

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION	)	
OF SUEZ WATER DELAWARE INC.	)	
CONCERNING THE SEMI ANNUAL	)	
ADJUSTMENT TO THE DISTRIBUTION	)	PSC DOCKET NO. 18-0899
SYSTEM IMPROVEMENT CHARGE (“DSIC”))	)	
EFFECTIVE JULY 1, 2018 PURSUANT TO	)	
26 DEL. C. §314(b)(5) (Filed June 5, 2018)	)	

**THE DIVISION OF THE PUBLIC ADVOCATE’S OPPOSITION TO SUEZ WATER
DELAWARE, INC.’S MOTION FOR RECONSIDERATION**

The Division of the Public Advocate (“DPA”) hereby opposes the Motion of Suez Water Delaware, Inc. (“Suez”) for Reconsideration of the Public Service Commission Staff’s (“Staff”) rejection of Suez’s untimely-filed application to amend its semi-annual Distribution System Improvement Charge (“DSIC”), and states as follows:

BACKGROUND

1. In 2001, the Delaware General Assembly enacted 26 *Del. C.* §314, which authorized public water utilities regulated by the Delaware Public Service Commission (“Commission”) to file rate schedules on a semi-annual basis establishing a DSIC rate to allow an automatic adjustment of that utility’s basic rates and charges. Specifically, Section 314(b) provides:

Notwithstanding any other provision of this subchapter, a public utility providing water service *may* file with the Commission rate schedules establishing a DSIC rate that will allow for the automatic adjustment of the public water utility’s basic rates and charges to provide recovery of DSIC costs on a semi-annual basis.

26 *Del. C.* §314(b) (emphasis added).

2. Section 314(b) continues on to establish the effective date of DSIC rate changes and, importantly, when the public water utility must file its request with the Commission:

- (3) The effective date of changes in the DSIC rate *shall* be January 1 and July 1 every year.
- (4) The public water utility *shall* file any request for a change in the DSIC rate and supporting data with the Commission *at least 30 days prior* to its effective date.

Id. §314(b)(3), (4) (emphasis added). Finally, the statute authorized the Commission to adopt rules and regulations “not inconsistent with this title” to administer a DSIC. *Id.* §314(d).

3. In 2012, after the General Assembly enacted a statute allowing electric and natural gas utilities to make semi-annual applications for costs incurred in complying with governmental requests to relocate utility facilities, the Commission adopted regulations to implement both the DSIC statute and the Utility Facility Relocation Charge. Section 1009.2.1 specifically states that “[a] utility may initiate or seek a change in its DSIC ... rate by filing an application and supporting schedules as required by these Regulations with the Commission to be effective on January 1st or July 1st of each year,” and that any such application “*shall* be filed with the Commission *at least 30 days prior* to the effective date.” 26 *Del. Admin. C.* §1009.2.1 (emphasis added).

4. Clearly, both the DSIC statute and the Commission’s regulations implementing it require a water utility that seeks to implement a new or changed DSIC rate to file its application with the Commission at least 30 days prior to either a January 1 or a July 1 effective date.

5. Suez and its predecessor companies have filed DSIC applications since the DSIC statute was enacted in 2001. *See, e.g.*, Docket Nos. 12-540, filed on November 30, 2012 (United Water);¹ 13-216, filed on May 29, 2013 (United Water); 13-472, filed on November 26, 2013 (United Water); 14-192, filed on May 29, 2014 (United Water); 14-0537, filed on November 25, 2014 (United Water); 17-0370, filed on May 25, 2017 (Suez); 17-1158, filed on November 27,

¹ United Water was Suez’ predecessor company.

2017 (Suez). According to the Commission's records on Delafile, it did not file DSIC applications in 2016.²

6. If Suez were going to request a change in its DSIC rate to become effective on July 1, 2018, it was required to file its application on or before May 31, 2018.

7. On June 5, 2018, Suez filed an application to increase its DSIC rate from 2.33% to 3.41% effective July 1, 2018. (Exhibit A to Suez Motion for Reconsideration).

8. By letter dated June 12, 2018, the Commission Secretary notified Suez that its application had been rejected for its failure to file at least 30 days prior to the July 1, 2018 effective date, in violation of 26 *Del. C.* §314(b)(4) and 26 *Del. Admin. C.* §1009.2.1. (Exhibit B to Suez Motion for Reconsideration).

SUEZ'S MOTION FOR RECONSIDERATION

9. Suez acknowledges that it filed its application late. (Motion at ¶4). It claims, however, that its failure to file its application timely was "a result of recent staffing changes." (*Id.*). Although it purports to recognize the need for the 30-day period between filing the application and a new DSIC rate becoming effective, it nevertheless requests the Commission to grant it "a limited, one-time exception" to the statutory and administrative requirements that the application be filed at least 30 days prior to the effective date; allow it to implement the new DSIC rate effective September 1, 2018; and create a truncated DSIC period from September 1, 2018 through January 1, 2019 (*Id.* at ¶¶5-6). It asserts that its proposal will neither prejudice any party's rights nor prejudice its customers, but it will be harmed by not being permitted to "timely recover its allowable return on the eligible investments "it made from November 1, 2017 through April 30,

² Dockets were identified by a Delafile search on July 2, 2018.

2018. (*Id.* at ¶9). Notably, its motion is bereft of any case law or other authority supporting its request.

ARGUMENT

A. Suez's Request Should Be Denied.

10. The DPA wants to make clear that it is not opposing Suez's request because it doesn't like Suez or because it wants to be difficult. The DPA is sympathetic to Suez's position; if there were no statutory or administrative requirements explicitly addressing deadlines and effective periods, the DPA probably would not object. But there *are* statutory and administrative requirements explicitly addressing effective dates and filing deadlines, and the DPA is opposing the request because Suez did not comply with those statutory and administrative requirements.

11. The Commission is bound by statutory provisions, and is required to interpret those statutes in a manner that effects the General Assembly's intent. And the General Assembly's intent could not be clearer. The applicable semi-annual recovery periods are those that begin on January 1 and July 1, and none other. And a utility seeking a timely return on eligible investments is required to file its application for recovery at least 30 days before the applicable effective date, which is either January 1 or July 1. Nothing in the statute or the Commission's regulations authorizes the Commission to ignore the law or waive its requirements simply because no one will be prejudiced. Suez's motion for reconsideration must be denied.

1. The Commission Is Required to Effect the General Assembly's Intent, And the General Assembly Clearly Intended the Effective Dates and Filing Deadlines to Be Mandatory.

12. In interpreting a statute, the Commission must give effect to the General Assembly's intent as expressed in the language used. *Zambrana v. State*, 118 A.3d 775, 776 (Del. 2015); *Terex Corp. v. Southern Track & Pump, Inc.*, 117 A.2d 537, 543 (Del. 2015); *Dambro v.*

Meyer, 974 A.2d 121, 129-30 (Del. 2009). The Commission has no authority to vary the terms of a statute or ignore its mandatory provisions. *Zambrana*, *supra* at 776.

13. The General Assembly used the word “shall” in both subsections 314(d)(3) (establishing the effective dates for the semi-annual recovery periods) and 314(d)(4) (establishing when the applications for recovery must be filed). Generally, use of the word “shall” connotes a mandatory requirement (although use of that term does not control the question of legislative intent if the full statute suggests a different construction). *In re Adoption of Swanson*, 623 A.2d 1095, 1097 n.4 (Del. 1993); *Miller v. Spicer*, 602 A.2d 605, 65, 67 (Del. 1991).

14. Here, the full statute does not suggest a different construction; indeed, it supports the interpretation that subsections 314(b)(3) and (b)(4) are mandatory. In the introductory portion of Section 314(b), the General Assembly stated that a public water utility *may* file for a DSIC rate. In subsections 314(b)(3) and (b)(4), however, the General Assembly used the word “*shall*.” The General Assembly is presumed to have inserted every provision in a statute for some purpose, and when the General Assembly uses different terms in a different part of the statute, it is reasonable to assume that it intended a distinction between the terms. *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012); *Colonial Ins. Co. of Wisconsin v. Ayers*, 772 A.2d 177, 181 (Del. 2001).

15. “Shall” is a different term than “may.” Reading the two together, it is clear that the General Assembly intended that: (1) water utilities can (but are not required to) file applications to impose or change a DSIC rate; (2) the effective dates for DSIC recovery were January 1 and July 1, and *only* January 1 and July 1; and (3) a utility seeking DSIC file its application 30 days *before* the effective date of January 1 or July 1, and not some date thereafter.

16. If the Commission accepts Suez's position, it will be ignoring 26 Del. C. §§314(b)(3) and (b)(4)'s mandatory provisions. This it cannot do. The DPA respectfully requests the Commission to deny Suez's motion.

2. The Commission Cannot Waive the Provisions of 26 Del. C. §314(b).

17. Suez asks for a limited one-time waiver of the mandatory filing deadline and effective dates in Section 314(b). The DSIC statute does not contain any provision authorizing the Commission to waive the mandatory filing and effective dates in subsections 314(b)(3) and (b)(4), however. Contrast this lack of authority with the express authority that the General Assembly gave the Commission to extend deadlines in other parts of the Public Utilities Act: 26 Del. C. §§201(c)(3) (authorizing Commission to extend period for approval or disapproval of telecommunication utilities' applications for deregulation); 201(e)(3) (authorizing Commission to extend period for approval or disapproval of public utility requesting deregulation of a public utility product or service); 203A(c)(5) (authorizing Commission to extend period for making a decision on an application to abandon public utility service for good cause); 203C(h)(1) (authorizing Commission to extend deadline for deciding water utility CPCN applications for good cause shown and if public interest requires); 203D(g)(1) (same as above for wastewater utility CPCN applications); 203E(c) (same as above for electric transmission utilities); 301(c) (for good cause, Commission had authority to extend deadline for completing review of wastewater utilities' initial rate applications after they became subject to Commission jurisdiction); 304(a) (granting Commission authority to waive 60-day notice of proposed rate change for good cause shown).

18. The Commission has only the powers that the General Assembly has granted it. *Public Service Commission v. Diamond State Telephone Co.*, 468 A.2d 1285, 1300 (Del. 1983) (because Commission is creature of legislature, its powers are limited to those conferred by the

legislature); *Eastern Shore Nat. Gas Co. v. Public Service Commission*, 635 A.2d 1273, 1277 (Del. Super. 1993), *aff'd*, 637 A.2d 10 (Del. 1994), *overruled on other grounds*, *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999). Had the General Assembly wanted to give the Commission authority to waive the mandatory effective and filing date provisions of Section 314(b), it could easily have done so. The General Assembly knew how to provide that authority; indeed, it provided authority to the Commission to extend deadlines in several other statutes within the Public Utilities Act. That it did not do so in Section 314(b) is a clear statement that its omission of such language was deliberate and it did not intend to give the Commission that authority. Were the Commission to grant Suez's motion, it would improperly engraft language into Section 314(b) that the General Assembly did not include. See *Humm v. Aetna Casualty & Sur. Co.*, 656 A.2d 712, 715 (Del. 1995); *Swanson*, *supra* at 1097. Thus, because the Commission cannot grant Suez the relief it seeks, it must deny Suez' motion.

3. Allowing Suez to Recover Its As-Filed DSIC Rate Effective September 1, 2018 Would Be Retroactive Ratemaking.

19. Finally, Suez requests to implement its as-filed rate on September 1, 2018. (Motion at ¶7). The deadline for filing its application was May 31, 2018. If the Commission decides (in contravention of the statutory mandate and its own regulations) to allow Suez's petition with an effective date of September 1, 2018, but includes all of the allegedly DSIC-eligible pre-September 1, 2018 investment, it will be engaging in impermissible retroactive ratemaking.

20. The prohibition against retroactive ratemaking reflects the fundamental principle that rates are set prospectively and may not be designed to recoup past losses. *In the Matter of the Application of United Water Delaware Inc. for Approval of Accounting Treatment to Defer an Extraordinary Industrial Revenue Loss*, Docket No. 10-171, Order No. 7838 (Sept. 21, 2010) at

¶10, citing *Public Service Commission v. Diamond State Telephone Co.*, 468 A.2d 1285, 1298 (Del. 1983). As the Commission has previously observed:

In setting prospective rates, the “normal ratemaking method followed is one which equates revenue requirement (or cost of service) with the total of: operating expenses, depreciation, taxes, and a reasonable rate of return allowance on the utility’s investment in rate base. The rates set afford a utility a “reasonable prospective opportunity to meet the revenue requirement developed from this regulatory equation.

Like most jurisdictions, rates in Delaware are based upon a “test period” level of revenue and operating expenses, which may be adjusted for certain known and measurable changes. Under our regulations, a “test period” is a period consisting of “twelve months ending at the end of a reporting quarter utilized by the utility to support its request for relief.” Major utilities, such as United, may choose an historic test period or partially projected (up to nine months projected) test period. In either case, comparing revenues and expenses from the same period is crucial, as it ensures adherence to the matching principle – that “the relationship of rate base, revenues and expenses be within the same time frame when we are setting just and reasonable rates for the future.

Retroactive ratemaking runs counter to these fundamental principles because it seeks the imposition on future rates of a surcharge to recover a utility’s past losses from past services. Thus, for example, in the *Artesian* case, we held that the prohibition against retroactive ratemaking barred Artesian from recovering the difference between its actual rate case expense and what was estimated in its previous rate case. We noted that the “rate setting process provides no guarantee that a utility will recover all of its actual expenses from ratepayers.” As the Commission explained, the “proposition that a utility should recover on a dollar-for-dollar basis each and every expense misses the test year/test period process and conflicts with the fundamental prohibition against retroactive ratemaking in Delaware.”

Id. at ¶¶11-13 (internal citations omitted).

21. If we understand Suez’s request correctly, Suez seeks to earn a return on the investments it made between November 1, 2017 and August 31, 2018, even though its application would only become effective on September 1, 2018. The DPA objects to this request for retroactive ratemaking.

CONCLUSION

22. 26 Del. C. §§314(b)(3) and (b)(4) are clear. The applicable semi-annual DSIC recovery periods are those that begin on January 1 and July 1, and none other. And a utility seeking a timely return on DSIC-eligible investments is required to file its application for recovery at least 30 days before the applicable effective date, which is either January 1 or July 1. The Commission cannot waive those mandatory statutory provisions.

23. The DPA acknowledges that this is a harsh result for a 5-day lag in filing. But the fact is that the fault is Suez's, not this Commission's. Suez and the Commission are both bound by the intent of subsections 314(b)(3) and (b)(4) as expressed in their clear and unambiguous language. The DPA does not believe that the Commission can take actions that exceed the authority the Public Utilities Act gives it, and that its own regulations would seem to forbid. Nor should this Commission engage in impermissible retroactive ratemaking.

WHEREFORE, the Division of the Public Advocate respectfully requests the Commission to deny Suez Water Delaware, Inc.'s Motion for Reconsideration.

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Dated: July 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, I caused the attached DIVISION OF THE PUBLIC ADVOCATE’S OPPOSITION TO SUEZ WATER DELAWARE, INC.’S MOTION FOR RECONSIDERATION to be served on the following persons by electronic mail and to be filed with the Public Service Commission using Delafile.

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