

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION
CASE NO. 16-W-0259

PROCEEDING ON THE MOTION OF THE COMMISSION AS
TO THE
RATES, CHARGES, RULES AND REGULATIONS OF
NEW YORK AMERICAN WATER COMPANY, INC. FOR
WATER SERVICES

**Direct Testimony of
DAVE DENENBERG**

September 1, 2016

LI CLEAN AIR WATER AND SOIL, LTD.

1 **Background**

2 **Q-1. Please state your name, organization, title and your background.**

3 A-1. My name is Dave Denenberg. I am a founder and co-director of LI Clean Air Water
4 and Soil, Ltd. (“CAWS”), a not-for-profit organization formed on Earth Day 2016 to act as
5 stewards of our environment, protecting and preserving Long Island’s natural resources. I am
6 President of Cobra Consulting Group, LLC, consulting on environmental engineering,
7 intellectual property, real estate development, tax certiorari, and land-use matters.

8 I served 15 years on the Nassau County Legislature, representing Bellmore, Merrick, Seaford
9 and Wantagh, areas in which NYAW’s Merrick District provides water. I chaired, and was the
10 ranking member of, the Legislature’s planning, development and environment, finance and
11 public works committees. During that time, I was the main sponsor of more laws than any other
12 legislator, including a law creating a five year capital plan requirement, Nassau County’s only
13 environmental bond acts as well as several laws designed to protect our water resources and
14 open spaces.

15 I am an environmental engineer with a degree in Chemical Engineering from the Cooper Union
16 and a law degree from Brooklyn Law School. I worked as an engineer and/or attorney in the
17 environmental services and intellectual property fields for 30 years and am currently President
18 of Cobra Consulting Group, LLC, a Long Island based consulting firm specializing in these
19 fields, as well as other fields, as noted above.

20 **Q-2. What is the purpose of your testimony in this case?**

21 A-2. The purpose of my testimony is to oppose this rate increase.

1 **Q.3. What is the basis for your opposition?**

2 A-3. Obviously, there are numerous reasons why I oppose this rate increase as well as
3 previous rate increases. My opposition is based upon my 15 years of public service as a Nassau
4 Legislator representing a district which was predominantly served by NYAW, but which also
5 had residents on public water such as Freeport Water and Hempstead Water; 30 years
6 experience in environmental services as an engineer and attorney with particular expertise in
7 water contamination and remediation; 30 years of paying taxes on Long Island and over 25
8 years of paying for water from NYAW and its predecessors. Therefore, I am experienced as a
9 taxpayer, ratepayer, lawmaker, environmental engineer/attorney/consultant and have specific
10 knowledge and experience in water protection, supply, remediation and contamination.

11 **Q-4. What are the grounds for your opposition?**

12 Q-4. Simple. First, NYAW rates are already too high – NYAW rates in complete
13 comparison to neighboring water districts’ rates and taxes are at least three times higher. Next,
14 NYAW’s profits do not justify another rate increase. Further, NYAW seeks full recovery of
15 infrastructure and research and development in the amount of \$4.5 million from ratepayers
16 when such capital costs and the research and development costs should be amortized over a
17 longer period of time and should also be paid by the shareholders who benefit the most from
18 such spending.

19 And there are more fundamental grounds for my opposition. The State of New York, whether
20 through its designation of authority to the Public Service Commission (“PSC”) or through the
21 basic oaths taken by its elected and appointed officials, must uphold the federal and state
22 constitutions. But, the State of New York has failed to do so. A basic tenet of the equal

1 protection clauses of each constitution is that people within a jurisdiction are entitled to equal
2 rights, which includes equal services at equal rates and at equal costs. So where the State
3 delegates a service to be provided at the local level, the local government (i.e., town or village)
4 must ensure that the service is provided equally in terms of cost and access. At the most basic
5 level, the PSC and the State fail miserably when it comes to NYAW and its rates. The State and
6 the PSC allow Nassau County, the towns of Hempstead and Oyster Bay and schools and other
7 districts to levy property taxes on NYAW and then allows NYAW to pass that tax burden onto
8 its Merrick and Lynbrook ratepayers. At the same time, water districts are exempt from
9 property taxes so town and county residents served by those districts do not pay for a property
10 tax levy on their water supplier. The result is that all Nassau County and Towns of Oyster Bay
11 and Hempstead residents benefit from the property tax levied upon NYAW, while the burden
12 of that tax falls upon those residents of the county and towns served by NYAW. The same is
13 true with respect to the school tax burden where all residents of a school district benefit from
14 NYAW's property tax levy, which is ultimately paid by NYAW ratepayers who don't even live
15 in that school district and do not get any benefit in terms of school taxes from public water
16 districts.

17 If the PSC and State recognize this clear violation of equal protection, NYAW's property tax
18 burden should be negated.

19 **Q-5. Don't ratepayers of public water districts pay a water district tax that NYAW**
20 **customers do not pay?**

21 A-5. Of course, and that is precisely our point with respect to constitutionality. Residents of
22 Nassau County on public water pay a nominal water district tax that goes to the water district

1 for maintenance and supply, including capital and administrative costs. The tax does not go to
2 Nassau County, the towns of Hempstead and Oyster Bay, any school or other district.

3 In contrast, NYAW charges for maintenance and supply, as well as its profits, in its rates and
4 must pay for property taxes separate and apart from any of these costs. The recipient
5 jurisdictions of NYAW's property tax payments utilize the receipt to benefit all its residents,
6 while the burden falls upon the few who are NYAW customers.

7 Moreover, a water district tax is fully deductible on federal and state income tax returns. While
8 NYAW may be able to deduct its property taxes, the NYAW customer who is actually paying
9 for that tax cannot deduct their water bills.

10 **Q-6. What effect does NYAW request and its property tax payments have upon local**
11 **districts?**

12 A-6. For a fire district, the problem, unequal treatment and unconstitutionality argument is
13 exacerbated.

14 Fire districts within NYAW territory pay over \$700 and even over \$800 for a fire hydrant.
15 Some of the same fire districts pay less than \$80 for a fire hydrant within a public water district.
16 It is beyond me that such a cost discrepancy is acceptable to the PSC and the State.
17 Furthermore, NYS officials proudly implemented a tax cap on all taxing jurisdictions within the
18 state. State officials, starting with the Governor, proudly and repeatedly say they implemented
19 the tax cap to protect NYS residents. So a fire district, water district, school district, village,
20 town and county can only raise their main source of revenue by 2%, or the cost of inflation,
21 which is less than 1% this year. Customers of NYAW, including fire and school districts, have
22 no such protection. How is that equal protection under the law?

1 With respect to school districts, historically, most school districts within NYAW's testimony
2 receive far less, if any, tax revenue from NYAW than districts served by public water. If this
3 clearly unconstitutional and perhaps, illegal, property tax allocation is no longer in effect,
4 CAWS requests proof and demands an accounting of the historic and current tax allocations
5 and refunds to NYAW and its customers for past improper payments. If refunds were paid, the
6 PSC must ensure the benefit goes to the NYAW customers who actually paid the tax.

7 **Q-7. If NYAW doesn't pay property taxes, won't that cause a tax increase?**

8 A-7. The savings to the NYAW customer will more than offset any tax increase to that
9 customer. Approximately 24% of the average NYAW bill is property taxes. Most NYAW
10 customers are in school districts and fire districts, which receive little benefit from NYAW's
11 tax payments and the offset in any tax increase required by the jurisdiction would be
12 exceedingly nominal and tax deductible. As to the loss of revenue to the towns and the county,
13 the burden would go to ALL county and town residents, which is precisely our constitutionality
14 argument; there is no justification for NYAW customers to be paying property taxes for their
15 private water company while other residents get the benefit of those taxes, but do not pay
16 property taxes for their public water district.

17 **Q-8. Does the State Tax Cap factor into your arguments?**

18 A-8. Of course. I refer my arguments above. In some, every state official from the Governor
19 to the Legislators, proudly tell us, usually in publicly-funded mailings, that the tax cap was
20 implemented to protect over-burdened tax payers. While that may be true, when it comes to
21 water, water district ratepayers are protected, but private water monopoly ratepayers are not
22 protected by the same law. Again, unequal protection.

1 Ironically, the fire districts are subject to this law when increasing their tax revenue, but have
2 no protection under this law if they are NYAW customers. And I can't see how the State and
3 the PSC can justify fire districts paying \$800 per hydrant to NYAW and less than \$80 per
4 hydrant to a water district.

5 **Q.9 How do municipalities fund capital improvements and compare that to NYAW?**

6 A-9. In my experience, municipalities bond or borrow for projects that have a benefit that
7 will last for several years or more. Infrastructure improvement projects such as roads, bridges,
8 sewage treatment, park facilities, etc. are examples of projects with a long-term benefit and are
9 paid through capital borrowing. The municipality bonds for the projects and pays off the bonds
10 of term of years by budgeting for the financing in its annual budget. The municipality must
11 stay within the tax cap so any large expense in any one year for a capital improvement is
12 extremely difficult unless the municipality utilizes a one-shot revenue source or a rainy-day
13 fund. Most finance professionals view capital bonding for such projects as proper and
14 appropriate.

15 NYAW is seeking reimbursement for its infrastructure projects and funding for future projects
16 directly from ratepayers over a very short period of time. Given that the infrastructure
17 improvements will last decades, this practice is inappropriate and extremely costly to
18 ratepayers. If NYAW had to pay itself, it would spread out the cost and carefully limit future
19 borrowing. Instead, by forcing ratepayers to pay for the infrastructure improvement over three
20 years, NYAW gets a long term benefit without any financing requirement and will be free to
21 add additional such projects in the near future without any long-term planning considerations.
22 In contrast, a public water district must carefully plan its capital improvements to fit within its
23 long-term debt financing projections and the tax cap.

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2 **Q.10. Please give a little history as to what transpired since Aqua's rate proposal of 2009.**

3 A-10.. As the Nassau County Legislator representing residents being served by Aqua Water, I,
4 urged the Towns of Hempstead and Oyster Bay to reconstitute the Water Authority of
5 Southeast Nassau County ("WASENC") to study the feasibility of a public acquisition of Aqua.

6 WASENC was reconstituted in January of 2010 and disbanded in January of this year. A
7 feasibility study was conducted, but it never compared apples to apples. It assumed that
8 residents would have to pay taxes to their schools, whether in their water bills or otherwise.
9 However, it didn't take into account that we were paying taxes to school districts that NYAW
10 didn't serve or that the gap in the town and county budgets would have been filled by ALL
11 residents and not levied only on those whose water was being supplied by NYAW.

12 WASENC informed us that Aqua and later NYAW were fighting the assessment on the 25
13 school districts that it didn't serve. We were told that residents would receive refunds in their
14 water bills for the overpayment of taxes to school districts that Aqua did not serve. To the best
15 of my knowledge, and by the testimony given in these proceedings, no lawsuits or tax
16 grievances were made by Aqua or NYAW for the taxes it paid to school districts it did not
17 serve.

18 If NYAW received a refund, that refund must be passed onto the NYAW customers who paid
19 the tax. If NYAW did not receive a refund, an accounting is in order. Finally, if the monies
20 were allocated to schools, such allocation must be to school districts within the NYAW service
21 area and, again, we seek an accounting.

1 **Q-11. Do you believe NYS and the PSC affected the towns' decision to dissolve**
2 **WASENC?**

3 A-11. Yes. As I stated above, the state allows the towns and Nassau County to levy property
4 taxes on NYAW and allows NYAW to pass that burden to its customers. Since the levy
5 benefits all county and town residents, but is only paid by the minority of residents within
6 NYAW's service area, the tax is unconstitutional as argued above. By allowing this practice,
7 the state created a situation where the towns of Hempstead and Oyster Bay would oppose a
8 public takeover of NYAW because of their loss of significant revenue – that is over \$12 million
9 to Nassau County and the Town of Hempstead and \$1 million to the Town of Oyster Bay. If
10 the towns weren't looking at a revenue loss, I do not believe their appointees would have
11 dragged out their "study" for over six years to accomplish literally nothing.

12 **Q.12. Shouldn't NYAW pass its research and development ("R and D") to the**
13 **ratepayers?**

14 A-12. No. In my experience, public and private companies budget for R and D, which
15 reduces profits, dividends and distributions to shareholders and principals. The benefit of R
16 and D may go to customers in the form of improved product and services, but the greater
17 benefit goes to shareholders due to increase profits. Here, any R and D project will only
18 immediately benefit a very small area and has the long-term goal of increasing profits while
19 improving NYAW's future profitability. There is no justification to pass the entire cost onto
20 customers who will not benefit as opposed to shareholders who ultimately will be the prime
21 beneficiary. Public or private companies that do not have a monopoly over a public necessity
22 could not pass all such R and D costs onto its customers – they would go out of business. **Q-13.**

1 **Q-13. Please explain your concerns regarding both customer and company-**
2 **owned lead pipes in NYAW's system.**

3 A-13. Children who are lead poisoned are 7 times more likely to drop out of
4 school and 6 times more likely to become involved in the juvenile justice system.
5 Learning disabilities that can affect children who have been lead poisoned include:
6 violent, aggressive behavior; speech delays; Attention Deficit Disorder;
7 hyperactivity; diminished IQ; hearing and memory problems; and reduced motor
8 control and balance.
9 Lead poisoning effects on adults include: 46 percent increased rate of early
10 mortality; 16 to 19 percent increased risk of cardiovascular disease; hypertension;
11 depression; reproductive problems; and complications related to osteoporosis.
12 Studies have shown that even trace amounts of lead consumed by children have
13 devastating affects.
14 Governor Cuomo recognized the problems of lead in our water and asked school
15 districts to test for lead. Lead was found in schools throughout Long Island.
16 CAWS claims that if lead was found in schools, it must also be in our homes.
17 There are strict laws regarding lead paint in our homes, but ironically, tens of
18 thousands of NYAW customers are getting their water from lead pipes and no one
19 even knows about it.
20 CAWS is concerned with the number of homes in NYAW's Long Island districts
21 that not only have company-owned lead pipes, but customer-owned lead pipes as
22 well. We are concerned with the manner in which NYAW tests homes for lead and
23 the small number and age of the sample homes that it tests for lead.
24 CAWS asks NYAW to include a more aggressive plan in its proposal to the PSC to
25 address this health risk that is prevalent in NYAW's Long Island districts.

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