whether Upstate Communities have unduly delayed the commencement of proceedings to challenge rates implemented annually on July 1 from 2000 to 2003, the legislative history concerning the statute of limitations in section 1045-g(4) of the Public Authorities Law is instructive. The intent of section 1045-g(4), according to the Board, is to provide in-city water customers with an administrative remedy to challenge their water or sewer bills. When initially enacted, section 1045-g did not include a statute of limitations. The Board explained that the Legislature considered amending section 1045-g to extend a two-year limitation provided for in the Board's implementing regulations. In 1999, the Legislature attempted to amend the Public Authorities Law to provide a six-year statute of limitations. As a compromise between the legislative and executive branches, a four-year statute of limitations was enacted in 2001. Therefore, the statute of limitations for in-city water customers to commence administrative proceedings challenging their water bills has ranged from no limitation, to a two-year regulatory limitation, and then to a statutory four-year

limitation, but only after consideration of a six-year limitation.

Given the legislative history concerning the statute of limitations of Public Authorities Law § 1045-g(4), it would be difficult for me to conclude that undue delay would result from the failure of an upstate water customer to commence an administrative proceeding pursuant to Administrative Code § 24-360, the ECL and implementing regulations to challenge water rates within four years of the date that the rate was implemented, all other factors being equal. Therefore, if the four-year statute of limitations in section 1045-g(4) is relied upon as guidance, then petitions concerning rates implemented annually on July 1 from 2002 and 2003, and perhaps 2001, may still be considered timely. As the Board pointed out, the two-year regulatory limitation would have applied to a petition concerning the July 1, 2000 rate and, thereby, would bar the challenge as untimely.

On the other hand, the statute of limitations for judicial review of final agency actions of an appellate nature are usually very short. For example, the statute of limitations to file a petition pursuant to CPLR article 78 seeking judicial review of Board's determination after an administrative hearing pursuant to Public Authorities Law § 1045-g(4) is four months (see CPLR 217). In addition, the statute of limitations to file a petition pursuant to CPLR article 78 seeking judicial review of the Commissioner's determination in a water rate case after the administrative hearing authorized by Administrative Code § 24-360, ECL article 15, title 9, and 6 NYCRR part 603 is sixty days (see ECL 15-0905[2] and *Matter of Spinnerweber v New York State Dept. of Env'tl. Conservation*, 120 AD2d 172, 174-175, compare *Matter of Niagara Mohawk Power Corporation v State of New York*, 300 AD2d 949, 951). This is approximately one half the four-month statute of limitations in CPLR 217, as proposed by the Board.

As noted above, the Board must comply with extensive procedures outlined in Public Authorities Law § 1045-j(3) before it can implement a new water rate. The proceeding authorized by Administrative Code § 24-360, ECL article 15 and 6 NYCRR part 603 could be considered a review of a final agency action of an appellate nature. Therefore, if either the sixty-day statute of limitations in ECL 15-0905(2) (see *Spinnerweber*, 120 AD2d at 174-175), or the four-month statute of limitations in CPLR 217, which may apply to some determinations related to ECL article 15 (see *Niagara Mohawk*, 300 AD2d at 951), is relied upon as guidance,

then the date has long since passed to commence proceedings authorized by Administrative Code § 24-360, ECL article 15 and 6 NYCRR part 603 challenging rates implemented annually on July 1 from 2000 to 2003.

B. Prejudice

For laches to apply, the analysis turns to whether the delay has been prejudicial (see *Feldman*, 259 AD at 125). The Upstate Communities contended that the Board has not been prejudiced because the Village filed comments prior to the implementation of the 2000 through 2003 rate changes. Upstate Communities argued that the Village's correspondence put the Board on notice of the their concerns about the proposed rate changes.

The Board asserted, however, that it has been prejudiced. According to the Board, challenges to rates implemented annually on July 1 from 2000 to 2003 would result in a comprehensive reevaluation of water rates implemented over the last five years.<sup>1</sup> The Board contended that such a reevaluation would adversely impact the Board's statutory responsibility to implement rates that provide sufficient revenue to maintain and operate the City's water supply and sewer systems, and to service the Water Authority's financial obligations. The Board argued further that the comprehensive reevaluation contemplated by Upstate Communities would violate the agreement outlined in Public Authorities Law § 1045-t.

Rate making is a prospective endeavor. Therefore, excessive delay in commencing proceedings to challenge rates undermines the prospective nature of the process, and can result in prejudice. Particularly where, as here, Upstate Communities contemplate challenging rates implemented since July 1, 2000.

In addition, the financial impacts associated with each challenge to upstate water rates are significant. In their papers, the parties do not provide any cost analyses to quantify the potential financial impacts. However, some reasonable inferences can be made.

The Commissioner's rate determinations apply to all upstate water users regardless of who commenced the proceeding and who

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<sup>1</sup> The period would be ten years, if the County's pending petitions concerning rates implemented annually on July 1 from 1996 to 1999 are considered.

may have participated in the subsequent administrative hearing. In contrast, the financial impacts associated with in-city challenges authorized pursuant to Public Authorities Law 1045-g(4) would be comparatively less. For example, a section 1045-g(4) proceeding would be commenced by an individual water customer and limited to a particular billing cycle. Even if a group of in-city industrial water users jointly challenged their rates pursuant to section 1045-g(4), the potential financial impacts from that administrative determination would be substantially less than a change in the water rate charged to all upstate water users after a proceeding authorized by Administrative Code § 24-360, the ECL and implementing regulations. Therefore, I conclude that retroactive adjustments to upstate water rates, already in effect for two to five years, would have significant financial impacts that would prejudice the Board.

Based on the foregoing discussion and in the absence of any statute of limitations, I conclude that a reasonable period by which to commence a proceeding authorized by Administrative Code § 24-360, ECL article 15, title 9, and 6 NYCRR part 603 is one year from the date the Board implements a change to the upstate water rate. After such time, I find that the doctrine of laches may be applied because the undue delay would result in prejudice to the Board. Based on this ruling, Upstate Communities are barred from challenging the water rates implemented annually on July 1 from 2000 to 2003.

## II. The County's petitions

The parties raised no issue about whether the County timely commenced its proceedings to challenge water rates implemented annually on July 1 from 1996 to 1999. Consequently, issues concerning the applicability of a statute of limitations for commencing a proceeding to challenge rates are not relevant here. Rather, the parties argued extensively about whether any legal authority exists to reinstate the County's petitions after the County's withdrawal of them.

The threshold legal question, however, is not whether to reinstate the County's petitions, but whether the delay in proceeding with those petitions bars hearings pursuant to Administrative Code § 24-360, the ECL and implementing regulations. Therefore, for purposes of discussion here, it will be assumed that the County did not withdraw the petitions related to water rates implemented annually on July 1 from 1996 to 1999.

At the County's request, all petitions related to the rates implemented annually on July 1 from 1996 to 1999 were held in abeyance while the County's consultant reviewed the Board's reports, which served as the bases for the rate changes. With respect to each petition, the County stated that its consultant would prepare a report that would propose an alternative rate.

After a proceeding to challenge a rate has commenced, Administrative Code § 24-360, ECL article 15 and 6 NYCRR part 603 do not provide any rule about when the administrative hearing must be held. In contrast, for example, an administrative hearing concerning a permit application processed by Department staff pursuant to the Uniform Procedures Act (Environmental Conservation Law [ECL] article 70) must commence within 90 calendar days after the date the application is complete (see 6 NYCRR 621.7[g]).

Even though the County duly commenced proceedings to challenge water rates implemented annually on July 1 from 1996 to 1999, the County's delay in beginning the hearings associated with those petitions has been so extensive that the doctrine of laches may bar the proceedings from going forward (see *Matter of Agoado*, 282 AD2d at 603). The County's failure to begin the hearings has unduly delayed the review of the rates implemented annually on July 1 from 1996 to 1999, and as a result, prejudiced the Board (see *Feldman*, 259 AD at 125).

The procedural delay associated with the County's petitions ranges from six (July 1, 1999) to nine (July 1, 1996) years. Additional delay with respect to the County's petitions is likely for the following reasons. The regulations at 6 NYCRR 603.5 and 603.6 require the petitioner to file a statement of facts in favor of the contentions, and any pertinent reports or papers as part of its petition. The reports filed by the County's consultant in the prior rate hearings concerning rates implemented on July 1 in 1992 and 1994 fulfilled the requirements outlined in 6 NYCRR 603.5 and 603.6 (see *Matter of Westchester County [NYC Water Rates]*, Commissioner's Decision, November 9, 1995, and *Matter of Westchester County [NYC Water Rates - WAS #9475]*, Commissioner's Decision, April 7, 1997). To date, however, the County has not produced any of the promised reports related to the pending petitions, and the status of the County's pending reports is unknown. Moreover, the County has not offered any other information that would support alternative rates.

Even if Upstate Communities take on the sole responsibility of preparing reports and providing information in support of

alternative rates to those implemented annually on July 1 from 1996 to 1999, it is not known when these reports or additional supporting information required by 6 NYCRR 603.5 and 603.6 would become available. A *de novo* review of the rates implemented annually on July 1 from 1996 to 1999 would be necessary before Upstate Communities could produce any information within the near future.

To allow the petitions related to water rates implemented annually on July 1 from 1996 to 1999 to come to hearing at some unknown future date would significantly threaten the operational and financial viability of the New York City water supply system. As previously discussed, significant adverse financial impacts would result from a ten-year reevaluation of the water rates.

Based on the foregoing discussion, the delay from postponing the hearings related to the County's petitions challenging water rates annually implemented on July 1 from 1996 to 1999 has prejudiced the Board. Accordingly, I grant the Board's motion, and dismiss the County's petitions related to water rates implemented annually on July 1 from 1996 to 1999.

#### Appeals

The parties may appeal this ruling (see 6 NYCRR 624.8[d][4]). Any appeal must be received at the office of Commissioner Denise M. Sheehan (attention: Louis A. Alexander, Assistant Commissioner for Hearings), 625 Broadway, Albany, New York 12233, no later than the close of business on February 17, 2006. Replies are authorized, and must be received no later than the close of business on March 17, 2006.

The appeals and any replies sent to the Commissioner's Office must include an original and one copy. In addition, one copy of all appeal and reply papers must be sent to Chief ALJ James T. McClymonds at the Office of Hearings and Mediation Services, to all other persons on the enclosed Preliminary Service List revised May 16, 2005, and to me at the same time and in the same manner as service is made to the Commissioner. Service of any appeal or reply by facsimile transmission is not permitted and will not be accepted.

#### Further proceedings

At this time, the only valid petition before me is the one filed by Upstate Communities concerning the water rate

implemented on July 1, 2004. By February 24, 2006, the parties shall report to me about the status of discovery. In addition, Upstate Communities shall provide a timetable concerning the development of the reports and papers required by 6 NYCRR 603.6 that would support an alternative rate.

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

Dated: Albany, New York  
January 13, 2006

To: Preliminary Service List revised May 16, 2005