

SUPPLEMENTAL WRITTEN TESTIMONY OF JOHN P. COYLE
ENERGY, UTILITIES AND TECHNOLOGY COMMITTEE
MAINE LEGISLATURE
LD 1708 PUBLIC HEARING HELD MAY 20, 2021
(MAY 27, 2021)

Senator Lawrence, Representative Berry, and Members of the Committee: My name is John P. Coyle. I presented both live and written testimony before the Committee during the May 20, 2021, public hearing on L.D. 1708. During my live testimony, Representative Berry invited me to supplement my written testimony to cover certain points I had raised in my live testimony. This is the supplement requested by Representative Berry. I will speak to three further points I discussed in my live testimony.

LD 1708 Provides Due Process of Law

A number of witnesses opposing the bill condemned it as denying Central Maine Power Company and Versant due process of law. This is inaccurate. As noted in the study performed by London Economics International, LLC, and Peter W. Brown, the Maine Supreme Court upheld the use of a referee procedure in eminent domain in *Rangeley Water Co. v. Rangeley Water Dist.*, 691 A.2d 171 (1997).

Eminent Domain Risk

Witnesses opposing the bill also spoke at length about the length and uncertainty of outcome of eminent domain proceedings, and the risk of an excessive award of condemnation damages to the incumbent public utilities. In response, I suggested that one answer to the risk of an excessive award of condemnation damages was to ensure that the incumbent utilities' weighted average cost of capital (that is, the combined cost of the utilities' debt financing and equity ownership) as the discount rate in using the capitalization of income valuation method of valuation. Doing so limits the possibility of the award of compensation in eminent domain becoming a source of what Mr. Roosevelt called in his Portland speech "arbitrary write-ups of assets and inflation of vast capital accounts." The abuses of the utility holding company system to which Mr. Roosevelt referred in his speech led Congress to declare, as a matter of policy, in Section 1(b)(1) of the Public Utility Holding Company Act of 1935 that:

. . . the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts . . .

That declaration led, in turn, to the uniform use of depreciated original cost as the basis for utility rate regulation throughout the United States. Utility assets derive their value from their ability to earn that regulated return. It is therefore entirely appropriate to ensure that the relationship between allowed return and utility asset values plays an appropriate role in the valuation of utility property in condemnation.

I would in particular invite the Committee's attention to the procedure outlined in New York Public Authority Law § 1199-eee(5) (copy attached) as a useful application of the principle that utility assets are most accurately valued in a properly conducted capitalization of income valuation. That statute, which establishes the Saratoga County Water Authority, expresses a legislative preference for the use of the capitalization of income valuation methodology in the eminent domain proceedings it authorizes, based on a certification from the New York Public Service Commission as to the actual net income it allows the utility whose property is the subject of the eminent domain proceeding. The statute further gives the public authority the opportunity to "withdraw the condemnation proceeding without prejudice or costs to any party" after judgment, if the court uses a methodology other than the capitalization of income. New York's highest court has upheld the constitutionality of this provision because it reflects "the Legislature's attempt to protect the property owner's right to just compensation by allowing [the trial court] to use methods other than income capitalization while simultaneously providing the condemnor with an avenue of escape in case of an unusually high valuation." *Saratoga Water Svcs., Inc. v. Saratoga County Water Auth.*, 83 N.Y.2d 205, 212, 630 N.E.2d 648, 651 (1994). The Committee may wish to consider a refinement to proposed 35-A M.R.S.A. § 4003(5)(B) to incorporate a similar preference in LD 1708. This would ensure that the possibility of an anomalously exaggerated condemnation award does not impose undue risks or burdens on Maine's beleaguered electricity consumers, while at the same time protecting the rights of the affected public utilities to just compensation.

Transmission Revenue Forecasts

During the May 20 hearings, Mr. Bishop of Concentric Energy Advisors offered a study performed by his firm on behalf of Central Maine Power Company that disputed the transmission revenue forecasts used by London Economics International and by Dr. Silkman in their respective analyses of the feasibility of forming a public authority to acquire the transmission assets currently owned by Maine's incumbent investor-owned utilities. Mr. Bishop's premise was that the use of a capital structure consisting primarily of low-cost debt would result in transmission rates based on that capital structure, which would be substantially lower than transmission rates based

on the equity-heavy capital structures currently used by Central Maine Power Company and Versant. This assertion is incorrect for several reasons.

First, the Federal Energy Regulatory Commission (“FERC”) – which regulates the rates and charges paid for the transmission of electric energy in interstate commerce under Section 201(b)(1) of the Federal Power Act (16 U.S.C. §§ 791a-828c (the “FPA”), § 824(b)(1)) has consistently held that “it is appropriate for a non-public utility to include a return component in the rate charged for section 211 transmission services, so long as the return is reasonable.”¹ This is because a consumer-owned utility, “like any other similar business, must provide internal funding for a portion of its expenses. The fact that the financing is funded internally rather than through the sale of common stock makes it no less of a cost.”² FERC has specifically approved the use of its Discounted Cash Flow (“DCF”) methodology as one means of establishing a just and reasonable ROE for a non-jurisdictional, consumer-owned utility.³ FERC has also amplified its early holdings on the subject of return on “equity” for consumer-owned utilities by accepting the alternative method of using of debt service coverage requirements and related cash flow requirements concepts to establish the return component of transmission rates for non-jurisdictional utilities.⁴

FERC also allows consumer-owned utilities participating in a Regional Transmission Organization (which would be the case with the Pine Tree Power Company under LD 1708) to use the return on common equity of adjacent investor-owned utilities as a “proxy” for their own internal cost of capital.⁵ The transmission revenue requirements formula set forth in Attachment F to the ISO New England, Inc. Open Access Transmission Tariff (*i.e.*, the tariff provision that would govern Pine Tree Power Company’s transmission revenue requirements) adopts this approach, allowing consumer-owned utilities to recover the same return on equity as allowed by

¹ *Pinnacle West Capital Corp.*, 131 FERC ¶ 61,143 at P 52 (2010), *citing AES Power, Inc.*, 74 FERC ¶ 61,220 at p. 61,745 (1996).

² *AES Power, Inc.*, *supra*, 74 FERC ¶ 61,220 at p. 61,745.

³ Beginning with *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092 at P 96 (2005) (“We find that the DCF model for a non-investor-owned entity such as Vernon is appropriate”), *order on reh’g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh’g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006), *rev’d on other grnds sub nom. Trans. Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007).

⁴ *PJM Interconnection, L.L.C., AMP Transmission, LLC*, 166 FERC ¶ 61,216 at PP 75-78 (2019) (upholding a “margin factor” of 0.4 times debt service requirements), and *Pinnacle West Capital Corp.*, 131 FERC ¶ 61,143 at PP 52-53, *reh’g denied*, 133 FERC ¶ 61,034 (2010) (upholding a 1.25 TIER for return).

⁵ *See, e.g., La. Energy & Pwr. Auth.*, 167 FERC ¶ 61,089 at P 6 (2019), *Ind. Mun. Pwr. Agency*, 114 FERC ¶ 61,008 at P 20 (2006).

the FERC for their investor-owned counterparts unless State law provides for a lower rate of return,⁶ stating:

Return on Equity (ROE): The ROE shall equal the value most recently approved by the Commission, except as limited by state law for Section 201(f) PTOs.

CONCLUSION

I thank the Committee for this opportunity to supplement my written testimony in support of LD 1708, and continue to urge the Committee to vote LD 1708 “ought to pass.”

⁶ The reference to limitations imposed by State law is primarily to Mass. G.L. c. 164, § 58, which limits the Commonwealth’s municipal light plants to earning a return of eight percent, but on gross plant (municipal light plants are obligated by Massachusetts law actually to fund their depreciation reserves). The phrase “Section 201(f) PTOs” refers to consumer-owned utilities, which are generally exempted from FERC regulation of their rates by Section 201(f) of the FPA (16 U.S.C. § 824(f)).

NY CLS Pub A § 1199-eee

Current through 2021 released Chapters 1-109

New York Consolidated Laws Service > Public Authorities Law (Arts. 1 — 11) > Article 5 Public Utility Authorities (Titles 1 — 11-D) > Title 8-F Saratoga County Water Authority (§§ 1199-aaa — 1199-xxx)

§ 1199-eee. Powers of the authority

Except as otherwise limited by this title, the authority shall have the power:

1. To sue and be sued;
2. To have a seal and alter the same at pleasure;
3. To borrow money and issue negotiable or non-negotiable notes, bonds, or other obligations and to provide for the rights of the holders thereof;
4. To enter into contracts and execute all instruments necessary or convenient or desirable for the purposes of the authority to carry out any powers expressly given it in this title;
5. To acquire, by purchase, gift, grant, transfer, contract or lease or by condemnation pursuant to the eminent domain procedure law within the district, lease as lessee, hold and use and to sell, lease as lessor, transfer or otherwise dispose of, any real or personal property or any interest therein, within or without the district, as the authority may deem necessary, convenient or desirable to carry out the purpose of this title and to pay the costs thereof; provided, however, that the authority may not condemn real property of a municipality without the consent of the governing body of such municipality. Provided, however, notwithstanding any provision of the eminent domain procedure law to the contrary, in any proceeding brought by the authority to condemn real property pursuant to such law, title shall vest in the authority and compensation shall be paid only upon (a) a decision by the supreme court that compensation for the real property condemned shall be determined solely by the income capitalization method of valuation based on the actual net income as allowed by the public service commission, and (b) such supreme court's determination that the amount of such compensation shall be based on the income capitalization method, entry of a final judgment, the filing of the final decree and the conclusion of any appeal or the expiration of the time to file an appeal related to the condemnation proceeding. If any court shall utilize any method of compensation other than the income capitalization method, or if the proposed compensation is more than the rate base of the assets taken in condemnation, as utilized by the public service commission in setting rates and as certified by such commission, then the authority may withdraw the condemnation proceeding without prejudice or costs to any party;
6. To purchase, in the name of the authority, any water facility, including plants, works, instrumentalities or parts thereof and appurtenances thereto, lands, easements, rights in land and water rights, rights-of-way, contract rights, franchises, permits, approaches, connections, dams, wells, pumps, reservoirs, water mains and pipe lines, pumping stations, treatment facilities, meters, equipment and inventory, or any other property incidental to and included in such system or part thereof, and any improvements, extensions and betterments, situated wholly within the district and to pay the costs thereof; provided, however, that the authority shall have the power to purchase any source of supply,

supply facility, water supply system, or transmission facility or any part thereof situated wholly or partly without the territorial limits of the district, provided the same shall be necessary in order to supply water within the district; and in connection with the purchase of such properties the authority may assume any obligations of the owner of such properties, and, to the extent required by the terms of any indentures or other instruments under which such obligations were issued, the authority may assume and agree to perform covenants and observe the restrictions contained in such instruments; and furthermore the owner of any properties, which the authority is authorized to acquire, is hereby authorized to sell or otherwise transfer the same to the authority, whereupon the authority shall become charged with the performance thereof, and as a means of so acquiring for such purpose, the authority may purchase all of the stock of any existing privately owned water corporation or company and in the case of a sale or other transfer of properties of a public utility corporation pursuant to this provision, upon the purchase of the stock of such corporation or company it shall be lawful to dissolve such corporation within a reasonable time;

7. To construct, improve, maintain, develop, expand or rehabilitate water facilities and to pay the costs thereof;

8. To operate and manage and to contract for the operation and management of facilities or property of the authority;

9. To enter into contracts, and carry out the terms thereof, for the wholesale provision of water produced by supply facilities constructed, owned or operated by the authority, to municipalities and private water companies and to carry out the terms thereof, for the transmission of water from new or existing supply facilities;

10. To apply to the appropriate agencies and officials of the federal, state and local governments for such licenses, permits or approvals of its plans or projects as it may deem necessary or advisable, and upon such terms and conditions as it may deem appropriate, to accept, in its discretion such licenses, permits or approvals as may be tendered to it by such agencies and officials;

11. To take all necessary and reasonable actions within the district to conserve, preserve and protect the water supply to the district, including the making of plans and studies, the adoption of watershed rules and regulations, the enforcing of compliance with all current and future rules and regulations of the state of New York, its agencies and departments with regard to water supply and usage, the requiring of cross-connection controls, the providing of educational material and programs to the public, and the cooperating with water suppliers outside the district to conserve, preserve and protect the entire water reserve as it is affected within and outside the authority's supply area;

12. To appoint such officers and employees as are required for the performance of its duties, to fix and determine their qualifications, duties and compensation, and to retain or employ counsel, auditors, engineers, and private consultants on a contract basis or otherwise for rendering professional or technical services and advice;

13. With the consent of the governing body of a municipality, to use officers and employees of such municipality and to pay a proper proportion of the compensation or costs for the services for such officers or employees;

14. To make plans and studies necessary, convenient or desirable for the effectuation of the purposes and powers of the authority and to prepare recommendations in regard thereto;

15. To prepare a water supply emergency plan which may include, but not be limited to, the following:

- (a) establishment of criteria and procedures to determine critical water levels or safe yield of system;

- (b) identification of existing and future sources of water under normal conditions and emergency conditions;
 - (c) system capacity and ability to meet peak demand and fire flows concurrently;
 - (d) storage capacities;
 - (e) current condition of present interconnections and identification of additional interconnections to meet a water supply emergency;
 - (f) specific action plan to be followed during a water supply emergency including a phased implementation of the plan;
 - (g) general water conservation programs and water use reduction strategies for water supply users;
 - (h) prioritization of water users;
 - (i) identification and availability of emergency equipment needed during a water supply emergency; and
 - (j) public notification program coordinated with the phased implementation schedule. Such plan shall not be adopted until a public hearing on such plan shall have been held, upon not less than fourteen days' notice thereof to each customer, either by mail or by publication once in a newspaper having general circulation within the district; every five years, such plan shall be reviewed and revised if necessary after a public hearing, with notice to each customer as aforesaid;
- 16.** To enter upon such lands, waters or premises as in the judgment of the authority shall be necessary for the purpose of making surveys, soundings, borings and examinations to accomplish any purpose authorized by this title, the authority being liable only for actual damage done;
- 17.** To apply for and to accept any gifts or grants or loans of funds or property or financial or other aid in any form from the federal government or any agency or instrumentality thereof, or from the state or any agency or instrumentality thereof, or from any other source, for any or all of the purposes specified in this title, and to comply, subject to the provisions of this title, with the terms and conditions thereof;
- 18.** To obtain, store, treat, distribute, supply and sell water for domestic, commercial and public purposes at retail to individual consumers within the district;
- 19.** To purchase water in bulk from any person, private or public benefit corporation or municipality when necessary or convenient for the operation of such water system;
- 20.** To produce, develop, distribute and sell water or water services within or without the territorial limits of the district; and to purchase water from any municipality, town water district, person, association or corporation, provided, however, that water may be sold at retail to individual consumers only within the district and further provided that in exercising the powers granted by this title, the authority shall not sell water in any area which is served by a water system owned or operated by a municipality or special improvement district unless the governing body of such municipality or district shall adopt a resolution requesting the authority to sell water in such served areas;
- 21.** To make bylaws for the management and regulation of its affairs and rules and regulations for the conservation, preservation, protection and distribution of the authority's water supply and, subject to agreements with bondholders, rules for the sale of water and the collection of rents and charges therefor. A copy of such rules, regulations and bylaws and any rules and regulations adopted pursuant to subdivision eleven of this section, and all amendments thereto, duly certified by the secretary of the authority shall be filed in the office of the county clerk of the county. In addition, the board of supervisors by local law shall have power to prescribe that violation of specific bylaws, rules, or rules and regulations of the authority, published once in a newspaper having general circulation within the

county, shall be punishable by fine, not exceeding one hundred dollars, or by imprisonment for not longer than fifteen days, or both;

22. To fix rates and collect charges for the use of the facilities of, or services rendered by, or any commodities furnished by the authority such as to provide revenues sufficient at all times to pay, as the same shall become due, the principal of and interest on the bonds, notes, or other obligations of the authority together with the maintenance of proper reserves therefor, in addition to paying as the same shall become due, the expense of operating and maintaining the properties of the authority together with proper maintenance reserves, capital reserves, repair reserves, tax stabilization reserves and other contingency reserves, and all other obligations and indebtedness of the authority; however, no such rates or charges shall be changed until a public hearing on such changes shall have been held upon not less than fourteen days notice thereof to each customer, either by mail or by publication once in a newspaper having general circulation within the district;

23. To enter into cooperative agreements with other authorities, municipalities, counties, cities, towns, villages, water districts, utility companies, individuals, firms or corporations, within or without the territorial limits of the district for the interconnection of facilities, the provision, exchange or interchange of services and commodities, the conservation, preservation and protection of the authority's supply area, and, within the territorial limits of the district, to enter into a contract for the construction, operation and maintenance of a water supply and distribution system by the authority for any municipality, upon such terms and conditions as shall be determined to be reasonable including, but not limited to, the reimbursement of all costs of such construction, or for any other lawful purposes necessary or desirable to effect the purposes of this title;

24. To provide for the discontinuance or disconnection of the supply of water for nonpayment of fees, rates, rents or other charges therefor imposed by the authority, provided such discontinuance or disconnection of any supply of water shall not be carried out except in the manner and upon the notice as is required of a waterworks corporation pursuant to subdivisions three-a, three-b and three-c of section eighty-nine-b and section one hundred sixteen of the public service law;

25. To act as a county water agency, pursuant to the provisions of article five-A of the county law; and

26. To do all things necessary, convenient or desirable to carry out its purposes and for all exercise of the powers granted in this title.

History

Add, L 1990, ch 678, § 1, eff July 22, 1990.

Annotations

Notes to Decisions

Language of CLS Pub A § 1199-eee(5) implies only preference for income capitalization method and does not dictate method of valuation to be employed, and thus statute does not usurp power to determine just compensation designated to judiciary by CLS NY Const Art I § 7, even though statute gives condemnor right to withdraw proceeding in event income capitalization method is not used, since court retains its power to determine in first instance whether income capitalization method is to be used; even if condemnor does withdraw from proceeding, it remains liable for damages

for period from taking to abandonment of condemnation, in which case court's determination of value would be used to fix compensation for temporary taking. *Saratoga Water Servs. v Saratoga County Water Auth.*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

Valuation language of CLS Pub A § 1199-eee(5) would not apply to property of nonutility property owners since statute abrogates Eminent Domain Procedure Law only with regard to property of public utilities; CLS EDPL Art 5 continues to govern valuation of property not subject to regulation by Public Service Commission. *Saratoga Water Servs. v Saratoga County Water Auth.*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

Valuation procedure of CLS Pub A § 1199-eee(5) is not unconstitutionally vague because it requires court to value property as of some indeterminable future date, even though it provides that title vests and compensation must be paid after valuation of property by Supreme Court, since statute merely separates "taking" or "acquisition" event from vesting of title; title vests later when appeals process is exhausted in order that condemnor may be able to withdraw proceeding in event that court determines that income capitalization method should not be used, and in order to comply with rule that condemnor cannot abandon appropriation after title vests. *Saratoga Water Servs. v Saratoga County Water Auth.*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

Water authority's proposed acquisition of property owned by private corporations did not include property beyond authority's statutory authority to condemn since CLS Pub A § 1199-eee(5) plainly provides authority with power "to acquire...by condemnation pursuant to the Eminent Domain Procedure Law...any real or personal property or any interest therein." *Saratoga Water Servs. v Saratoga County Water Auth.*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

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interest therein.” *Saratoga Water Servs. v Saratoga County Water Auth.*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

CLS Pub A § 1199-eee(5) is constitutional, notwithstanding contention that it deprived petitioners of their property without due process of law because it restricts methods for determining just compensation to net income capitalization method, since statute only implies preference for net income capitalization method and permits use of other methods. *Saratoga Water Servs. v Sarasota County Water Auth.*, 190 A.D.2d 40, 596 N.Y.S.2d 872, 1993 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 3d Dep't 1993), *aff'd*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

CLS Pub A § 1199-eee(5) is not unconstitutionally vague on ground that it fails to establish when taking occurs so that valuation of property can be decided, since statute sufficiently defines when property vests in water authority as that time when appeal process has been completed. *Saratoga Water Servs. v Sarasota County Water Auth.*, 190 A.D.2d 40, 596 N.Y.S.2d 872, 1993 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 3d Dep't 1993), *aff'd*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

Water authority's power to condemn property under CLS Pub A § 1199-eee(5) is not restricted to property regulated by Public Service Commission, and water authority is empowered to condemn any property necessary to fulfill its purpose. *Saratoga Water Servs. v Sarasota County Water Auth.*, 190 A.D.2d 40, 596 N.Y.S.2d 872, 1993 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 3d Dep't 1993), *aff'd*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

In action pertaining to condemnation by water authority under CLS Pub A § 1199-eee(5) of assets of domestic corporation, court would reject contention that there was excessive taking because of alternative and superior route since (1) proposed alternative route did not connect directly to water mains over shortest route, and (2) condemned route was found not to pose any significant environmental concerns. *Saratoga Water Servs. v Sarasota County Water Auth.*, 190 A.D.2d 40, 596 N.Y.S.2d 872, 1993 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 3d Dep't 1993), *aff'd*, 83 N.Y.2d 205, 608 N.Y.S.2d 952, 630 N.E.2d 648, 1994 N.Y. LEXIS 159 (N.Y. 1994).

Valuation procedure under CLS Pub A § 1199-eee(5) does not impermissibly require court to render advisory opinion simply because it first requires court to supply parties with valuation figure for properties, after which petitioner has option either to accept figure or to withdraw from proceeding altogether. *In re Acquisition of Real Prop. by Saratoga County Water Auth.*, 252 A.D.2d 626, 675 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 7992 (N.Y. App. Div. 3d Dep't 1998).

Research References & Practice Aids

Hierarchy Notes:

NY CLS Pub A, Art. 5