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May 31, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

In re: Docket No. R-2017-2624240, *et al.*
Pa. P.U.C., *et al.* v. The Newtown Artesian Water Company

Dear Secretary Chiavetta:

We are counsel to The Newtown Artesian Water Company in the above matter and are submitting, via electronic filing with this letter, the Company's Reply Brief on Remand. Copies of the Reply Brief on Remand are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Thomas T. Niesen

cc: Certificate of Service (w/encl.)
Brenden E. Brett, Esquire (via email, w/encl.)

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Deputy Chief Administrative Law Judge
Christopher P. Pell, Presiding**

Pennsylvania Public Utility Commission	:	Docket No. R-2017-2624240
Office of Consumer Advocate	:	Docket No. C-2017-2626954
	:	
v.	:	
	:	
The Newtown Artesian Water Company	:	

**REPLY BRIEF ON REMAND OF
THE NEWTOWN ARTESIAN WATER COMPANY**

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Dated: May 31, 2018

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I. STATEMENT OF THE CASE

A. Introduction

This proceeding concerns The Newtown Artesian Water Company's ("NAWC" or "Company") Supplement No. 126 to Tariff Water – Pa.P.U.C. No. 9 ("Supplement No. 126"). NAWC presented a procedural history of the proceeding in Section I.A of its Main Brief on Remand, which we incorporate herein by reference.

On May 25, 2018, NAWC filed a Main Brief on Remand addressing the limited issue on remand identified by the Public Utility Commission ("Commission") in its Opinion and Order entered April 26, 2018 ("Order entered April 26"). The Office of Consumer Advocate ("OCA") also filed a Main Brief on Remand on May 25, 2018.

NAWC submits this Reply Brief on Remand in reply and opposition to the Main Brief on Remand of the OCA and in further support of Supplement No. 126 and the Company's proposed increase of the DSIC cap to 7.5%.

NAWC's Reply Brief on Remand is supplemental to its Main Brief on Remand and is limited to those matters which require additional discussion as a result of the Main Brief on Remand filed by the OCA.

B. Burden of Proof

The Order entered April 26 remanded this matter to address the single issue of whether NAWC has exceeded its current 5% DSIC cap and will continue to exceed it, and whether this justifies the requested increase to a 7.5% cap

NAWC acknowledges that Section 315 of the Public Utility Code, 66 Pa. C.S. § 315, places the burden of proof upon it to show that its DSIC exceeds 5%, will continue to exceed 5% and that this justifies an increase in the DSIC cap to 7.5%.

As set forth herein and in its Main Brief on Remand, NAWC has met its burden.

NAWC's DSIC exceeds 5% and will continue to exceed 5%. An increase in the DSIC cap to 7.5% is supported by the evidence of record, is allowed by clear and unambiguous statutory language, is consistent with well-established Commission precedent and is just and reasonable.

II. SUMMARY OF ARGUMENT

In its Summary of Argument, the OCA contends that the “remaining issue ... is whether the Commission should waive the statutory 5 percent DSIC cap and permit NAWC to increase its DSIC cap to 7.5 percent.”¹ This, of course, is not the “remaining issue.”² The remaining issue, as directed by the Commission in its Order entered April 26, is the limited single issue of whether NAWC has exceeded its current 5% DSIC cap and will continue to exceed it, and whether this justifies the requested increase to a 7.5% cap.³

Through the limited single issue on remand, the Commission is seeking assurances that NAWC's DSIC exceeds, and will continue to exceed, 5%. NAWC has provided the sought for assurances. The evidence of record demonstrates that NAWC has exceeded the current 5% DSIC cap. NAWC's current DSIC calculation, effective May 1, 2018, is 5.48%. The substantial evidence of record also demonstrates that the DSIC will continue to exceed 5% as the Company moves forward with its Commission approved LTIP.

A DSIC cap of 7.5% is supported by the evidence of record, is allowed by clear and unambiguous statutory language, is consistent with well-established Commission precedent and is just and reasonable. In Section 1358(a)(2) of the Public Utility Code,⁴ the General Assembly capped the DSIC for water companies at 7.5%.

¹ OCA Main Brief on Remand at 3.

² Additionally, as addressed below, there is no statutory 5 percent DSIC cap for water utilities.

³ Order entered April 26, Ordering Paragraph 5, slip op. at 46.

⁴ 66 Pa. C.S. § 1358(a)(2).

Supplement No. 126 should be allowed to go into effect on August 1, 2018.

III. ARGUMENT

A. **Reply to the OCA's Contention Whether NAWC's DSIC Has Exceeded the Current Cap of 5.0%**

The OCA acknowledges that “the facts now show that NAWC exceeded the [5%] DSIC cap” in its most recent quarterly DSIC filings effective February 1, 2018 and May 1, 2018.⁵ Even with the inclusion of private fire protection service revenue, the DSIC calculations at 5.25% as of February 1 and 5.48% as of May 1 were above 5%.⁶

The February and May filings did not contain “upward adjustments” as the OCA now claims.⁷ Contrary to the OCA's contention, the filings reflected the appropriate federal tax rates based on the clear language of Section 1357(b)(1) of the Public Utility Code. The February 1 filing appropriately reflected the pre-TCJA federal tax rate. The May 1 filing was calculated using the new TCJA federal tax rate.⁸

Additionally, contrary to the OCA's contention, the Company did not upwardly adjust its February 1 and May 1 DSIC calculations by including the reconciliation factor in them. The inclusion of the prior period undercollection in the February 1 and May 1 calculations is required by Commission approved tariff language.⁹ It is incorrect, and, we submit misleading, for the OCA to attempt to characterize a required component of the Commission approved DSIC formula as an “upward adjustment.”

⁵ OCA Main Brief on Remand at 5.

⁶ NAWC St. No. 1 Remand at 3-4. The Company's DSIC related investment, effective 2/1/18, rate of 5.44% would have been 5.25% if the Company included private fire protection service customers in its determination. Similarly, the Company's DSIC related investment, effective 5/1/18, rate of 5.71 % would have been 5.48% if the Company included private fire protection service customers in its determination. *See* NAWC Main Brief on Remand at 7-8.

⁷ OCA Main Brief on Remand at 6.

⁸ NAWC St. No. 1 Remand at 4-5.

⁹ NAWC St. No. 1R Remand at 2-3.

We reviewed and addressed the calculation of the current DSIC in Section III.A of our Main Brief on Remand, including the exclusion of short term debt, the use of the actual cost of long term debt, the impact of fire protection revenue, the appropriate treatment of the new TCJA federal tax rates and the appropriate reflection of the reconciliation factor. We respectfully incorporate that discussion herein in further reply to the OCA.

In sum, the substantial evidence of record demonstrates that NAWC's DSIC is above 5%. The current DSIC calculation, effective May 1, 2018, is 5.48%, excluding short term debt, using the actual cost of long term debt, including private fire protection service and reflective of the new TCJA federal tax rate.

B. Reply to the OCA's Contention Whether NAWC's DSIC Will Continue to Exceed 5.0%

While acknowledging that NAWC's DSIC exceeds 5%, the OCA contends that the Company's arguments that it will continue to exceed a 5% DSIC rate do not support a "waiver" of the DSIC cap.¹⁰

The OCA contends, first, that the Company's projections of a continuing DSIC in excess of 5% assumes that the Company will not file a base rate case and that lengthening the rate case interval by "waiving" the DSIC cap is not consistent with the policy of the Commission or the intent of the statutory cap "waiver" provision.¹¹

We submit, in regard to the OCA's first contention, that this is not what the Commission directed the parties to address on remand. The Commission's decision remanding this matter to address a limited single issue and the recent Commission press release emphasizing the benefits of the water DSIC suggest that the Commission is inclined to allow the proposed cap increase if NAWC's DSIC exceeds 5% and will continue to exceed 5%.

¹⁰ OCA Main Brief on Remand at 7.

¹¹ OCA Main Brief on Remand at 7-8.

There is, moreover, no Commission “policy” limiting the number of years between base rate proceedings. In respect to Commission “policy,” we quote, again, from Commissioner Fitzpatrick, in 2007, when the Commission approved Pennsylvania American Water Company’s request for a 7.5% cap:

While the *policy* that utility expenditures will only be recovered in setting base rates still applies in most situations, the General Assembly has created an exception for expenditures by water utilities for distribution system infrastructure. Our decision today is consistent with the legislative intent in establishing the DSIC mechanism.¹²

Subsequent to the PAWC proceeding, the General Assembly expanded legislative intent and, through Section 1358(a)(2) of the Public Utility Code legislated a DSIC cap of 7.5% for water utilities.¹³

We submit, further, in reply to the OCA’s first contention, that there is no statutory cap “waiver” provision associated with a water DSIC of 7.5%. The statutory “waiver” provision in Section 1358(a)(1) of the Public Utility Code applies to utilities *other* than water utilities. For water utilities the statutory cap enacted by the General Assembly in Section 1358(a)(2) is 7.5%.

The OCA’s second contention criticizes the Company for bringing a project to completion under budget at a cost of \$705,000 instead of the originally projected cost of \$1,030,000. Based on the foregoing, the OCA argues that it is equally possible that the Company’s projected expenditures in other years of its LTIP will be “overstated.”¹⁴ Contrary to this contention, with a DSIC calculation presently in excess of 5%, NAWC’s calculated DSIC will continue to increase and exceed the current 5% cap as the Company continues to make

¹² *Petition of Pennsylvania-American Water Company*, Docket No. P-00062241 (Opinion and Order adopted July 11, 2007 and entered August 14, 2007, concurring statement of Commissioner Terrance J. Fitzpatrick).

¹³ Section 1358(a)(2) of the Public Utility Code, 66 Pa. C.S. § 1358(a)(2).

¹⁴ OCA Main Brief on Remand at 9.

further DSIC eligible capital improvements.¹⁵

The OCA contends, further, in regard to its second contention that the Company has the ability to file a base rate case, roll the DSIC into base rates and reset the DSIC to zero.¹⁶ This simplistic contention ignores that fact that the Company will continue to under recover the costs of its Commission approved LTIP program while the base rate case moves along from preparation and filing through statutory suspension and final Commission order. The under recovery as a result of this regulatory lag is neither just nor reasonable.¹⁷ The DSIC cap, rather, should be increased to 7.5% until the next base rate case.

In its third contention, the OCA contends that, in any quarter, the DSIC rate is subject to “adjustment” for prior period undercollections or overcollections.¹⁸ The reflection of prior period undercollections or overcollections is not an “adjustment” to the DSIC. As presented above, the reflection of prior period undercollections or overcollections in the DSIC calculation is part of the Commission approved DSIC formula.

We reviewed and addressed the continued calculation of a DSIC in excess of 5% in Section III.B of our Main Brief on Remand. We respectfully incorporate that discussion herein in further reply to the OCA. The substantial evidence of record shown on Schedule 7 of NAWC Statement No. 1, Exhibit HW-1, demonstrates that the Company’s DSIC calculation will continue to exceed the current DSIC rate cap of 5%.¹⁹

¹⁵ NAWC St. No. 1 Remand at 5-6.

¹⁶ OCA Main Brief on Remand at 9.

¹⁷ Section 1301 of the Public Utility Code, 66 Pa. C.S. § 1301, provides that all rates must be “just and reasonable.”

¹⁸ OCA Main Brief on Remand at 9.

¹⁹ As shown on Schedule 7 of NAWC Statement No. 1 Remand, Exhibit HW-1Remand, the Company’s current DSIC rate, effective May 1, 2018, of 5.48% is projected to increase to: 6.30% after the 2018 DSIC related infrastructure is completed; to 8.87% after the 2019 DSIC related infrastructure is completed; to 10.47% after the 2020 DSIC related infrastructure is completed; and to 11.49% after the 2021 DSIC related infrastructure is completed.

C. Reply to the OCA's Contention Whether the Requested Increase to a 7.5% Cap Is Justified

The Commission in its Order entered April 26 remanded this matter seeking assurances that NAWC's DSIC exceeds 5% and will continue to exceed 5%. NAWC has provided the sought for assurances and, thus, we submit that the increase of the DSIC cap to 7.5% is justified.²⁰ With the DSIC capped at 5% and a current DSIC calculation greater than 5%, NAWC is under recovering costs incurred in furtherance of its Commission approved LTIIP – costs that it could recover if the DSIC cap were increased to 7.5%.

The OCA opposes the proposed increase in the DSIC cap and contends that the Company has not demonstrated that an increase to the DSIC cap is necessary and in the public interest.²¹ We submit, however, that the increase is, in fact, necessary and in the public interest. Through Section 1350, *et seq.*, of the Public Utility Code, the General Assembly provided an additional mechanism for recovery of costs related to the repair, improvement and replacement of eligible property. The mechanism includes Commission approval of a Long Term Infrastructure Improvement Plan²² and a DSIC cap of 7.5% for water utilities.²³

With a DSIC presently in excess of 5% and continuing to be in excess of 5% and a Commission approved LTIIP with projected DSIC eligible capital expenditures of \$4,251,000, it is entirely necessary, reasonable, appropriate, justified and in the public interest to increase the DSIC cap to 7.5%. Section 1358(a)(2) contemplates a DSIC cap of 7.5% for water utilities.²⁴ This is especially so now that the Company has demonstrated that its DSIC exceeds 5% and will

²⁰ NAWC St. No. 1 Remand at 6.

²¹ OCA Main Brief on Remand at 10.

²² 66 Pa. C.S. § 1352.

²³ 66 Pa. C.S. § 1358(a)(2).

²⁴ For all other utility types, Section 1358(a)(1) provides for a DSIC cap of 5% which the Commission may upon petition waive.

continue to exceed 5%.

We would point out that Section 1301 of the Public Utility Code provides that all rates must be just and reasonable. Consistent with this statutory objective, the Company is entitled to the opportunity to earn a fair rate of return.²⁵ Under the present circumstance, the Company is being unreasonably denied the opportunity to recover the fixed costs (depreciation and pre-tax return) of completed DSIC eligible LTIP projects until they, ultimately, are reflected in base rates in the Company's next base rate case.

The Commission has approved and allowed United Water Pennsylvania Inc. ("United"),²⁶ Aqua Pennsylvania, Inc. ("Aqua")²⁷ and Pennsylvania American Water Company ("PAWC")²⁸ to increase their DSIC caps from 5.0% to 7.5%. Contrary to the contention of the OCA,²⁹ there is no basis upon which these requests of other Pennsylvania water utilities to increase their DISC cap, ultimately approved by the Commission, can continue to be distinguished from the request of NAWC to increase its DSIC cap. The evidence presented by NAWC in this remand proceeding demonstrates that NAWC's DSIC exceeds 5% and will continue to exceed 5%.

Additionally, and as set forth above in Section III.B, contrary to the further contention of the OCA,³⁰ there is no Commission "policy" limiting the number of years between base rate proceedings. As stated in 2007 by then-Commissioner Fitzpatrick, "while the *policy* that utility expenditures will only be recovered in setting base rates still applies in most situations, the

²⁵ *Bluefield Water Works and Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923).

²⁶ *Petition of United Water Pennsylvania Inc. for Approval of a Tariff Supplement to Revise its Maximum Distribution System Improvement Charge to 7.5% of Billed Revenues*, Docket No. P-2013-2389331 (Order entered December 19, 2013).

²⁷ *Pa. P.U.C., et al. v. Aqua Pennsylvania, Inc.*, Docket No. R-2008-2079310 (Opinion and Order entered July 23, 2009).

²⁸ *Petition of Pennsylvania-American Water Company*, Docket No. P-00062241 (Opinion and Order adopted July 11, 2007 and entered August 14, 2007).

²⁹ OCA Main Brief on Remand at 11.

³⁰ OCA Main Brief on Remand at 11.

General Assembly has created an exception for expenditures by water utilities for distribution system infrastructure.” That exception now provides for a maximum DSIC of 7.5% for water utilities that are pursuing a Commission approved LTIP.³¹

The OCA also contends that a further acceleration of infrastructure replacement is required to justify the proposed increase to the DSIC cap.³² This contention is contrary to the Order entered April 26. In remanding this matter to address a single limited issue, the Commission noted, citing its Order entered July 12, 2017, at Docket No. P-2017-2594725, that it has already determined that NAWC has “fulfilled the sixth of the eight elements required in an LTIP filing that the replacement of aging infrastructure is or will be accelerated.”³³ The Commission is not looking for a further acceleration of infrastructure replacement to justify the increase to the DSIC cap. The Public Utility Code, in any event, does not require a further acceleration to justify the proposed DSIC cap increase.

The OCA contends, lastly, that the Company could file a base rate case to address regulatory lag. We addressed this contention in Section III.B, *supra*, explaining that it ignores the fact that the Company will continue to under recover the costs of its Commission approved LTIP program while the base rate case moves along from preparation and filing through statutory suspension and final Commission order. The under recovery as a result of this regulatory lag is neither just nor reasonable. The DSIC cap, rather, should be increased to 7.5% until the next base rate case.

We addressed the justification for increasing the DSIC cap to 7.5% in Section III.C of our Main Brief on Remand. We respectfully incorporate that discussion herein in further reply to the

³¹ Section 1358(a)(2) of the Public Utility Code, 66 Pa. C.S. § 1358(a)(2).

³² OCA Main Brief on Remand at 11.


³³ Order entered April 26, slip op. at 35.

OCA. NAWC has a Commission approved LTIP with projected DSIC eligible capital expenditures of \$4,251,000 for 2017 through 2021, totaling approximately 41% of existing rate base. With the DSIC capped at 5% and a current DSIC calculation greater than 5%, NAWC is not recovering depreciation and pre-tax return that it would otherwise be able to recover if the DSIC cap were increased to 7.5%. It is just, reasonable and appropriate that the Company be allowed to recover these costs. NAWC submits that it has justified the proposed increase of the DSIC cap to 7.5%

IV. CONCLUSION WITH REQUESTED RELIEF

NAWC's DSIC exceeds 5% and will continue to exceed 5%. The proposed increase in the DSIC cap to 7.5% is fully justified as it is supported by the evidence of record, is allowed by clear and unambiguous statutory language, is consistent with well-established Commission precedent and is just and reasonable. The Commission should approve NAWC's Supplement No. 126 increasing the DSIC cap to 7.5% of billed revenue.

Respectfully submitted,

By  _____

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Dated: May 31, 2018

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	:	
v.	:	
	:	
The Newtown Artesian Water Company	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of May, 2018, served a true and correct copy the Reply Brief on Remand of The Newtown Artesian Water Company, upon the persons and in the manner indicated below:

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

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