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

In the Matters

- of –

the Petitions to Fix the Water Rates Charged to Upstate Communities for the Rate Years Commencing on July 1, 1996 through July 1, 1999 and Challenges to the Water Rates Charged to Upstate Communities for the Rate Years Commencing on July 1, 2000 through July 1, 2003 by the New York City Water Board pursuant to Section 24-360 of the Administrative Code of the City of New York, Environmental Conservation Law Article 15, and Part 603 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

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

Petitioners.

DECISION OF THE ACTING COMMISSIONER

February 14, 2011

DECISION OF THE ACTING COMMISSIONER

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

Pending before me is an appeal by the Village of Scarsdale, Westchester Joint Water Works, the City of White Plains, United Water New Rochelle, and the Aquarion Water Company ("Upstate Communities") pursuant to the December 1, 2010 Interim Decision of the Acting Commissioner ("2010 Interim Decision"). The 2010 Interim Decision provided that the Upstate Communities could appeal from the January 13, 2006 ruling ("2006 Ruling") of Administrative Law Judge ("ALJ") Daniel P. O'Connell, "insofar as that ruling dismissed the petitions challenging the rates established on July 1 from 1996 to 1999" (2010 Interim Decision, at 14).[1]

Upstate Communities filed an appeal dated December 29, 2010, arguing that ALJ O'Connell should not have dismissed the petitions challenging the Board's rates implemented on July 1, 1996 through July 1, 1999 and that the petitions should be reinstated ("2010 Upstate Communities Appeal"). In addition, Upstate Communities also argued that the ALJ was incorrect in his determination that the challenges to the rates implemented on July 1, 2000 through July 1, 2003 were untimely.

The Board filed a response dated January 25, 2011 ("Board response") in which it argued that the ALJ, in the 2006 Ruling, correctly dismissed the petitions challenging rates set from July 1, 1996 through July 1, 1999. The Board also asserted that Upstate Communities are precluded from filing an appeal from the 2006 Ruling with respect to the ALJ's determination that the challenges to the rates implemented on July 1, 2000 through July 1, 2003 were untimely.

Based on the record before me, the appeal of Upstate Communities is rejected, and the 2006 Ruling is affirmed.

BACKGROUND

The Water Supply Act of 1905, as amended and now codified in section 24-360 of the Administrative Code of the City of New York, authorizes communities located north of the City to take and receive water from the City's water system. As set forth in the Administrative Code, the Board is authorized to charge a rate based on the actual total cost of the water to the City, less all costs associated with distributing the water within the City. By resolution, the Board sets the rate, based on data and projections related to the costs of providing water supply. This rate, which becomes effective on July 1 of each year, is required to be fair and reasonable, that is, "grounded in either known and measurable changes, or well-considered estimates of future expenses" (see Matter of Westchester County, Hearing Report of the ALJ, at 7, adopted by

[1] The 2010 Interim Decision remanded to the ALJ for further proceedings the challenge to the Board's water rate for the period of July 1, 2004 to June 30, 2005, consistent with the interim decision.

Decision of the Commissioner, November 9, 1995). The procedures governing the challenges to the Board's water rates, which are heard by the New York State Department of Environmental Conservation ("Department"), are set forth at parts 603 and 624 of title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ("NYCRR").

Westchester County filed petitions, pursuant to 6 NYCRR part 603, that contested the water rates that the Board implemented on July 1, 1996, July 1, 1997, July 1, 1998, and July 1, 1999. Each petition constitutes a separate proceeding. Upstate Communities filed a petition pursuant to 6 NYCRR part 603, that contested the water rate that the Board established on July 1, 2004 (for the period July 1, 2004 through June 30, 2005). Although no petitions were filed contesting the rates implemented on July 1, 2000, July 1, 2001, July 1, 2002, and July 1, 2003, Upstate Communities expressed interest in challenging those rates.

In addition to the time periods referenced above, petitions have been filed on behalf of various upstate communities challenging the water supply rates established on July 1, 2005, July 1, 2006, July 1, 2007, and July 1, 2008. Those matters are currently on hold pending the resolution of the proceeding on the Upstate Communities' challenge to the July 1, 2004 water rate.

In the 2006 Ruling, ALJ O'Connell ruled on the Board's motion to dismiss the petitions of Westchester County contesting the rates the Board implemented annually from July 1, 1996 to July 1, 1999. The ALJ held that Westchester County timely filed petitions challenging the rates that became effective on July 1, 1996, July 1, 1997, July 1, 1998 and July 1, 1999. The ALJ noted that, by letter dated March 18, 2005, Westchester County withdrew all of its petitions, but subsequently, by letter dated May 9, 2005, requested that the ALJ reinstate its petitions. In that letter, Westchester County expressed the concern that, because of the withdrawal of its petitions, Upstate Communities would not be entitled to challenge the water rates established for the period from July 1, 1996 through July 1, 1999. For purposes of his ruling, the ALJ assumed that Westchester County had not withdrawn its petitions. The ALJ concluded that Westchester County failed to timely pursue the matters and that this extended delay prejudiced the Board. Accordingly, the ALJ dismissed the petitions, applying the doctrine of laches.

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

DISCUSSION

Petitions contesting rates implemented by the Board from July 1, 1996 through July 1, 1999

The ALJ addressed the status of petitions challenging the rates implemented from July 1, 1996 through July 1, 1999 in the 2006 Ruling (see 2006 Ruling, at 12-14). Westchester County, which had timely filed challenges to those rate years, subsequently withdrew them, and then sought their reinstatement. Upstate Communities never filed petitions challenging the rates for those years. However, Upstate Communities indicated that the Village of Scarsdale ("Village") had objected to the rates that the Board implemented from July 1, 1996 through July 1, 1999. According to Upstate Communities, the Village submitted its objections directly to the City of New York (2010 Upstate Communities Appeal, at 1-2). The Village, however, never filed petitions contesting the rates with the Department pursuant to 6 NYCRR part 603.

According to the ALJ, the threshold legal question was "not whether to reinstate Westchester County's petitions, but whether the delay in proceeding with those petitions bars hearings pursuant to Administrative Code § 24-360, the ECL and the implementing regulations" (2006 Ruling, at 12). For purposes of his ruling, the ALJ assumed that Westchester County's petitions were not withdrawn (id. at 12). Instead, the ALJ noted that Westchester County's delay in beginning the hearings associated with the petitions "has been so extensive that the doctrine of laches may bar the proceedings from going forward" (id. at 13). The ALJ determined that Westchester County's failure to begin the hearings "unduly delayed" the review of the rates, "and as a result, prejudiced the Board" (id.). Accordingly, the ALJ dismissed Westchester County's petitions related to water rates implemented annually from July 1, 1996 through July 1, 1999 (id. at 14).

Upstate Communities argue that they, as well as any other interested party, have a right to proceed on the petitions of Westchester County. They maintain that, under the New York Civil Practice Law and Rules ("CPLR"), before a petition could be properly withdrawn, the ALJ must issue a written order. Upstate Communities also contend that, pursuant to the State Administrative Procedure Act, no right is granted to a party to withdraw an application. Finally, Upstate Communities argue that, as interested parties engaging in discovery as to the years covered by Westchester County's petitions, they are entitled to have the matters proceed. Accordingly, they conclude that allowing Westchester County to withdraw its petition without notice to other interested parties, such as Upstate Communities, "would be unfair and inequitable" (2010 Upstate Communities Appeal, at 10).

The arguments of Upstate Communities are rejected. The 2006 Ruling demonstrates that Westchester County's delay was so substantial that the doctrine of laches applies. As noted by the ALJ, at the time of the 2006 Ruling, the procedural delay associated with Westchester County's petitions extended from six years (with respect to the petition challenging the July 1, 1999 water rate) to nine years (with respect to the petition challenging the July 1, 1996 water

rate) (see 2006 Ruling, at 13). Furthermore, the applicable regulations require that a petitioner file a statement of facts and arguments in favor of its contentions, and any pertinent reports or papers as part of its petition (see 6 NYCRR 603.5). As the ALJ noted, as of the date of the 2006 Ruling, Westchester County had not produced any of the reports relating to the petitions, and the status of the reports was unknown (see 2006 Ruling, at 13). The ALJ concluded, and I agree, that to allow the petitions to come to hearing "at some unknown future date" would threaten the "operational and financial viability" of the City's water supply system (see id. at 14). The Board is entitled to be able to close its records on water customer accounts and finalize its operations for a specific rate year in a timely fashion. It should not be subject to an extended period of uncertainty relating to its water rates, with the accompanying adverse implications for all ratepayers and its bondholders. The delay here was inordinate, unexplained and prejudicial. Accordingly, I concur with the ALJ that the petitions challenging the rates established on July 1, 1996 through July 1, 1999 should be dismissed.

Upstate Communities, in their papers, present arguments based upon issues relating to Westchester County's withdrawal of its petitions, but ignore the fact that the ALJ dismissed the petitions on laches grounds. The ALJ assumed, for purposes of his ruling, that the petitions had not been withdrawn (see 2006 Ruling, at 12). Accordingly, Upstate Communities' arguments, insofar as they are based on the withdrawal or discontinuance of the petitions, are not relevant on this appeal and are otherwise misplaced. In this regard, Upstate Communities' reliance on 6 NYCRR part 622 to incorporate provisions of the CPLR with respect to withdrawal, and their interpretation of section 301(5) of the State Administrative Procedure Act with respect to withdrawal, are of no moment here.[2]

Upstate Communities assert that dismissal of the proceeding is adverse to interested parties to this proceeding, and that public notice should have been provided of Westchester County's withdrawal of its petitions. Upstate Communities' claims of procedural errors because the ALJ did not conduct a hearing involving all interested parties prior to the dismissal of the petitions and because the ALJ failed to dismiss the petitions in writing are lacking in merit. The ALJ dismissed the petitions for rates set on July 1, 1996 through July 1, 1999 in a written ruling issued on January 13, 2006, after providing full opportunity for Westchester County, Upstate Communities, the Board and Department staff to be heard. Upstate Communities cite no authority that would require an evidentiary hearing prior to dismissal of challenges to the Board's water rates on laches grounds, and none exists.

[2] I note that the regulations at 6 NYCRR part 622, which are the Department's regulations governing enforcement hearing proceedings, are not applicable to water rate proceedings. As set forth in the 2010 Interim Decision, it is the Department's permit hearing regulations at 6 NYCRR part 624, together with the regulations set forth in 6 NYCRR part 603, that apply to these proceedings (see 2010 Interim Decision, at 5-7).

Challenge to rates implemented by the Board from July 1, 2000 through July 1, 2003

The ALJ also addressed the status of the objections to the July 1, 2000 through July 1, 2003 rate years in the 2006 Ruling (see 2006 Ruling, at 7-12). The ALJ noted that no upstate water user had formally commenced a proceeding contesting the water rates for this period, and that correspondence from the Village of Scarsdale to the Board did not constitute petitions consistent with the requirements of 6 NYCRR part 603 (see id. at 8). The ALJ concluded that a reasonable period in which to commence a proceeding authorized by section 24-360 of the Administrative Code, title 9 of article 15 of the Environmental Conservation Law, and 6 NYCRR part 603, is one year from the date the Board implements a change to the upstate rate (see 2006 Ruling, at 12). After that time, the ALJ held that "the doctrine of laches may be applied because the undue delay would result in prejudice to the Board" (see id.). Accordingly, the ALJ determined that the Upstate Communities were barred from challenging the water rates implemented from July 1, 2000 through July 1, 2003.

The ALJ established that any appeals from the 2006 Ruling must be filed no later than the close of business on February 17, 2006 (see id., at 14). No appeals were filed. On December 8, 2008, the ALJ issued a ruling in the proceeding concerning the water rate effective on July 1, 2004 ("2008 Ruling"). In an appeal of the 2008 Ruling, Upstate Communities requested that its appeal from the ruling "on the 1996-1999 review petitions be preserved" (Appeal of the Upstate Communities, December 8, 2008, at 12). Upstate Communities made no similar request with respect to the 2000-2003 time period. In fact, Upstate Communities have never filed any petitions with respect to the water rates implemented on July 1, 2000 through July 1, 2003 in accordance with the requirements of 6 NYCRR part 603, nor has any other upstate water user. Accordingly, no pending proceedings exist with respect to the rate periods from July 1, 2000 through July 1, 2003.

Because of apparent confusion in the record over the appeal period applicable to the challenges to the water rates established on July 1 from 1996 through 1999, the 2010 Interim Decision granted the opportunity for an additional appeal period relating to the petitions challenging those rates (see 2010 Interim Decision, at 14). The 2010 Interim Decision, however, did not authorize any additional appeal period relating to the 2000-2003 rate years.

As the Board correctly asserts, the 2010 Interim Decision established the parameters of what additional appeals would be allowed, and was based on the specific relief that Upstate Communities previously requested (see Board response, at 11). Upstate Communities had the right to appeal from the 2006 Ruling with respect to its determinations relating to the 2000-2003 rate time periods. Upstate Communities failed to do so in a timely fashion and made no request to have that matter preserved. It is essential for the administrative process that appeals are timely raised, and in accordance with the applicable regulatory requirements. The failure to adhere to applicable procedures is prejudicial to other parties in a proceeding.

The appeal of the Upstate Communities, with respect to the 2000-2003 rate periods, is untimely and unauthorized, and shall not be entertained. Accordingly, I do not need to reach the arguments of Upstate Communities relating to the applicability of section 1045-g of the Public Authorities Law to water rate proceedings. However, even assuming that the appeal with respect to the 2000-2003 rate periods could be entertained, which it is not, I would concur with the ALJ that section 1045-g of the Public Authorities Law does not apply to water rate proceedings authorized by Administrative Code § 24-360, ECL article 15, title 9, and 6 NYCRR part 603, and that a reasonable time to commence such a proceeding is one year from the date the Board implements a change to the upstate water rate (see 2006 Ruling, at 12).

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To the extent that Upstate Communities have raised other arguments on their appeal, these have been considered and found to be lacking in merit. Accordingly, the appeal of Upstate Communities is rejected and the ruling of the ALJ dated January 13, 2006 is affirmed.

For the New York State Department
of Environmental Conservation

By: /s/
Joseph J. Martens
Acting Commissioner

Dated: Albany, New York
February 14, 2011