

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION                    )  
OF THE ARTESIAN WATER COMPANY, INC.,            )  
FOR AUTHORITY TO INCREASE RATES                ) PSC Docket No. 14-132  
AND CHARGES FOR WATER SERVICE                 )  
(Filed April 11, 2014)                            )

ORDER NO. 8704

**ADMITTING DPA'S IN-HEARING DATA REQUEST INTO THE RECORD, DENYING  
ARTESIAN'S MOTION TO SUPPLEMENT THE RECORD, AND CLOSING THE RECORD.**

**AND NOW**, this 2<sup>nd</sup> day of February, 2015:

**WHEREAS**, pursuant to PSC Order No. 8558, dated May 13, 2014, the Commission designated me as Hearing Examiner to conduct the evidentiary hearings in this Docket, and required me to thereafter report to the Commission my proposed Findings and Recommendations;

**WHEREAS**, on January 8, 2015, Artesian Water Company, Inc. ("Artesian") filed a Motion To Supplement The Record ("The Motion") to have admitted as a sealed exhibit designated Exhibit 92 a confidential Compensation Study that was performed in 2013, together with the invoices reflecting its cost;

**WHEREAS**, the Public Advocate and Staff filed a Response to the Motion on January 16, 2015;

**WHEREAS**, I permitted Artesian to file a Reply to the Response filed by Staff and the DPS, which Artesian did on January 21, 2015;

**WHEREAS**, I permitted the Public Advocate and Staff to file a Reply to Artesian's Response, which was filed on January 22, 2015;

**WHEREAS**, at the evidentiary hearing, I granted the DPA's In-Hearing Data Request for the hourly rate of Artesian's three (3) attorneys in this Docket, which rate information was provided post-hearing, and by email on December 22, 2014, the DPA sought that it be admitted into the record, and the DPA also sought that I close the record;

**WHEREAS**, pursuant to the authority granted to me in PSC Order No. 8558, having considered the above-described pleadings, Commission precedent, and Delaware law, I hereby find as follows:

**NOW, THEREFORE,**

1. Artesian's Motion to Supplement the Record is denied. The 2013 Compensation study and invoices reflecting its cost shall not be admitted to the record as Exhibit 92. However, the Employee Compensation Study alone shall be marked as Exhibit 92. Because of its highly sensitive nature, Exhibit 92 is hereby sealed, with its distribution limited to Artesian Water's counsel, the Public Advocate, Staff and the Commission.

2. Artesian's Responses to the DPA's In-Hearing Data Request No. DPA-IH-1, DPA-IH-2 and DPA-IH-3 seeking the hourly rate of each Artesian's three (3) attorneys in this Docket, are admitted into record as Exhibit 93.

3. The record in this Docket is now closed.

**PROCEDURAL BACKGROUND**

4. Artesian filed this water case on April 11, 2014. I presided over a two (2) day evidentiary hearing on December 8 and 9, 2014.

5. Although I generally close the evidentiary record at the end of the last day of hearings, in this Docket, I kept the record open for two (2) reasons:

- a. An In-Hearing Data Request by the DPA to Artesian, with Artesian's three (3) Counsel present, for the hourly rate of each Counsel in this Docket; and
- b. Receipt of complete, un-redacted attorney's fees, consulting and court reporter costs for the Chester Water Authority litigation filed by Artesian. (Tr. 382, 814-19.)
- c. Post-Hearing, Artesian sought to supplement the record with a 2013 Employee study, together with the invoices reflecting its cost. Only (a) (The In-Hearing Data Request) and (c) (The Employee Compensation Study) discussed above are at issue now because the parties resolved (b) above.

**DISCUSSION**

6. **The DPA's In-Hearing Data Request.** Rate case expenses for any large utility including Artesian are always substantial. In this case, a number of estimates, and their computation, have been proffered by the parties. After briefing, whether the Commission

eventually accepts the Company's estimate, Staff's estimate or the DPA's estimate, a substantial amount of money borne by ratepayers is clearly involved.

7. At the evidentiary hearing, the DPA requested the hourly rates for the three (3) attorney's representing Artesian. The hearing transcript for December 8, 2014 states as follows:

**BY MS. IORII:**

Q. Mr. Spacht, do you recognize this document?

A. Yes, I do.

Q. And do you adopt this response or data request response as your own?

A. Yes.

Q. And it's true and correct to the best of your knowledge, information and belief?

A. Yes

Q. I would like to talk a little, or, actually, a lot about rate case expense. How many lawyers are present at this hearing on behalf of Artesian?

A. Three.

Q. How much per hour is Mr. Houghton charging Artesian for its services in this case?

A. I don't have that in front of me right now.

MS. IORII: Your Honor, I would like to make an on-the-record request for that information.

HEARING EXAMINER LAWRENCE: Granted.

BY MS. IORRII:

Q. How much is Mr. Scaggs charging Artesian for his services in this case?

A. Same comment. I don't have it in front of me.

MS. IORII: I'd like to make an on-the-record request for that information.

HEARING EXAMINER LAWRENCE: Granted.

BY MS. IORRII:

Q. How much is Mr. Randall charging Artesian for his services in this case?

A. I don't have it in front of me.

MS. IORII: I'd like to make an on-the-record request for that information.

HEARING EXAMINER LAWRENCE: Granted. (TR. 425-27.)

On the following day, December 9, the DPA renewed its request for the attorneys' rate information. The hearing transcript provides as follows:

MS. IORII: Your Honor, yesterday during the cross examination of Mr. Spacht, I made an on-the-record data request for the hourly billables, the hourly rates of the three outside Counsel that Artesian has had at the hearings. And Your Honor granted all three of those requests.

I would think that would have been a fairly easy thing to get me an answer to by today, but I have not received an answer.

HEARING EXAMINER LAWRENCE: Okay. So, we're going to have to receive responses to that. Well, one response to that request, which lists the three hourly attorney rates.

I did see Mr. Houghton's rates in the Chester Water Authority, but that is a different matter. This is a different case.

MR. SPACHT: That was Saul Ewing. I'm sorry.

HEARING EXAMINER LAWRENCE: Can that be sent to everyone by Friday?

MR. SCAGGS: Yes, it can. (TR. 814-15.)

8. My practice is that I permit In-Hearing Data Requests for important information which is easily attainable so that the Commission can have a complete evidentiary record to rely upon in making its final decision. I have permitted utilities, Staff and DPA to issue them in other rate cases, where the circumstances permit. Hearing Examiners before me also used In-Hearing Data Requests.

9. The DPA asked the question about attorney's hourly rates to David Spacht, Artesian's Chief Financial Officer since 1992, while all three (3) attorneys were present. (Id.) Assuming Mr. Spacht did not know the exact rates as he stated, I have to assume, based upon his extensive experience, that Mr. Spacht could "ballpark" the rates, the three (3) attorneys in the room knew which rates they were then charging. (Id.) Again, this was information important for the Commission's final decision and easily accessible.

10. As the hearing transcript reflects, I permitted this hourly rate issue to be addressed post-hearing because Artesian and the DPA attempted in the hearing to reach an agreement as to attorney's fees. (TR. 431-40, 814-15.) Moreover, knowing attorney fee agreements often change, I wanted to give Artesian - and its Counsel - adequate time to provide an accurate answer all could live with. I did want an In-Hearing Data Request compromising the attorneys' compensation. Like Staff's Counsel and the DPA's Counsel, each of Artesian's lawyers in this case has done a very good job representing their respective clients.

11. In any event, at the hearing, I granted the DPA's In-Hearing Data Request requesting the hourly rate of Artesian's three

(3) attorneys. I now admit the attorneys' confidential responses as Exhibit 93.

12. **Artesian's Motion to Supplement the Record.** Artesian's Motion to Supplement the Record is much different from the DPA's In-Hearing Data Request. I deny Artesian's Motion because it does not comply with Commission precedent or Delaware law, and would set a poor precedent for future rate cases. Before addressing why Artesian's Motion lacks merit, however, I must discuss the background of this case and the Motion.

13. Artesian filed this case on April 11, 2014. Between that date and the evidentiary hearings on December 8 and 9, approximately eight (8) months transpired. I issued a Procedural schedule which the parties agreed upon, and the parties conducted substantial discovery.

14. On January 8, 2015, one (1) month after the evidentiary hearings, Artesian filed its Motion to Supplement the Record with a 2013 Employee Compensation Study, together with the invoices reflecting the cost of \$97,000. (Motion, ¶¶ 5, 6.)

15. It is undisputed that, although the 2013 Employee Compensation Study and invoices were produced to the DPA and Staff during discovery, Artesian did not seek to admit the 2013 study and invoices at the hearing, although Artesian did admit a 2008 study which, according to Artesian, cost \$36,000. (Motion, ¶¶¶ 2, 3, 5, Response ¶ 16.)

16. Moreover, neither the DPA nor Staff has argued yet that, if the 2013 Employee Compensation Study and invoices is excluded from the record, then Artesian cannot be compensated for it. (Sur - Reply, ¶

5.) Artesian states that "the testimony in the record correctly states the amount of expense uncured in the 2013 study" and "[i]t is not, and has never been, necessary for all documents related to every expense to be in the hearing record." (Reply, ¶ 1, inc. fn. 1.)

17. The DPA and Staff strongly maintain that, based upon Commission precedent and Delaware law, Artesian should not be permitted to belatedly admit these documents into the record. The DPA and Staff argue as follows:

"2. Artesian has cited no legal authority to support its Motion and has not distinguished the legal authority cited by Staff and the DPA. Instead, it only reiterates what we have already acknowledged: that court rules do not bind the Commission. Tellingly, it also did not address this Commission's denial of a request to reopen the record that we submitted as legal support for our arguments. See *In the Matter of the Application of Artesian Water Company, Inc. for a Revision in Water Rates*, PSC Docket No. 08-96, Hearing Examiner's Letter Decision dated April 29, 2009 at 9-10 (Exhibit C to our opposing papers). Rather, it merely complains that it mistakenly neglected to introduce the document into evidence and then attacks Staff and the DPA for not agreeing to let it do so now."

18. In PSC Docket No. 08-96, which also involved Artesian, Artesian successfully prevented Staff from opening the record to address the costs associated with the Company's proposal to charge from quarterly to monthly billing and to address tariff changes. (Response, ¶ 17; inc. Exh. C.)

19. In Docket No. 08-96, Artesian objected to Staff's Motion to Open the Record according to Senior Hearing Examiner Price, who recommended that the Docket remain closed as requested by Artesian:

"[Artesian's Counsel] Mr. Scaggs asserted that this proposal was not a surprise to Staff because the proposal, and the resulting cost effects, were plainly stated in the Company's original application. Artesian argued that Staff had "ample opportunity to investigate the impact of monthly billing on the Company's billing methodology during the nearly five months of discovery in this case, and the Parties to this proceeding did propound discovery on the Company's monthly billing proposal." Appendix B at 3. Artesian noted that it provided Staff and the other parties an internal memorandum outlining the Company's reasons for the move from quarterly to monthly billing. Appendix B at 3. Further, Mr. Scaggs noted that neither Staff nor the Intervenors contested the proposal. Artesian observed that Staff's expert, Mr. Frank Radigan, opined that the Company's proposed rate structure is reasonable and will "give the customer the price signal to conserve". See Appendix B at Hearing Ex. 18 at p. 9 (Pages 8-10 of Mr. Radigan's testimony is attached to Appendix B as Exhibit C.)" (Response, Exh. C, p. 3.)

20. In her letter ruling, Senior Hearing Examiner Price also found that:

The above time-line convincingly demonstrates that Staff had more than five months to propound additional discovery on the Company's proposal to implement monthly billing. Further, it had at least seven (7) months before the evidentiary hearing to raise any problems it had with the proposal. Moreover, after discovery, Staff's expert concluded that the Company's proposal to implement monthly billing was reasonable.

While the facts do not support Staff's requested relief on this issue, neither does the law. In its response to this request, Artesian cited the decision of the Hearing Examiner in PSC Docket No. 01-194. In *re Delmarva Power & Light Co.*, HE Report at ¶ 54, adopted by the Commission in Order No. 5941 at ¶ 19 ("A party who raises procedural problems needs to do so when such problems may be corrected or else suffer the consequences of having its silence deemed consent to the procedures.") (See Excerpts at Appendix B,

Exhibit D. )It is well-settled in this jurisdiction that a party who fails to timely raise an objection to opening the record to conduct discovery waives the objection. Most importantly, Staff has no credible reason for failing to make this request earlier. Staff's request to reopen the record for discovery at this stage is long past and waived. (Response, Exh. C., p. 9.)

21. Additionally, in its Response in this Docket, DPA and Staff persuasively rely upon Delaware law in arguing that Artesian's belated Motion to Supplement the Record must be denied. According to the DPA and Staff:

"20. The Delaware Court of Chancery has identified certain relevant factors by which it reviews motions to supplement the record with new evidence. These factors include the following:

- (1) Whether the party learned of the evidence since the trial;
- (2) Whether the party could have discovered the evidence for use at trial through the exercise of reasonable diligence;
- (3) Whether the evidence is so material and relevant that it will likely change the outcome;
- (4) Whether the party has sought timely consideration of the new evidence;
- (5) Whether the opposing parties would suffer undue prejudice; and
- (6) Consideration of judicial economy.

*See Pope Investments LLC v. Benda Pharmaceutical, Inc.*, 2010 WL 3075296, at \*1 (Del. Ch. July 26, 2010); *Carlson v. Hallinan*, 925 A.2d 506, 519-520 (Del. Ch. 2006) (citing *Daniel D. Rappa, Inc. v. Hanson*, 209 A.2d 163, 166 (Del. 1965.)) (footnote omitted) (Response, ¶ 20.)

22. As opposed to discussing the DPA's and Staff's lengthy response which I agree with, below I briefly give their responses to the six (6) issues listed above:

- (1) Not satisfied because Artesian knew of the evidence pre-hearing;
- (2) Not satisfied by Artesian;
- (3) Evidence is not material because it only comprises approximately \$15,000 of the Company's revenue requirement;
- (4) This is not "new evidence" because Artesian possessed this evidence all along - admitting late evidence is not favored;
- (5) DPA and Staff are prejudiced because they cannot examine a Company witness; also DPA and Staff have large work demands due to proposed Exelon/PHI merger; and
- (6) Another day of hearings with witness(es), rebuttal witnesses, Counsel, the Hearing Examiner and the court reporter is wasteful.

23. I also find that, because Artesian does not meet any of these factors, Artesian's Motion to Supplement the Record must be denied and the record is now closed.<sup>1</sup>

/s/ Mark Lawrence  
Mark Lawrence  
Senior Hearing Examiner

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<sup>1</sup> By closing the record, this is notice to the parties that I will review their treatment of interest rates in their post-hearing Briefs.