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 August 18, 2016 Petition) OHMS Case No.: 201671203

October 7, 2019

Rulings on Proposed Issues
from the March 5, 2019 Issues Conference

Proceedings

With a cover letter dated August 18, 2016 from Joel R. Dichter, Esq. (Dichter Law, LLC, New York), 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.

Petitioners seek administrative review of the following water rates:

1. Effective July 1, 2014 (FY 2015), the Water Board set the upstate rate for entitlement water at $1,573.61 per million gallons (per MG), and the upstate rate for excess water at $4,946.52 per MG. (*See* Joint Petition at ¶ 4, Exhibits 1 and 2 [Minutes from June 13, 2014].)

2. Effective July 1, 2015 (FY 2016), the Water Board set the upstate rate for entitlement water at $1,728.99 per MG, and the upstate rate for excess water at $5,093.58 per MG. (*See* Joint Petition at ¶ 4, Exhibits 1 and 2 [Minutes from June 12, 2015].)

3. Effective July 1, 2016 (FY 2017), the Water Board set the upstate rate for entitlement water at $1,750.52 per MG, and the upstate rate for excess water at $5,200.53 per MG. (*See* Joint Petition at ¶ 5, Exhibits 1 and 2 [Public Notice].)

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] Although the New York State Legislature had amended several sections of Environmental Conservation Law (ECL) article 15, title 15 (Water Supply) in 2011,[2] I concluded that this legislation did not amend either Administrative Code § 24-360(b), or Public Authorities Law (PAL) §§ 1045-j(9) and 1045-bb. As a result, I determined that the Commissioner's authority to review and fix the rates that the Water Board may charge upstate communities for entitlement water (*see* Administrative Code §24-360[e]) was unchanged by the 2011 amendments. (*See* April 26, 2017 ruling at 9.)

In the April 26, 2017 ruling, I reserved on Petitioners' request to review rates for excess water. After receiving additional filings from the Petitioners, the Water Board, and Department staff, I issued a ruling dated February 9, 2018 addressing the scope of the Department's jurisdiction to review excess water rates.

The additional information provided by the parties included copies of the permits issued by the Department's predecessor commissions that authorized the construction and operation of the Delaware and Catskill reservoir systems. These permits remain effective today, pursuant to ECL 15-1501(2), as amended in 2011.

The permits allow the Water Board, on an on-going basis, to provide excess water to upstate communities, up to the limit of the City's water supply system. As noted by the Court in *Matter of Village of Scarsdale v Jorling* (91 NY2d 507, 517-518 [1998]), the Commissioner's power to review the rates associated with excess water usage derives from the Department's authority, as the conservator of the State's water resources, to issue permits with conditions for taking excess water. In the February 9, 2018 ruling, I determined that the Department's oversight role to consider disputes associated with excess water rates had been triggered in the manner contemplated by the Court. Moreover, I concluded that the Commissioner has the authority to consider Petitioners' request to review the rates for excess water. (*See* February 9, 2018 ruling at 9.)

Subsequently, a notice of issues conference and deadline for party status petitions dated January 29, 2019 was published in the Department's *Environmental Notice Bulletin* (*ENB*) on January 30, 2019. Petitioners published a copy of the January 29, 2019 notice in the *Journal News* on February 5, 2019. In addition, the Water Board provided me with a list of upstate water

[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.

[2] *See* L 2011, ch 401, effective February 15, 2012.

customers, and the Office of Hearings and Mediation Services (OHMS) sent a copy of the January 29, 2019 notice, by regular mail, to each customer.

The January 29, 2019 notice provided instructions for filing petitions for full party status and for amicus status, and set February 25, 2019 as the due date for the receipt of such petitions. Consistent with the directions outlined in the January 29, 2019 notice, the Town of Carmel and the Carmel Water District #2 timely filed a petition for full party status. OHMS received no other petitions.

In addition, the January 29, 2019 notice scheduled an issues conference for 10:00 a.m. on March 5, 2019 at the Scarsdale Village Hall. The issues conference convened as scheduled. The representatives for the Water Board were Gail Rubin, Esq., Chief, Affirmative Litigation Division; Melanie Ash, Esq., Senior Counsel; and Krista Friedrich, Esq., Senior Counsel. Joel R. Dichter, Esq. (Dichter Law, LLC [Mount Kisco, New York]), represented Petitioners. Department staff was represented by Anthony London, Esq., and Gregory L. Folchetti, Esq. (Costello & Folchetti, LLP [Carmel, New York]) appeared on behalf of the Town of Carmel and the Carmel Water District #2 (Carmel).

OHMS received the transcript from the March 5, 2019 issues conference on March 15, 2019. As discussed during the issues conference (Transcript [Tr.] at 82-84), the parties developed a schedule for filing briefs and replies about the legal issues discussed during the issues conference. The parties' documents related to the legal issues were timely received by May 10, 2019. A list of the documents received and considered below is attached to this ruling as Appendix A.

Legal Issues

The discussion at the March 5, 2019 issues conference identified two legal issues for briefing. The first issue is the standard of review that should be applied to the excess water rates. The second is whether the Commissioner has authority to consider the issues proposed in Carmel's February 22, 2019 petition for full party status at Paragraphs 7, 8, and 9. However, for the first time in the March 21, 2019 brief, Carmel challenged the Water Board's jurisdiction over Carmel Water District #2 because Carmel and Lake Gleneida are located entirely within Putnam County.

Given the threshold nature of Carmel's argument, the question of whether Carmel is subject to the Water Board's rates setting authority is addressed first. The second issue considered is the standard of review that should be applied to the excess water rates. The discussion then turns to the issues proposed in Carmel's February 22, 2019 petition for full party status.

In this section of the ruling, the following issues are also considered. First, Petitioners requested a review of the FY 2017 water rates in the Joint Petition. However, litigation initiated by a group of in-city customers prevented the Water Board from implementing these rates.

Consequently, whether the Water Board's proposed FY 2017 water rates can be considered here is at issue.

Second, in response to a set of jointly filed petitions dated from July 20, 2004 to October 21, 2008, the Commissioner issued a Decision dated June 3, 2011. In the June 3, 2011 Decision, the Commissioner adopted a stipulation signed by the parties in May 2011 (May 2011 stipulation), and ordered its implementation. The June 3, 2011 Decision resolved rates for entitlement water assessed by the Water Board for Fiscal Years 2005-2009. The applicability of the May 2011 stipulation to the rates identified in the Joint Petition and to various upstate communities is at issue.

Finally, Petitioners and Carmel agreed to provide additional documentation required by 6 NYCRR 603.3 and 603.4. Although not at issue, I remind the parties of their obligation to submit these documents.

I. Water Supply Act of 1905 and Amendments

In its March 21, 2019 brief, Carmel explained that the Town, Carmel Water District #2, and Lake Gleneida are located entirely within the boundaries of Putnam County, which is located north of Westchester County. Although the City of New York purchased Lake Gleneida in 1893, the purpose of the acquisition as stated in the statute was to protect the upland area of the Croton River (*see* Carmel's March 21, 2019 brief, Exhibit C *citing* L 1893, ch 189). Carmel noted that the statutory language concerning the purchase of Lake Gleneida contrasts with the language from the Water Supply Act of 1905. The latter statute was enacted "to provide for additional water supply of pure and wholesome water for the City of New York" (Preamble to L 1905, ch 724). Carmel noted further that only the municipal corporations and water districts located in Westchester County may take water from the City's supply system (*see* L 1905, ch 724). Based on the foregoing, Carmel asserted that it is not subject to the Water Board's rate setting authority as provided by the 1905 Water Supply Act and the Administrative Code. (*See* Carmel's March 21, 2019 brief at 2-3, and Exhibit C.)

Department staff argued, however, that Carmel's proposed issue is untimely raised and should be denied. Staff noted that Carmel neither proposed this issue in its February 22, 2019 petition for full party status, nor discussed this proposed issue at the March 5, 2019 issues conference. Staff noted further that Carmel admitted these circumstances in its March 21, 2019 brief (at 2). Furthermore, staff contended that Carmel's February 22, 2019 petition does not comply with the requirement outlined in 6 NYCRR 624.5(b)(2)(i), which states that an acceptable petition must identify an issue for adjudication. By not asserting the proposed issue in the February 22, 2019 petition for full party status, staff concluded that Carmel's petition does not comply with the regulatory requirements. (*See* Staff's April 15, 2019 brief at 4-5.)

In addition, Department staff asserted that Carmel's proposed issue should be denied because Petitioners did not raise this issue in the August 18, 2016 joint petition. Staff noted that Petitioners are not located in Putnam County, and asserted no issue in the Joint Petition

concerning the applicability of the Water Supply Act and Administrative Code § 24-360 to them. Rather, the issues proposed in the Joint Petition concern the method used by the Water Board to calculate the proposed water rates. To support this assertion, staff referenced 6 NYCRR 624.5(d)(1)(ii). According to staff, Carmel would not make a meaningful contribution to the record regarding a substantive and significant issue proposed by another party, in this case, Petitioners. (*See* Staff's April 15, 2019 brief at 5.)

With respect to the merits of Carmel's proposed issue, Department staff argued the following, in the alternative. First, staff acknowledged that Chapter 724 of the 1905 Water Supply Act did not expressly incorporate Putnam County. However, Chapter 726 of the Laws of 1905 did. Chapter 726 states that when the City of New York acquires either the natural lakes in Putnam County or constructs reservoirs in that county as part of the water supply system for the City, residents may withdraw water from the acquired water bodies. The entitlement is limited to the per capita amount used by in-city residents. The rate will be based on an agreement between the City and the Putnam County municipalities, or determined by a special term of the Supreme Court in the Second Judicial District. (*See* Staff's April 15, 2019 brief at 5-6, and Exhibit B.)

Second, staff noted that Chapter 525 of the Laws of 1928 amended the 1905 Water Supply Act to allow municipal corporations or water districts in counties other than Westchester County to take water from the City's water supply system. These additional counties included Putnam County. Staff noted further that Chapter 443 of the Laws of 1935 retained the language from Chapter 525 of the Laws of 1928 concerning the municipal corporations or water districts in the counties identified in the 1928 statute. In the April 15, 2019 brief, Department staff also cited to ECL 15-0317, Administrative Code § 24-360, and provisions of the Public Authorities Law to support the argument that Carmel is obliged to pay the Water Board for any water that Carmel may withdraw from Lake Gleneida. (*See* Staff's April 15, 2019 brief at 6-7, and Exhibits C, D, and E.)

With its April 17, 2019 brief, the Water Board also provided a copy of Chapter 545 of the Laws of 1928, which amended the 1905 Water Supply Act. With the amendments, municipal corporations and water districts in Putnam County, among other counties, obtained the right to take and receive water from New York City's water supply system. (*See* Water Board's April 17, 2019 brief at 3 and Exhibit A.) Other documents included as exhibits to the Water Board's brief recount the historical interactions between the City and Carmel as they relate to the withdrawal of potable water from Lake Gleneida. In each instance, the documentation references the Water Supply Act and its subsequent amendments, as well as earlier versions of

what is now codified as Administrative Code § 24-360. (*See* Water Board's April 17, 2019 brief at 3-5, and Exhibits B through H.)[3]

Discussion and Ruling: Subsequent amendments to Section 40 of the Water Supply Act of 1905 expanded the counties whose municipal corporations and water districts located therein may take water from the New York City water supply system. In addition to Westchester County, the counties of Ulster, Greene, Delaware, Schoharie, Sullivan, Orange and Putnam, as well as the Village of Deposit, located in the Counties of Delaware and Broome, were included in Chapter 525 of the Laws of 1928. The current version of Administrative Code § 24-360 expressly authorizes the municipal corporations and water districts located in Putnam County, such as Carmel Water District #2, to take water from the New York City water supply system.

The parties' papers demonstrate the extensive interactions between Carmel, and the Water Board and its predecessors dating from the late nineteenth century. Carmel has invested substantial resources to improve and maintain its access to Lake Gleneida. In so doing, Carmel has come to rely on the lake as a potable water source. The City of New York has incorporated Lake Gleneida into its water supply system.

No community is required to take water from the New York City water supply system. Administrative Code § 24-360 identifies the communities who may take water. In exchange, the communities who choose to take water must compensate the City. Therefore, to the extent that Carmel wishes to continue to take water from the City's supply system, Carmel must compensate the Water Board for this resource.

II. Standard of Review for Excess Water Rates

At the March 5, 2019 issues conference, the parties discussed the standard of review that should be applied to evaluate the proposed rates that the Water Board charges upstate customers for excess water (Tr. at 7-9, 53-70). The Water Board cited *Matter of Prometheus Realty Corp. v New York City Water Bd.* (30 NY3d 639 [2017]), and argued that it has great discretion to set the rates for excess water, based on the Court's determination. According to the Water Board, the proposed rates for excess water must be upheld unless they are found to be arbitrary or otherwise unsupported by economic or public policy goals. (Tr. at 54).

Petitioners noted that the *Prometheus* matter considered in-city retail rates, and argued that the holdings should not be applied to the review of the proposed upstate water rates, which

[3] Exhibit B is a copy of a letter dated September 18, 1936 from Joseph Goodman, NYC Acting Commissioner to J. Wilbur Irish, Consulting Engineer on behalf of Town of Carmel. Exhibit C is a copy of a permit dated September 18, 1936 issued to Carmel Water District #2, Town of Carmel, Putnam County. Exhibit D is a copy of a letter dated October 22, 1963 from Armand D'Angelo, NYC Commissioner to Joseph Sullivan, Esq., Town Attorney, Town of Carmel. Exhibit E is a copy of L 1964, ch 672 [amending Administrative Code (codified as § K51-42.0) to add subdivision f]. Exhibit F is a copy of legislative history regarding the addition of subdivision f to Administrative Code § K51-42.0. Exhibit G is a copy of L 1966, ch 354 (repeal of § K51-42.0, subdivision f). Exhibit H is a copy of legislative history regarding the repeal of § K51-42.0, subdivision f.

are wholesale rates (Tr. at 58). Petitioners acknowledged that the proposed excess water rates charged to upstate communities would be equivalent to the in-city water rates. Nevertheless, the proposed excess water rates would be about three times the proposed entitlement rates. Petitioners characterized the proposed excess water rates as penal in nature. Petitioners concluded that the Commissioner must determine whether the proposed rates for excess water would be fair and reasonable. (Tr. at 62-63.)

Carmel agreed with Petitioners' characterization that the proposed excess water rates would be punitive in nature. According to Carmel, Water District #2 includes about 1700 users who, in FY 2016, paid a total of $700,000 for water, including excess consumption. Contrary to the Water Board's position that the proposed excess water rate should be considered presumptively valid, Carmel argued that the proposed excess water rates are rebuttable. Finally, Carmel argued that the *Prometheus* determination would only apply to the review of in-city rates, and not to upstate water rates. (Tr. at 67-68.)

The parties offered additional arguments in their respective papers. The Water Board argued that the statutory authority to set excess water rates rests in the Public Authorities Law given that the scope of the Water Supply Act (*see* Administrative Code § 24-360) is limited to entitlement water and the associated rate. To support this argument, the Water Board cited PAL § 1045-g(4) which, in broad terms, empowers the Water Board to set and collect fees related to the use of the water supply and sewer systems, and *Matter of Village of Scarsdale v Jorling* (91 NY2d at 515, "Thus the statutes give broad powers to the Water Board, but reserve only certain authority for the DEC"). The Water Board argued further that the Court of Appeals in the *Prometheus* matter affirmed the standard of review applicable to the Water Board's rate setting activities under the Public Authorities Law. The Water Board asserted that it "has unfettered discretion to fix rates," and that its proposed rates for excess water must be upheld unless "utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them" (*Prometheus Realty Corp.*, 30 NY3d at 646, *citing Cary Transp. v Triborough Bridge & Tunnel Auth.*, 38 NY2d 545, 553 [1976]). Regardless of whether the water rates are applied to in-city users or upstate communities, the Water Board concluded that the same standard applies to the review of its decisions pursuant to the Public Authorities Law. (*See* Water Board's March 26, 2019 letter brief at 1-3.)

The proposed rates for excess water at issue here are equal to the in-city rates. The Water Board observed, however, that it has discretion to set the excess water rates greater than those charged to in-city users (*see Village of Scarsdale*, 91 NY2d at 517, "For excess water, however, there is no such limitation on the rates that the Water Board may charge"). The Water Board concluded that Petitioners have no basis to challenge the proposed excess water rates, particularly when the courts have determined that charging higher rates to out-of-district users is rational (*see e.g. Matter of Board of Trustees of Inc. Vil. of E. Williston v Board of Trustees of the Inc. Vil. of Williston Park*, 119 Ad3d 679, 680 [2d Dept 2014]; *Heritage Co. v Village of Massena*, 192 AD2d 1039, 1041 [3d Dept 1993]; *Town Bd. of Poughkeepsie v City of Poughkeepsie*, 22 AD2d 270, 274-277 [2d Dept 1964]). The Water Board concluded that the proposed excess water rates charged to upstate communities are rational because they equal the

rates charged to in-city users who take water from the same supply system. (*See* Water Board's March 26, 2019 letter brief at 4.)

In addition, the Water Board asserted that the proposed excess water rates would promote conservation. As support, the Water Board noted that the Commissioner has required the development and implementation of water conservation plans within the context of rate-making hearings (*see e.g. Matter of Petition from Westchester County*, Commissioner's Decision, dated November 9, 1995 [Water Supply Application No. 8865] at 1).[4] The Water Board noted further that the courts have recognized the effect that water rates have on water conservation (*see Matter of Village of Scarsdale*, 229 AD2d at 111). Based on the foregoing, the Water Board argued that a rational basis for conserving water resources is to set the excess water rates at levels greater than the entitlement rates. (*See* Water Board's March 26, 2019 letter brief at 5.)

In the April 15, 2019 brief, Department staff reiterated its position that the Commissioner lacks the jurisdiction to adjudicate excess water rates. In addition, staff argued that the *Prometheus* determination established the standard of review for the excess water rates proposed by the Water Board. (*See* Department staff's April 15, 2019 brief at 2 and n 1.)

Staff noted that Administrative Code § 24-360 authorizes upstate communities to take entitlement water, and prescribes the method for calculating the associated rate. Staff noted further that the amount of water consumed by upstate communities which exceeds the entitlement is referred to as "excess water" (*Matter of Village of Scarsdale v Jorling*, 91 NY2d at 514). However, Administrative Code § 24-360 does not provide any formula for calculating the rate for excess water. Nevertheless, staff asserted that the Water Board has broad discretion to fix excess water rates:

> so as to receive revenues which, together with other revenues available to the board, if any, shall be at least sufficient at all times so that such system or systems shall be placed on a self-sustaining basis (Public Authorities Law § 1045-g[4]).

(*See* Department staff's April 15, 2019 brief at 2.)

Department staff contended that the Court's reference to the *Cary Transp.* (38 NY2d at 553) matter in its *Prometheus* (30 NY3d at 646) determination is significant. Staff noted that the issue in *Cary Transp.* concerned a challenge to the ability of a public authority to set a different toll rate for a particular class of buses where no statute expressly prescribed a rate-setting methodology (*see Cary Transp.*, 38 NY2d at 549). The circumstances here are similar, according to Department staff, because no statutorily-prescribed method has been identified for calculating excess water rates. Staff concluded that the Water Board has broad discretion to set the excess water rates based on the *Prometheus* matter. (*See* Department staff's April 15, 2019 brief at 2-3.)

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[4] The Appellate Division confirmed the Commissioner's November 9, 1995 Decision in *Matter of New York City Water Bd. v Zagata*, 240 AD2d 1005 (3d Dept 1997).

Department staff asserted that applying the determination in the *Prometheus* matter is not limited to the Water Board's in-city rate-making activities. According to Department staff, the Legislature could have prescribed a method to set excess water rates for upstate communities but, to date, has not done so. Staff argued that the Legislature's decision not to prescribe a method for setting excess water rates for upstate communities was intentional. As support, staff cited *Cary Transp.* (38 NY2d at 549). (*See* Department staff's April 15, 2019 brief at 3.)

Department staff asserted further that the Water Board's decision to propose rates for excess water consumption that are comparatively higher than those for entitlement consumption is consistent with the Department's and the Water Board's common policy objective to promote the conservation of the State's potable water resources. Staff concluded that the proposed excess water rates are rational, and consistent with the standard of review outlined in the *Prometheus* determination. (*See* Department staff's April 15, 2019 brief at 3.)

Petitioners contended, however, that the statutory schemes that apply to the Water Board's rate making authority are distinguishable. Petitioners noted that the *Prometheus* matter considered a Civil Practice Law and Rules (CPLR) article 78 petition to review in-city retail water rates developed pursuant to the Public Authorities Law. With respect to challenges made to in-city rates, water customers do not have any administrative remedy, according to Petitioners. Rather, disputes about in-city water rates must be brought to the court's attention, as in the case of *Prometheus*. In contrast, Petitioners noted that the Water Supply Act (*i.e.*, Administrative Code § 24-360), ECL 15-1503, and case law[5] provide upstate water customers with an administrative remedy before the Department. According to Petitioners, the Commissioner is empowered to "fix" rates for both entitlement and excess water. As support, Petitioners also referenced the February 9, 2018 ruling (at 9). (*See* Petitioners' April 17, 2019 response at 1-3.)

According to Petitioners, the rates, whether for entitlement or excess water, must be fair and reasonable. To support this argument, Petitioners cited ECL 15-1503(2)(c), and the water supply permits issued by the Department's predecessor commissions. These permits authorized the construction and operation of the Catskill and Delaware reservoir systems, and remain in full force and effect. The permit conditions include, for example, the following language:

> In such case the compensation, if any to be made by the taker of the water to the city may be agreed upon between the parties, or, if they cannot agree, shall be fixed by the Commission (Condition No. 6, Water Supply Permit No. 466, dated May 25, 1929).

Petitioners contended that the deference sought by the Water Board, pursuant to the *Prometheus* matter, would essentially annul their rights as provided by the ECL and the conditions outlined in the water supply permits issued by the Department's predecessor commissions. (*See* Petitioners' April 17, 2019 response at 3-4; *see also* Petitioners' May 6, 2019 response letter at 1.)

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[5] *See Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517-518.

The Water Board's justification that the proposed excess water rates are rationally based because they equal the in-city rates is misplaced, according to Petitioners. Petitioners noted that the in-city rates are retail rates that include costs associated with the City's internal distribution system, its treatment systems, retail billing systems, and in-city labor costs, among other things. Petitioners argued that these in-city costs must be excluded from the wholesale upstate water rates, and asserted that the wholesale upstate water rates may only be based upon the costs associated with the facilities located north of the City, as prescribed in the Water Supply Act (*see* Administrative Code § 24-360[c]). (*See* Petitioners' April 17, 2019 response at 5; *see also* Petitioners' May 6, 2019 response letter at 2.)

Finally, Petitioners argued that the Water Board's claim that implementing the proposed excess water rates would promote conservation is unsupported. Petitioners inquired how the proposed rates for excess water that are 300% greater than the proposed rates for entitlement water promote conservation, when similar results might be obtained when excess water rates are, for example, 120% greater than entitlement rates. Petitioners alleged that applying excessively high rates to water when the demand for it becomes inelastic is penal in nature. Petitioners contended that a hearing is necessary to develop a factual record about what the "fair and reasonable" rates for excess water should be. (*See* Petitioners' April 17, 2019 response at 5-6; *see also* Petitioners' May 6, 2019 response letter at 2.)

Carmel argued that the purpose of the hearing should not be limited to a "review" of the excess water rates proposed by the Water Board, but to "fix" them. To support this argument, Carmel cited 6 NYCRR 603.2 and 603.5. Section 603.2 outlines the scope of the Commissioner's jurisdiction to:

> fix rates and charges for water only after the proper authorities of the two municipalities or other civil divisions of the State have failed to agree as to such rates and charges.

Carmel continued that 6 NYCRR 603.5 outlines the contents of a petition in which municipalities or water districts ask the Commissioner to "fix fair and reasonable charges or rates to be paid for water." To further support its arguments, Carmel referenced Administrative Code §24-360 and ECL article 15, title 9 [Administrative Procedures for Article 15]. According to Carmel, the Department is the administrative agency with the greatest understanding of the State's water resources, and how those resources should be used for potable purposes. Carmel concluded that the Department has the authority to fix potable water rates when, as here, municipalities or water districts cannot agree. (*See* Carmel's March 21, 2019 brief at 12-13.)

Carmel argued further that the Water Board's reliance on the *Prometheus* determination is misplaced for the following reasons. First, the Commissioner is not a court who must give deference to the Water Board. Second, the Commissioner heads the Department, which possesses "superior knowledge" about the State's water resources. According to Carmel, the Commissioner's authority to set rates should not be usurped by the Water Board. (*See* Carmel's March 21, 2019 brief at 14.)

The Water Board replied to the arguments presented by Petitioners and Carmel. The Water Board maintained that the Court's holding in the *Prometheus* matter mandates a highly deferential review of its rate-making activities. The Water Board argued that when, as here, the proposed rates for excess water pass a rational basis review standard, the Commissioner should uphold them. (*See* Water Board's May 8, 2019 reply at 2.)

The Water Board argued that Petitioners' reliance on ECL 15-1503(2) and conditions from the permits authorizing the development of the Catskill and Delaware reservoir systems as justification for a "just and equitable" standard of review for excess water rates is misplaced. The Water Board observed the following. First, when reviewing permit applications, the Department's predecessor commissions considered whether the proposed projects resulting in the development of the Catskill and Delaware reservoir systems would be "just and equitable," not whether the rates charged for taking water post-development would be just and equitable. Second, the permit conditions limited the amount of water that upstate communities could take from the water supply system to the entitlement amount. (*See e.g.* Water Supply Application [WSA] No. 1 dated May 14, 1906, at 19-21; WSA No. 214 dated June 6, 1916, at 3-4 and Condition No. 5; WSA No. 2005 dated November 14, 1950, at 17.)[6] Based on the foregoing, the Water Board contended that these permits did not consider providing excess water to upstate communities and, therefore, the permit conditions cannot be read to provide a "just and equitable" standard for calculating the associated rate. (*See* Water Board's May 8, 2019 reply at 2-3.)

Contrary to Carmel's and Petitioners' arguments,[7] the Water Board contended that it is not attempting to constrain the rights of the upstate communities by asserting a deferential review consistent with the Court's determination in *Prometheus*. Rather, the Water Board observed that setting excess water rates equal to the in-city rate is rational because the source of water for all customers is the same. Consequently, the Water Board concluded that the scope of the Commissioner's review would be limited. In support, the Water Board cited *Matter of the Village of Scarsdale v Jorling* (91 NY2d at 517), as well as the case law referenced in the Board's March 26, 2019 letter brief (at 3-4 and n 2). In addition, the Water Board asserted that the proposed excess water rates promote conservation. (*See* Water Board's May 8, 2019 reply at 3.)

The Water Board acknowledged that costs must be considered in calculating rates, and referenced the Public Authorities Law, which prescribes self-sustaining revenue requirements (*see e.g*. PAL § 1045-g[4]). The Water Board argued, however, that no statute or case law requires it to engage in a separate cost analysis to determine excess water rates when such rates equal the in-city rates, for which analyses have already been performed. (*See* Water Board's May 8, 2019 reply at 4.)

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[6] WSA No. 1 (at 21) states, in part, that: "[t]he amendments of Sections 31, 35 and 41 of Chapter 724 of the Law of 1905, together with the modifications of the plans as aforesaid, make said plans *just and equitable* to the other municipalities and civil divisions of the State affected thereby" (emphasis added).

[7] See Carmel's March 21, 2019 brief at 13-14, and Petitioners' April 17, 2019 response at 4.

The Water Board refuted Petitioners' and Carmel's allegation that the proposed excess water rates would be penal in nature. The Water Board referenced Laws of 1964, Chapter 672 (*see* Water Board's April 17, 2019 brief, Exhibit E).[8] Section 1 amended Administrative Code § K51-42.0 (the predecessor to § 24-360) to add subdivision f. When enacted, this subdivision authorized Carmel Water District #2 to take water in excess of the entitlement amount not to exceed an average of two million gallons per day during any calendar month. Furthermore, this subdivision authorized the Water Board to charge a rate for this excess water at three times the entitlement rate. Based on this statutory amendment, the Water Board concluded that the Legislature endorsed a rational rate for excess water at three times the entitlement rate, which would be similar to the proposed excess rates at issue here. (*See* Water Board's May 8, 2019 reply at 4.)

Discussion and Ruling: Pursuant to the Public Authorities Law, the Water Board has broad authority to set rates for water taken from the New York City water supply system. In setting these rates, the Water Board must collect sufficient revenue to operate and maintain the water supply system, and to pay obligations on bonds issued by the Water Finance Authority. (*See* PAL §1045-j[1].) In addition, provisions of the Public Authorities Law reference what is now codified as Administrative Code § 24-360. As a result, the Commissioner's role in setting rates for upstate communities who take water from the water supply system is preserved. (*See* PAL §§ 1045-j[1] and 1045-j[9].)

Reading both statues together, the Court of Appeals concluded that the joint effect of the Public Authorities Law and the Administrative Code is to give the Water Board as well as the Department a role in the setting rates for upstate users. The result:

> is in accord with the legislative purpose of the Public Authorities Law which gives the Water Board the power to set rates for all users taking into consideration the expenses of the system including servicing of debt. At the same time, the authority of the DEC to set final rates for non-City users is retained. (*Matter of Village of Scarsdale*, 91 NY2d at 516.)

The context of the Court's foregoing determination is with respect to the entitlement water and the associated rate. Administrative Code §24-360(c) identifies the criteria that may be considered by the Water Board during the rate-making process. The procedures that provide for public participation in the rate-making process are outlined in PAL § 1045-j(3). Administrative Code § 24-360(e) outlines the method for calculating the entitlement. With respect to calculating water usage, the Department has no authority. Rather, such authority rests with the Water Board because it operates the water supply system, maintains the equipment, and keeps the records related to per capita usage. (*See Matter of Village of Scarsdale*, 91 NY2d at 517-518).

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[8] *See also* Exhibits F through H of the Water Board's April 17, 2019 brief. Exhibit F is a copy of legislative history regarding the addition of subdivision f to Administrative Code § K51-42.0. Exhibit G is a copy of L 1966, ch 354 (repeal of § K51-42.0, subdivision f). Exhibit H is a copy of legislative history regarding the repeal of § K51-42.0, subdivision f.

The Court further determined that the Department has authority over the rates that the Water Board charges upstate communities for excess water. The Court held that ECL article 15 provides the Department with the authority to control, regulate, and preserve the State's water resources. Moreover, the Court held that the Department's authority pursuant to ECL article 15 is not abridged by PAL § 1045-bb. In this context, the Court noted that excess water rates are not capped at the in-city user rate as provided by Administrative Code § 24-360(c) with respect to the entitlement. (*See Matter of Village of Scarsdale*, 91 NY2d at 517.)

The focus of the discussion now turns to the applicability of the Court of Appeal's recent determination in the *Prometheus* matter. The Court held that the Water Board, as a utility, has unfettered discretion to set water rates provided it does not engage in discriminatory practices among different types of rate payers, and that the rates are not arbitrary or otherwise unsupported by economic or public policy goals. The Court noted further that a heavy burden rests on those who attempt to demonstrate that the utility's rate determinations are unreasonable. (*See Matter of Prometheus Realty Corp.*, 30 NY3d at 646, [internal citations omitted].)

While considering the nature of the Water Board's rate-making discretion in the *Prometheus* matter, the Court quoted from the *Matter of Village of Scarsdale* (91 NY2d at 515), where it held that the "Water Board is granted broad authority to set rates for water usage." Subsequently, in the *Prometheus* determination, the Court stated that it applied the well-established standard of review,[9] and concluded that the Water Board's Fiscal Year 2016 in-city water rate "fell short of being utterly arbitrary and unsupported by rational goals." As a result, the Court reversed the Appellate Division's order (147 AD3d 519 [1st Dept 2017]). (*See Matter of Prometheus Realty Corp.*, 30 NY3d at 646-648). The Prometheus determination does not modify or vacate the holdings set forth in the *Matter of the Village of Scarsdale*. The Court concluded that:

> while the Water Board has the authority, pursuant to its power under the Public Authorities Law to set rates initially, the DEC has the power to set the final rates for entitlement and excess water consumption by non-City users by virtue of its authority under the Administrative Code and the Environmental Conservation Law (*Matter of Village of Scarsdale*, 91 NY2d at 518).

The Water Board has offered its rationale for the proposed rates for excess water used by the upstate communities. Although greater than the proposed entitlement rates, the proposed excess water rates equal the rates for in-city water users. As a result, the proposed excess water rates would be consistent with the requirements outlined in PAL §1045-j(1). Setting rates at this level also avoids any potential conflict with the rate cap provided by Administrative Code § 24-360(c) concerning entitlement rates. The Water Board's proposal to assess higher rates for excess water compared to the rates for entitlement is consistent with the case law[10] that upholds the practice of assessing higher rates to out-of-district users. The Water Board contended that

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[9] *See Cary Transp*., 38 NY2d 545, 553 [1976].

[10] *See* Water Board's March 26, 2019 letter brief at 3-4 and n 2.

the proposed excess water rates would promote conservation. Now, the Water Board seeks to have the discretion recognized in the *Prometheus* determination applied to the proposed excess water rates.

Based on the Court's determinations in the *Matter of the Village of Scarsdale* and the *Matter of Prometheus Realty Corp*., I conclude that the standard of review that should be applied to the proposed excess water rates is not the "fair and reasonable" test that that the Commissioner applies to the review of entitlement rates as set forth in Administrative Code § 24-360(c). Rather, the standard of review is whether the proposed excess water rates would serve the Water Board's economic and public policy goals (*see Cary Transp.*, 38 NY2d at 550). Among the Water Board's economic goals are the requirements outlined in PAL § 1045-j(1). Conservation is an example of a relevant public policy goal.

Petitioners and Carmel have a heavy burden in challenging the proposed excess water rates. For example, the case law cited by the Water Board supports the practice of assessing higher rates to out-of-district users. Within the context of this proceeding, the upstate communities are analogous to the out-of-district users considered in the case law provided by the Water Board. With respect to *Town Bd. of Town of Poughkeepsie v City of Poughkeepsie* (22 AD2d 270, 274), the Court accepted out-of-district rates that were twice the rate for in-district users. This determination suggests that proposed excess rates that are twice the entitlement rates would be rationally based. Also, from 1964 to 1966, a provision of Subsection f of Administrative Code § K51-42.0 (the predecessor to § 24-360) authorized the Water Board to set an excess water rate for Carmel at three times the in-city rate (*see* Water Board's brief dated April 17, 2019, Exhibit E).[11] Finally, Carmel acknowledged, in its brief dated March 21, 2019 (at 13), the Department's role as the conservator of the State's water resources. As noted above, Department staff agreed with the Water Board that the proposed excess water rates would promote conservation.

Therefore, when the issues conference reconvenes, Petitioners and Carmel will have the opportunity to make offers of proof to demonstrate how the proposed excess water rates would not serve the Water Board's economic and public policy goals. After the parties discuss these offers of proof, I will evaluate them, and determine whether the offers of proof raise any relevant factual disputes. If so, the parties will have the opportunity to develop a factual record during the adjudicatory hearing. Upon review of the complete record, the Commissioner will subsequently set the final rates for excess water.

III. Carmel's February 22, 2019 Petition for Full Party Status

As noted above, Carmel timely filed a petition for full party status dated February 22, 2019 and participated in the March 5, 2019 issues conference. During the issues conference, the

[11] *See* L 1964, ch 672, § 1(3) "notwithstanding the limitations of paragraph c hereof, such water district shall pay the city of New York for such excess at a rate three times the rate determined pursuant to subdivision b and c hereof paid for water purchased within the quantity limited by subdivision e hereof."

parties discussed the issues proposed in Carmel's petition (Tr. at 70-82). In Paragraph 6 of Carmel's February 22, 2019 petition, Carmel stated that the grounds for its opposition to the water rates imposed by the Water Board are substantially the same as those presented in the Joint Petition filed by Petitioners. According to its petition, Carmel's opposition relates to the proposed rates for entitlement as well as excess water. (Tr. at 70-71; *see also* Carmel's March 21, 2019 brief at 4.)

The Water Board did not object to the issues proposed in Carmel's petition insofar as they are similar to Petitioners' cost issues (Tr. at 78). Department staff's position is essentially the same as the Water Board's (*see* Staff's April 15, 2019 brief at 7). However, the Water Board asserted that the issues proposed in Paragraphs 7, 8, and 9 of Carmel's February 22, 2019 petition are beyond the scope of the Department's jurisdiction (Tr. at 78-80). As noted above, the parties had the opportunity to brief the relevance of the proposed issues. Each proposed issue is discussed below.

A. Paragraph 7

In Paragraph 7 of the February 22, 2019 petition, Carmel objected to the methodology that the Water Board used to calculate the wholesale water rates, which results in all upstate customers paying the same water rates. According to Carmel, such treatment by the Water Board is inconsistent with the Water Supply Act of 1905, Administrative Code § 24-360, and 6 NYCRR part 603. Carmel argued that it should not be required to pay the same rate for water taken from Lake Gleneida that all other upstate customers pay for their water because Lake Gleneida is a natural water body, and any associated maintenance costs are either de minimis or negligible.

In the March 21, 2019 brief, Carmel reiterated the objection stated in the February 22, 2019 petition. Carmel argued that the Commissioner has authority pursuant to 6 NYCRR 603.2 to set different upstate water rates based on the circumstances that distinguish upstate customers. At 6 NYCRR 603.2, Carmel noted that the Commissioner may fix rates "after the proper authorities of the two municipalities or other civil divisions of the State have failed to agree…." Carmel noted further that the Water Board, an authority of the City of New York, is selling water to the Carmel Water District #2, one other civil division of the State. (*See* Carmel's March 21, 2019 brief at 5.)

To its brief, Carmel attached Exhibit A, which is a graphic depiction of a portion of the New York City water supply system that identifies over 75 upstate customers. Carmel noted that the Water Board charges all of these upstate customers the same rate regardless of any unique circumstances that may be associated with a particular upstate water user. Carmel acknowledged that from an administrative perspective one rate may be efficient. Carmel asserted, however, that one rate for all upstate users is not fair. According to Carmel, the Water Board has over 70 different rates for its in-city customers depending on various circumstances. With respect to upstate water rates, Carmel said that from 1967 until June 30, 1992 (*see Matter of Petition from Westchester County* [Water Supply Application No. 8865], Commissioner's Decision, dated

November 9, 1995), the Water Board charged two different rates. One rate was for upstate communities who took water from the Croton system, and the other was for those who took water from the Catskill-Delaware system. Carmel contended that the Water Board established these two different rates because the costs associated with capital improvements and maintenance were different between the two systems. (*See* Carmel's March 21, 2019 brief at 5-8; and Exhibits A, B, and D.)

According to Carmel, Putnam County maintains the water withdrawal equipment at Lake Gleneida at its own cost pursuant to the terms of an inter-municipal agreement with the City of New York. Carmel concluded that its water rates should be commensurate with the City's minimum costs and expenditures associated with Lake Gleneida. Carmel argued that the Commissioner has jurisdiction to set those rates. (*See* Carmel's March 21, 2019 brief at 8.)

Department staff noted, however, that Petitioners are not seeking separate rates for each upstate community who joined in the August 18, 2016 petition. Because Carmel's request for relief is not the same as the relief initially requested by Petitioners, Department staff argued that Carmel's proposed issue should be denied. According to Department staff, Carmel's proposed issue is not one already raised by another party (*see* 6 NYCRR 624.5[d][1][ii]). In the alternative, staff asserted that Administrative Code § 24-360 prescribes the method for calculating the entitlement rates, and the *Prometheus* determination provides the standard of review for the proposed excess water rates. (*See* Staff's April 15, 2019 brief at 8.)

The Water Board argued that 6 NYCRR 603.2 does not provide the Commissioner with authority to set water rates independent from the authority provided in Administrative Code § 24-360 and the Public Authorities Law (*see* Water Board's April 17, 2019 brief at 2-3). According to the Water Board, the statues applicable here (*i.e.* Administrative Code § 24-360 and provisions of the Public Authorities Law) do not provide for individualized rate determinations. The Water Board reads Administrative Code § 24-360 (c) to provide for an offset in the aggregate based on total costs. The Water Board argued that Carmel cites no statutory authority to support its claim that the Commissioner has the authority to determine individual water rates for each upstate community. (*See* Water Board's April 17, 2019 brief at 8.)

Discussion and Ruling: Carmel's reliance on the referenced provisions of 6 NYCRR part 603 as the bases for its claim that the Commissioner has authority to set separate water rates for individual upstate communities based on unique circumstances is misplaced. As an example of a circumstance unique to Carmel, the upstate community argued that Putnam County maintains the water withdrawal equipment at Lake Gleneida at its own cost pursuant to the terms of an inter-municipal agreement with the City of New York. As discussed in more detail below, the Water Board and Department staff submitted copies of the 1978 Agreement,[12] which authorized Carmel Water District #2 to construct and maintain raw water intake structures and appurtenances for the water district. As a result, Carmel has access to the water supply system via this intake. Pursuant to Administrative Code § 24-360(b), the municipalities and water districts are

[12] *See* Exhibit F to Department staff's April 15, 2019 brief, and Exhibit I to the Water Board's April 17, 2019 brief.

responsible for the expenses associated with the connections made between the City's water supply system and the upstate customer. Therefore, Carmel has not identified any unique circumstances that would warrant a separate rate.

Effective July 1, 1992, the Water Board has assessed one rate for upstate communities who take entitlement water (*see Matter of Petition from Westchester County* [Water Supply Application No. 8865], Commissioner's Decision, dated November 9, 1995). I deny Carmel's request to establish separate water rates. Carmel has not identified any legal authority that would authorize the Commissioner to do so. In addition, Carmel has not identified any factual circumstances unique to this upstate community that would necessitate an adjudicatory hearing to develop separate water rates.

B. Paragraph 8

In Paragraph 8 of the February 22, 2019 petition, Carmel objected to paying the Water Board any compensation for taking water from Lake Gleneida for the following reasons. First, Lake Gleneida is a natural body of water, and not a reservoir, aqueduct, or any other component of the New York City water supply system identified in the Water Supply Act of 1905. Second, Carmel used Lake Gleneida as its source of potable water prior to the City's acquisition of it.

In the March 21, 2019 brief, Carmel reiterated the objection stated in the February 22, 2019 petition. With reference to the 1893 legislation that authorized the City to purchase Lake Gleneida, Carmel argued that the statute did not preserve the right by any upstate community to take water from the New York City water supply system subject to fair and reasonable rates in the manner that the Water Supply Act of 1905 provided. According to Carmel, the 1893 legislation provided a "public purpose" provision that authorized Carmel to take water from Lake Gleneida in perpetuity. Moreover, the 1893 legislation limited the uses of Lake Gleneida by the City, Carmel argued. Carmel noted that the Water Supply Act of 1905 did not limit the public servitude provision of the 1893 legislation because the Water Supply Act applied to the consumption of water from reservoirs, aqueducts, and the like, but not from the lakes located in Putnam County. Because Carmel has a right to withdraw water from Lake Gleneida for a "public purpose," Carmel argued that the Commissioner has jurisdiction to hear evidence about the matter. (*See* Carmel's March 21, 2019 brief at 9-10.)

With respect to the issue proposed in Paragraph 8 of Carmel's February 22, 2019 petition, Department staff offered the following arguments. First, staff contended that the proposed issue relates to the amount of water used by Carmel rather than the rate assessed for that amount of water. Based on *Matter of Village of Scarsdale* (91 NY2d at 518), staff maintained that the Commissioner lacks authority to calculate water usage. Rather, that jurisdiction rests exclusively with the Water Board. Second, Carmel's proposed issue was not initially identified in the Petitioner's Joint Petition and, therefore, should not be adjudicated pursuant to 6 NYCRR 624.5(d)(1)(ii). Third, staff argued that Lake Gleneida is covered by amendments to the Water Supply Act of 1905, and by Administrative Code § 24-360. (*See* Staff's April 15, 2019 brief at 8-9.)

With respect to the third argument, staff offered the following details. Staff noted that Chapter 726 of the Laws of 1905 uses the term "lake," which would apply to Lake Gleneida. Staff acknowledged that the term "lake" is not used in subsequent amendments to the Water Supply Act (*see e.g.* L 1928, ch 525, and L 1935, ch 443) and does not appear in Administrative Code § 24-360. However, these statutes use the term "reservoir." The term "reservoir" is not defined. However, staff asserted that Lake Gleneida is a reservoir, or functions like a reservoir, because Carmel and the City had engaged in work activities to make Lake Gleneida a source of public water supply by constructing and maintaining "connection facilities." (*See* Staff's April 15, 2019 brief at 9.)

With the April 15, 2019 brief, Department staff provided a copy of the 1978 Agreement (*see* Exhibit F),[13] which includes plans and specifications for the connection facilities. The 1978 Agreement authorized Carmel to withdraw water from the City's Croton System at Lake Gleneida. In addition, the 1978 Agreement expressly references the Water Supply Act and provisions of the Administrative Code prior to its codification as Section 24-360. The terms and conditions of the 1978 Agreement limit the amount of water that Carmel may take from Lake Gleneida and describe the rate for the water withdrawals. With respect to excess water, the 1978 Agreement § 403(A) provides that the rate would be at the rate for metered water in the City. (*See* Staff's April 15, 2019 brief at 9-10 and Exhibit F.)

Based on the foregoing, Department staff contended that Carmel has waived its right to argue against compensation. Staff contended further that the doctrine of laches bars Carmel from asserting that it should not be charged for taking water from Lake Gleneida. (*See* Staff's April 15, 2019 brief at 10.)

According to the Water Board, the City acquired all rights in Lake Gleneida, including the right to use water from the lake as part of the City's water supply system. Attached to the Water Board's brief as Exhibit J is a copy of an Order from Supreme Court (Westchester County) dated June 30, 1906. The June 1906 Order confirmed the appraisal report for Lake Gleneida for its purchase by the City as provided for by Chapter 189 of the Laws of 1893 (*see* Water Board's April 17, 2019 brief, Exhibit K). The Order confirmed that the City acquired the underwater lands and the water of Lake Gleneida, and that after acquiring Lake Gleneida the City extinguished all other water rights and privileges and easements in the lake. Finally, the Water Board noted, among other things, that Carmel may continue to withdraw water from Lake Gleneida for a "public purpose" based on the Water Supply Act as codified in Administrative Code § 24-360. (*See* Water Board's April 17, 2019 brief at 5-7, and Exhibits J and K.)

Discussion and Ruling: The City of New York duly acquired Lake Gleneida. Contrary to Carmel's claim, Lake Gleneida is part of the City's water supply system. Whether Carmel used

[13] The Water Board also provided a copy of the 1978 Agreement as Exhibit I to its April 17, 2019 brief. Exhibit I included a copy of the Permit for Temporary Use of City Property (No. 8823) dated July 27, 1978, which authorized Carmel Water District #2 to construct and maintain raw water intake structures and appurtenances for the water district.

Lake Gleneida as a potable water source prior to the City's acquisition of the lake is immaterial. Pursuant to Administrative Code § 24-360(a), Carmel may take water from the City's water supply system. With the 1978 Agreement, Carmel has constructed an intake at Lake Gleneida to withdraw water from the lake. Carmel identifies no additional issue for adjudication relative to this water rate hearing. Carmel's objection as stated in Paragraph 8 of its February 22, 2019 petition is without merit.

C. Paragraph 9

In Paragraph 9 of the February 22, 2019 petition, Carmel further objected to any charge for the water it withdraws from Lake Gleneida because the Carmel District #2 wastewater treatment plant subsequently collects about 75% of the initial amount of water withdrawn from Lake Gleneida by the water district, and after providing microfiltration treatment, returns the water to the Croton watershed. Given these circumstances, Carmel claimed that it is entitled to a credit from the Water Board.

In the March 21, 2019 brief, Carmel reiterated the objection stated in the February 22, 2019 petition. Carmel explained that the treated water is released to the Croton Falls Reservoir. Carmel argued that its residents essentially "borrow" the water. Carmel noted that any water withdrawn from Lake Gleneida and used by the residents of the water district for outdoor purposes remains in the watershed, and is collected as groundwater. According to Carmel, the Commissioner should consider the amount of water returned to the Croton watershed as a factor in determining the fair and reasonable water rates for Carmel. (*See* Carmel's March 21, 2019 brief at 11.)

Because Carmel has requested a credit for the water it returns to the Croton watershed, Department staff contended that the proposed issue relates to the amount of water used by Carmel. Based on *Matter of Village of Scarsdale*, (91 NY2d at 518), staff argued that the Commissioner lacks authority to calculate water usage. Rather, that jurisdiction rests exclusively with the Water Board.[14] Staff also contended that Carmel's proposed issue was not asserted in the Petitioner's Joint Petition and, therefore, should not be adjudicated pursuant to 6 NYCRR 624.5(d)(1)(ii). Citing PAL § 1045-g(4), which allows the Water Board to set rates related to "the use of or services furnished by the … water system …," staff asserted that returning any water after it has been used or furnished is irrelevant. Staff also noted that Administrative Code § 24-360 does not provide for a credit for water returned to the watershed from which it was taken. (*See* Staff's April 15, 2019 brief at 10.)

Discussion and Ruling: With respect to this proposed issue, Carmel seeks a credit for an amount of water withdrawn from Lake Gleneida, a significant portion of which is subsequently treated, and returned to the Croton watershed. The proposed issue relates to the net amount of

[14] With respect to the issue proposed in Paragraph 9 of Carmel's February 22, 2019 petition, the Water Board's arguments about the proposed issue are similar to those offered by Department staff (*see* Water Board's April 17, 2019 brief at 9).

water used by Carmel. The Commissioner, however, lacks authority to calculate water usage. Rather, that jurisdiction rests exclusively with the Water Board. The issues proposed in Paragraph 9 of Carmel's February 22, 2019 petition is, therefore, denied because it is beyond the scope of the Commissioner's authority. (*See Matter of Village of Scarsdale*, 91 NY2d at 518.)

IV. The Water Board's Fiscal Year 2017 Water Rates

For Fiscal Year 2017, effective July 1, 2016, the Water Board proposed to set the upstate rate for entitlement water at $1,750.52 per million gallons (MG), and the upstate rate for excess water at $5,200.53 per MG. The proposed excess water rate of $5,200.53 per MG was equivalent to the in-city water rate. Unlike upstate communities, in-city rate payers do not have an administrative remedy before the Department to challenge the Water Board's decisions. Subsequently, Prometheus Realty Corporation and others commenced a proceeding pursuant to CPLR article 78 that challenged the Water Board's water and wastewater rate schedule for FY 2017 (*see Matter of Prometheus Realty Corp. v New York City Water Bd.*, 54 Misc 3d 745 [Sup Ct, NY County 2016]).

Supreme Court granted the petition and, among other things, vacated the proposed FY 2017 rate schedule, and ordered the Water Board to keep the FY 2016 water and wastewater rate schedule in place. This order applied to the proposed rates that the Water Board would charge upstate communities for entitlement and excess water. (*See Matter of Prometheus Realty Corp.*, 54 Misc 3d at 751). The Appellate Division affirmed (147 AD3d 519, 253 [1st Dept 2017]), which further prevented the Water Board from implementing the proposed FY 2017 rate schedule for all water customers, including upstate communities. Accordingly, the Water Board continued to implement the FY 2016 rate schedule. In December 2017, the Court of Appeals reversed the Appellate Division's order (30 NY3d at 648).

During the March 5, 2019 issues conference, counsel explained that the Water Board never implemented the FY 2017 water rates due to the litigation initiated by in-city customers. Consequently, upstate communities never paid the FY 2017 rates. At the issues conference, the Water Board moved to strike any proposed issues related to the FY 2017 rates. (Tr. at 7, 18-19.) Counsel explained further that the Water Board would be developing rates for FY 2020 (effective July 1, 2019). (Tr. at 19-20.)

Petitioners maintained that issues with the FY 2016 [sic] water rates remain. Petitioners explained that the adjudication of the FY 2016 water rates would affect payments made by upstate communities for fiscal years 2017, 2018, and 2019. According to Petitioners, the FY 2016 water rate schedule was in effect through FY 2019. (Tr. at 37-38.) However, counsel said that Petitioners would not challenge rates that were never put into effect (Tr. at 40). Carmel acknowledged that in 2017, 2018, and 2019, the Water Board charged Carmel the FY 2016 water rates. If the FY 2016 rates are adjusted as a result of the adjudication, Carmel contended that the adjustment should apply to the charges assessed during the period from 2017 to 2019. (Tr. at 40-41.)

Discussion and Ruling: As of the March 5, 2019 issues conference, the Water Board had not implemented the proposed FY 2017 water and wastewater rate schedule. During the issues conference, counsel said that the Water Board was in the process of developing a rate schedule for FY 2020 (effective date July 1, 2019) and, as a result, the FY 2017 rate schedule would not be implemented. From the pendency of the *Prometheus* litigation to the March 5, 2019 issues conference, the Water Board has assessed its customers, including the upstate communities, the FY 2016 water and wastewater rate schedule. (Tr. at 18-20.)

In order to preserve their rights to seek review by the Commissioner pursuant to Administrative Code § 24-360(b), Petitioners appropriately included the proposed FY 2017 rates for entitlement and excess water in the Joint Petition during the pendency of the *Prometheus* litigation. However, based on the foregoing circumstances, the proposed FY 2017 rates for entitlement and excess water have become irrelevant, and any associated issues alleged in the Joint Petition about the FY 2017 water rates are now immaterial. Accordingly, the adjudicatory hearing will not include any consideration of the proposed FY 2017 water rates.

V. Commissioner's Decision dated June 3, 2011

To settle previously disputed rate cases concerning entitlement water, Petitioners[15] and the Water Board entered into a stipulation in May 2011 (the May 2011 stipulation). Then-Commissioner Joseph J. Martens also signed the stipulation and incorporated it into his Decision dated June 3, 2011. During the March 5, 2019 issues conference, the parties discussed the relevance of the May 2011 stipulation to the captioned matter (Tr. 14-18).

In the March 21, 2019 brief, Carmel noted that it did not challenge any of the proposed water rates addressed by the Commissioner's June 3, 2011 Decision, and that it was not a party to the May 2011 stipulation. Carmel argued that it would not be bound by the terms and conditions of the stipulation with respect to the proposed rates under consideration in this matter. To support this argument, Carmel referenced 6 NYCRR 624.5(a), which identifies the mandatory parties to an administrative adjudicatory hearing. In the case of a water supply rate dispute, the mandatory parties are limited to the municipalities involved in the dispute. Carmel noted further that it did not receive any notice of the proceeding related to the Commissioner's June 3, 2011 Decision. Carmel concluded that the May 2011 stipulation is not operative against it. (Tr. at 35-36; *see also* Carmel's March 21, 2019 brief at 12.)

During the March 5, 2019 issues conference, the Water Board contended that Carmel and all other upstate customers were bound by the terms and conditions of the May 2011 stipulation. The Commissioner incorporated the stipulation into the June 3, 2011 Decision, which applied to all upstate users. (Tr. at 35-36). With its April 17, 2019 brief (*see* Exhibit L), the Water Board provided excerpts from the transcript of the October 23, 2008 issues conference to show that

[15] The upstate communities who joined in the petition dated July 20, 2004 were the Village of Scarsdale, Westchester Joint Water Works, the City of White Plains, United Water New Rochelle, and United Water Westchester (as successor to Aquarion Water Company).

Petitioners had duly published a Notice of Public Hearing dated September 12, 2008, and that OHMS had sent copies of the September 12, 2008 notice to all upstate customers by regular mail. Exhibit M to the Water Board's April 17, 2019 brief is the mailing list of the upstate customers that the Water Board provided to OHMS for the mailing, which included the Carmel Water District #2 (60 MacAlpin Avenue, Mahopac, New York 10541). (*See* Water Board's April 17, 2019 brief at 7-8, and Exhibits L and M.)

The Water Board also provided a copy of the Commissioner's Decision dated June 3, 2011 as Exhibit N to its April 17, 2019 brief. In addition to a copy of the Commissioner's Decision dated June 3, 2011, Exhibit N included a copy of the May 2011 stipulation, so ordered, by Commissioner Martens, and my Summary Report dated June 1, 2011. The Water Board explained that the Commissioner's June 3, 2011 Decision, incorporating the terms and conditions of the May 2011 stipulation, required the Water Board to provide a $10 million reduction to the upstate cost of service in FY 2012. All upstate customers, including Carmel, benefitted from this reduction, according to the Water Board. The Water Board argued that Carmel cannot disavow the Commissioner's June 3, 2011 Decision. (*See* Water Board's April 17, 2019 brief at 7-8, and Exhibit N.)

In the April 15, 2019 brief, staff supported the statements made by the Water Board's counsel during the March 5, 2019 issues conference concerning the applicability of the May 2011 stipulation on all upstate water users (Tr. at 35-36). In addition to the arguments offered in the Water Board's April 17, 2019 brief, Department staff noted that Carmel, among other upstate communities, received a copy of the Notice of Public Hearing dated September 12, 2008, which scheduled an issues conference for October 23, 2008. Staff concluded that Carmel had notice of the October 23, 2008 issues conference, and was provided with the opportunity to attend the issues conference as well as to participate in the proceeding that was resolved with the May 2011 stipulation. According to staff, Carmel is bound by the terms and conditions of the May 2011 stipulation. (*See* Staff's April 15, 2019 brief at 11.)

Discussion and Ruling: The Commissioner incorporated, by reference, the May 2011 stipulation into the June 3, 2011 Decision. The Commissioner's June 3, 2011 Decision and the May 2011 stipulation resolved rates for entitlement water assessed by the Water Board to upstate communities for FYs 2005-2009. As stated above, Carmel received notice of the October 23, 2008 issues conference and benefited, like all other upstate communities, from the Commissioner's June 3, 2011 Decision and the May 2011 stipulation.

In addition to resolving the water rates for FYs 2005-2009, the May 2011 stipulation provided a methodology for calculating the rates for entitlement water through FY 2016. Therefore, by its express terms, the May 2011 stipulation applies to the calculation of the water rates for FYs 2015 and 2016, which are at issue in this proceeding.[16]

[16] For the reasons outlined in the preceding section, the FY 2017 water rates (*i.e.*, entitlement and excess) are not relevant, and will not be considered in this proceeding.

Carmel has joined with Petitioners in seeking a review of the entitlement water rates for FYs 2015 and 2016 (*see* Carmel's February 22, 2019 petition, ¶ 6). Therefore, Carmel's participation in the hearing will be linked to the application of the May 2011 stipulation.

Paragraph 3 of the May 2011 stipulation (at 4) states, in pertinent part, that:

> [f]or entitlement water rates established effective July 1 from 2011 to 2015 (in other words, FY2012-2016), the Board will calculate projected consumption for the rate year by using a ten-year regression.

Paragraph 4 of the May 2011 stipulation (at 5) outlines how the Board will perform a "true-up" or cost reconciliation with respect to actual and recovered costs (*see* ¶ 4.a), and actual consumption (*see* ¶ 4.b). The terms of Paragraph 4 apply to the entitlement rates established effective July 1 from 2010 to 2015 (*i.e.*, FYs 2012-2015).

Paragraphs 5 and 6 of the May 2011 stipulation (at 5-6) relate to debt service considerations. Paragraph 5 outlines the methodology that the Board will use to calculate debt service costs. This paragraph states, in pertinent part, that:

> [t]he methodology used by the Board to set entitlement water rates for years after FY2010 is the same as that used in setting the entitlement water rate for FY2005.…

Paragraph 5 continues by identifying additional details to be considered when calculating debt service costs. The last sentence of Paragraph 5 states in full that:

> [i]f the Board changes the methodology at any time in the future, Upstate Communities will be free to challenge the Board's decision with respect to the year in which the methodology is changed, and going forward.

In part, Paragraph 6 resolves the Water Board's debt service calculations for all debt issued prior to and through FY 2010. In addition, Paragraph 6 states further that the upstate communities may review the costs, proof of costs, and calculation of costs related to debt service for debt issued subsequent to FY 2010.[17]

As noted below, Petitioners contended that the Water Board has neither applied the true-up mechanism nor calculated debt service costs consistent with the terms of the May 2011 stipulation. The Water Board asserted otherwise. Therefore, how the Water Board applied the terms of the May 2011 stipulation to its calculation of the entitlement rates for FYs 2015 and 2016 is relevant to the review of these rates in this proceeding.

[17] At this point in the proceeding, it is not known whether the FY 2015 and 2016 entitlement water rates include any costs related to debt service for debt issued subsequent to June 30, 2010.

VI. Compliance with 6 NYCRR Part 603

Part 603 of 6 NYCRR is titled, *Applications for Fixation of Water Rates*. The January 29, 2019 Notice of Issues Conference and Deadline for Party Status Petitions references 6 NYCRR part 603, and other regulations applicable to this proceeding. Pursuant to 6 NYCRR 603.3, any request or application filed with the Commissioner to review water rates must be "authorized by appropriate action of the governing body" of the municipality or water district making the request. In addition, 6 NYCRR 603.4 requires the chief executive officer to sign the request, and to provide a verification.

Exhibit 3 to the Joint Petition is a copy of a resolution dated August 1, 2016 by the Village of Scarsdale seeking the Commissioner's review of the Water Board's FY 2017 water rates. The resolution is verified by the Village Manager. Carmel's February 22, 2019 petition for full party status is signed by Kenneth Schmitt, Town Supervisor for the Town of Carmel. With the February 22, 2019 petition, Supervisor Schmitt provided a notarized verification.

During the March 5, 2019 issues conference, counsel for the Water Board acknowledged that the Joint Petition included Scarsdale's resolution and verification from the Village Manager, but noted that the resolution sought review of the FY 2017 water rates. Because the FY 2017 water rates were not implemented, the Water Board argued that a consideration of the FY 2017 water rates was beyond the scope of this proceeding. The Water Board requested that the upstate communities who filed the Joint Petition provide the documentation required by 6 NYCRR 603.3 and 603.4 concerning the FY 2015 and FY 2016 water rates. (Tr. at 49-50.) Petitioners' counsel stated that he would obtain the appropriate documentation from his clients, and distribute copies of the documents to the parties. (Tr. at 50).

With respect to Carmel, the Water Board requested the Town Board's authorization as required by 6 NYCRR 603.3 (Tr. at 50-51). Carmel's counsel explained that the Town Board had not considered a resolution prior to the February 25, 2019 due date for petitions for full party status. Counsel explained further that a resolution for the Board's consideration had been prepared. Counsel stated that he would provide copies of the Board's resolution to the parties (Tr. at 51).

Ruling: As of the date of this issues ruling, I have not received the documentation required by 6 NYCRR 603.3 and 603.4 from Petitioners and Carmel. I request that their respective counsel distribute these documents to the parties and me as soon as possible.

September 17, 2019 Telephone Conference Call

During the issues conference, the parties developed a schedule that was intended to complete discovery, and to provide Petitioners with the opportunity to submit a counter report (Tr. at 82). Without objection from the parties, the time for Petitioners to file their report was

extended. With an email from Mr. Dichter dated July 24, 2019, Petitioners distributed their report (Petitioners' July 24, 2019 Report).

With emails dated August 14, 2019, the parties timely responded to my request for input about the review of Petitioners' report and the status of discovery. In an email from Mr. London dated August 14, 2019, Department staff requested until September 6, 2019 to review Petitioners' report. Staff also explained that upon review of responses filed by Petitioners and Carmel, Department staff requested the opportunity to seek clarification about the responses received to discovery requests served on April 2, 2019.

In an email dated August 14, 2019 from Ms. Ash, the Water Board did not object to Department's staff's requests. The Water Board noted that Petitioners' report was not signed by their consultant, David E. Peterson, and because the report appears to have been prepared by the Petitioners' counsel, the Board contended that report does not prove adequate notice of the opinions and analysis that Petitioners' expert may testify about. The Board noted that the scope of the report is limited to FY 2016.

On behalf of Petitioners, Mr. Dichter sent an email dated August 20, 2019. Petitioners did not object to a reasonable schedule for further discovery.

In an email dated August 27, 2019, I granted Department staff's request to serve discovery demands about the Petitioners' report by September 6, 2019. In addition, I inquired about the parties' availability for a telephone conference call.

By email dated September 5, 2019, I scheduled a telephone conference call with the parties for 11:00 a.m. on Tuesday, September 17, 2019. I said that the purpose of the telephone conference call was to discuss the following topics: (1) outstanding discovery issues; (2) whether the parties wanted to respond to Petitioners' report; and (3) scheduling a time to identify issues for adjudication.

The telephone conference call convened on September 17, 2019 as scheduled. Representatives from every party participated. Mr. London, on behalf of Department staff, and Ms. Ash on behalf of the Water Board said that they would confer with Mr. Dichter about obtaining clarification of the responses to their respective discovery demands. Both parties do not anticipate filing new discovery demands about Petitioners' July 24, 2019 report. Mr. Dichter encouraged the parties' representatives to contact him as soon as possible about the need for clarification. Mr. Dichter explained that he would confer with his clients to obtain additional information, and advise Department staff and the Water Board accordingly. If motions to compel disclosure became necessary, Department staff and the Water Board agreed to serve them by October 21, 2019.

Mr. Dichter said that Petitioners are prepared to go to hearing.

The parties advised me that they are anticipating the issues ruling, and said that the ruling was needed to decide how the parties would proceed with their respective cases. I noted that the

rulings provide a schedule for the parties to file appeals and replies. I noted further that hearing schedule would depend, in part, on whether the parties appealed from the issues ruling.

Proposed Fact Issues

In Paragraphs 25(a) through 25(e) of the Joint Petition, the Petitioners outlined the bases for their objection to the Water Board's proposed entitlement rates. During the March 5, 2019 issues conference, Petitioners discussed the bases further. Also, Petitioners noted that additional issues have surfaced due to the exchange of information during the discovery process. (Tr. at 9-10.) The Water Board generally reserved on commenting about the proposed issues because Petitioners identified them for the first time at the issues conference (Tr. at 13). Nevertheless, the Water Board offered some comments, which are noted below. Petitioners' July 2019 report addresses some of the topics discussed during the issues conference, and references to the report are noted.

Petitioners are generally concerned about debt service, and the use of cash to fund construction, and how these costs are passed on to customers through the proposed water rates. (Tr. at 10-11; *see also* Petitioners' July 24, 2019 Report at 4-5; 7-10.) Petitioners are also concerned about the property taxes that the City pays to upstate communities and how those payments are allocated among the upstate customers (Tr. at 11-12).

According to Petitioners, the costs of the Croton Reservoir System are included in the upstate water rates. Petitioners noted, however, that none of the upstate customers have an interconnection with the Croton Reservoir System, and therefore do not take any water from that part of the City's water supply system. Petitioners said they may propose to remove the costs associated with the Croton Reservoir System from the upstate water rates. (Tr. at 12; *see also* Petitioners' July 24, 2019 Report at 5-6, 12-13.)

Petitioners have a similar concern with respect to the costs associated with the Hillview Reservoir. Petitioners acknowledged that the City of Yonkers relies, in part, on the Hillview Reservoir, but contended that in-city customers primarily benefit from this facility. Petitioners are considering whether the costs of the Hillview Reservoir could be apportioned between the limited upstate users and the in-city customers. According to Petitioners, a different allocation method was applied to the Hillview Reservoir in the past. (Tr. at 12; *see also* Petitioners' July 24, 2019 Report at 5, 11-12.)

Petitioners contended that the allocation of debt service was different in prior rates. Petitioners distinguished this concern from the debt service issue proposed above (Tr. at 13).

Petitioners acknowledged that the May 2011 stipulation provided a true-up mechanism to retroactively correct for cost estimates that initially served as the bases for the rates. Petitioners contended, however, that the Water Board has not been applying the true-up mechanism outlined in the May 2011 stipulation appropriately. Petitioners argued that the true-up mechanism should be limited to out-of-pocket expenses, such as chemical costs or other fixed costs that are beyond

the Water Board's control. (Tr. at 11, 25-26.) According to Petitioners, the Water Board is inappropriately using more cash to pay for more discretionary items. As a result, the reconciliation of costs has resulted in an assessment of additional charges, and the assessment has become excessive. Petitioners argued that such a practice was not intended by the true-up mechanism. (Tr. at 26-27.)

The Water Board explained that the May 2011 stipulation requires the Water Board to review the FY 2015 and FY 2016 water rates to reconcile costs. The result would be either the application of a credit, or an assessment of additional charges. A review would also be undertaken with respect to water consumption during these rate periods. The Water Board acknowledged that, pursuant to the terms of the May 2011 stipulation, the true-up review would end after FY 2016. The Water Board pointed out, however, that Petitioners seek review of the FY 2015 and FY 2016 water rates. Consequently, the Water Board maintained that the true-up mechanism outlined in the May 2011 stipulation would apply here. The Water Board contended that Petitioners are barred from challenging the true-up mechanism outlined in the May 2011 stipulation within the context of this hearing. (Tr. at 17-18.)

In addition, the Water Board argued that the terms and conditions of the May 2011 stipulation address Petitioners proposed issues related to debt service, cash to fund construction, and cash defeasance. The Water Board argued the following. The May 2011 stipulation remains in place. The Water Board has applied the methodology outlined in the May 2011 stipulation consistently with respect to the proposed FY 2015 and FY 2016 water rates. Accordingly, the Water Board concluded that Petitioners have no right to challenge the debt service component of the proposed water rates. (Tr. at 14, 16-17, 20; *see also* May 2011 Stipulation, ¶ 5.)

With respect to debt service, in particular, Petitioners contended that the May 2011 stipulation remains in effect but only as long as the Water Board consistently applies the methodology. According to Petitioners, the Water Board has not applied the methodology consistently. As a result, the May 2011 stipulation with respect to debt service no longer applies. (Tr. at 15-16.) Petitioners explained that the Water Board has changed the methodology and the materiality of the debt service calculation. (Tr. at 21, 29.)

Referring to Administrative Code § 24-360, the Water Board stated that the rate-making process must be based on actual costs. The Water Board argued that the cost of defeasance and the use of cash to finance construction are actual costs that have been incurred. The Water Board concluded that the proposed rates for entitlement water may recover these costs. According to the Water Board, Petitioners' expert, who participated in the development of the May 2011 stipulation, recommended at that time that the Water Board should use more cash rather than credit to fund construction. The Water Board said that it adopted this recommendation, which is reflected in the terms and conditions of the May 2011 stipulation. (Tr. at 20-21.) From a fiscal perspective, the Water Board noted there are many legitimate reasons to use cash to either finance construction, or for defeasance (Tr. at 31).

Petitioners' July 24, 2019 Report included a discussion about excess water rates. Other than the standard of review, as reviewed above, the parties did not discuss, or otherwise identify,

factual disputes related to the determination of excess water rates. As a result, the other parties have not had the opportunity to respond to Petitioners' discussion about this topic.

In the report, Petitioners noted that from 2009 to 2018, about 10% of upstate communities' total purchases were for excess water. This was about 4,217 million gallons per year on average. This average, however, represented only about 1% of the Board's total annual deliveries, according to Petitioners. Petitioners stated that the quantity of total purchases has declined during the same period. Because in-city usage has also decreased, Petitioners stated further that the upstate entitlement quantity has also decreased. Petitioners concluded that the amount of water, previously considered part of the entitlement has been re-classified as excess water. Petitioners observed that conservation has unintentionally resulted in more water being charged at the excess rate. (*See* Petitioners' July 24, 2019 Report at 13-14.)

Petitioners argued that sales of excess water to upstate communities represents additional margin beyond the cost of service because the total cost of service was originally included in the entitlement water rate (*see* Petitioners' July 24, 2019 Report at 14). When excess water is used, Petitioners explained that the Water Board will send a second invoice after the Board has applied the per capita formula to the in-city usage. As a result, upstate communities do not learn about the excess consumption until after they receive the second invoice. Petitioners argued that this practice is penal in nature because it is calculated on a post facto basis. (*See* Petitioners' July 24, 2019 Report at 15.) With respect to excess water rates, Petitioners recommended that the rate be set at 20% premium above the entitlement rate. Applying this formula, Petitioners calculated an excess water rate of $1,991.09 per MG for FY 2016 (retroactive to July 1, 2015). (*See* Petitioners' July 24, 2019 Report at 17.)

At the issues conference, the parties anticipated that it may be necessary to reconvene after reviewing Petitioners' report and responses to any additional discovery demands. The purpose of reconvening the issues conference would be to identify the factual disputes that need to be resolved by an adjudicatory hearing. (Tr. at 43-46.) Upon review of these rulings, the parties can advise whether the issues conference should reconvene, as initially contemplated.

Petitions for Full Party Status

Consistent with the directions outlined in the January 29, 2019 notice, the Town of Carmel and the Carmel Water District #2 timely filed a joint petition for full party status. The criteria for determining whether the ALJ should grant petitions for full party status are provided in 6 NYCRR 624.5(d)(1). Upon review of these criteria and the petition for full party status, I find that the Town of Carmel and the Carmel Water District #2 filed an acceptable petition consistent with the requirements outlined at 6 NYCRR 624.5(b)(1) and (2). Furthermore, Carmel raised substantive and significant issues for adjudication as discussed above, and demonstrated an adequate environmental interest (*see* 6 NYCRR 624.5[d][1][ii] and [iii]). Accordingly, I grant full party status, for the purpose of this administrative matter, to the Town of Carmel and the Carmel Water District #2.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Ordinarily, expedited appeals must be filed in writing within five days of the disputed ruling (*see* 6 NYCRR 624.6[e][1]). In this case, however, any appeals must be received before 3:30 P.M. on Wednesday, November 13, 2019. Replies are authorized, and must be received before 3:30 P.M. on Wednesday, December 4, 2019.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions. New materials enclosed with any appeal or reply will not be considered, and will be returned.

Send the original hard copy of any appeal plus two copies (for a total of three paper copies) to Louis A. Alexander, Deputy Commissioner, Office of Hearings and Mediation Services, 625 Broadway, 14th Floor, Albany, New York, 12233-1010. In addition, send one hard copy of any appeal to the parties on the service list (March 18, 2019 [revised]), excluding the ALJ, at the same time and in the same manner as transmittal is made to the Deputy Commissioner. Follow the same directions when filing replies.

In addition to the required number of hard copies of appeals and replies, each party shall file one electronic copy in portable document format (PDF) – optical character recognized (OCR) – via email to everyone on the service list, including the ALJ. The electronic copies are due by 3:30 P.M. on the dates specified above. The parties may call me at 518-402-9003 for instructions to convert documents to optimized PDFs.

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

Dated: October 7, 2019
Albany, New York

To: Attached Service List March 18, 2019 (revised)

Attachment: Appendix A

Appendix A – Briefs and Response

Village of Scarsdale, et al. August 18, 2019 Joint Petition
Water Rates for Fiscal Years 2015, 2016 and 2017

1. Carmel's brief dated March 21, 2019 with Exhibits A through D. Brief supporting proposed issues for adjudication, and standard of review for excess water rates.

2. Water Board's letter brief dated March 26, 2019. Brief regarding standard of review for excess water rates.

3. Department staff's brief dated April 15, 2019 with Exhibits A through F. Response to Carmel's proposed issues, and standard of review for excess water rates.

4. Petitioners' response dated April 17, 2019. Response to standard of review for excess water rates.

5. Water Board's brief dated April 17, 2019 with Exhibits A through N. Response opposing Carmel's proposed issues.

6. Petitioners' response dated May 6, 2019. Response to Water Board and Department staff regarding standard of review for excess water rates.

7. Water Board's reply dated May 8, 2019. Reply to Petitioners and Carmel regarding standard of review for excess water rates.

8. Petitioners' report titled, *Report of Petitioners in Response to the Entitlement and Excess Rates established by the Water Board on the basis of the Amawalk Consulting Rate Reports*, filed on July 24, 2019.