

## New York

Water and wastewater utilities in New York fall under several rate-setting regulatory systems.

### Commission-Regulated Utilities

The **New York Public Service Commission** (NYPSC) regulates the rates and services of private water companies. Pursuant to **N.Y. Pub. Serv. Law § 89-c**, NYPSC does not regulate government-owned utilities, including utilities owned by cities, towns, and water districts. NYPSC also does not have jurisdiction over county-owned utilities or water and wastewater authorities established under **N.Y. Pub. Auth. Law § 1014**.

With respect to NYPSC-regulated utilities, **N.Y. Pub. Serv. Law § 89-b(1)** states that all charges made or demanded “shall be just and reasonable and not more than allowed by law or by order of the commission.” The law goes on to state that no commission-regulated utility shall charge or receive<sup>256</sup> a greater or less compensation for water than it receives “from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.”<sup>257</sup> Finally, **N.Y. Pub. Serv. Law § 89-b(3)** maintains that no commission-regulated utility “shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever.”

**N.Y. Pub. Serv. Law § 37(1)** requires large private water companies regulated by NYPSC<sup>258</sup> and government-owned utilities to offer residential customers a deferred payment plan prior to disconnecting service.<sup>259</sup> The statute goes on to define the terms of such an agreement, which include a down payment on the amount past due, as well as full payment of arrears over time.

256. By any special rate, rebate, drawback or other device.

257. **N.Y. Pub. Serv. Law § 89-b(2)**.

258. **N.Y. Pub. Serv. Law § 50** defines “large private water utilities” as waterworks corporations with annual gross revenues in excess of \$250,000 per year.

259. Specifically, the law states that “no utility corporation or municipality shall terminate or refuse to take all actions within such corporation or municipality’s control . . . to restore service to a residential customer, because of arrears owed the utility corporation or municipality, unless the utility or municipality offers such customer a deferred payment agreement for such arrears.” **N.Y. Pub. Serv. Law § 37(1)**.

Commission-regulated utilities



Noncommission-regulated utilities



<b>State Population (2016):</b>	19,745,289
<b>Median Annual Household Income (2015):</b>	\$59,269
<b>Poverty Rate (2015):</b>	15.7%
<b>Typical Annual Household Water and Wastewater Expenditures (2015):</b>	\$600
New York has 2,324 community water systems (CWS), of which 1,102 are privately owned and 2,176 serve populations of 10,000 or fewer people.	
New York has 588 publicly owned treatment works facilities (POTWs), of which 438 treat 1 MGD or less.	
1,160,738 people are served by privately owned CWS; 17,041,181 are served by government-owned CWS; and 16,090,861 are served by POTWs.	
<b>Estimated Long-Term Water and Wastewater Infrastructure Needs:</b>	\$50.8 billion

*Sources: U.S. Census Bureau, 2016 Population Estimate & 2011–2015 American Community Survey 5-Year Estimates; 2016 EFC Rates Survey; U.S. Environmental Protection Agency, 2016 Safe Drinking Water Information System, 2011 Drinking Water Infrastructure Needs Survey, and 2012 Clean Watersheds Needs Survey. See Appendix C for more details.*

While the statutes referenced above would seem to limit the ability of commission-regulated utilities to provide low-income customer assistance programs (CAPs) funded by rate revenues, in January 2017 NYPSC approved the development of a low-income rebate program by SUEZ Water, an investor-owned utility operating in New York. NYPSC’s “Order Establishing Rate Plan” for SUEZ Water specifically states that the program can be funded by ratepayer revenues.<sup>260</sup> SUEZ Water has 6 months from the effective date of the Order (January 24, 2017) to design the program.

260. See Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of SUEZ Water New York Inc. for Water Service, **Case No. 16-W-0130** (N.Y. Pub. Serv. Comm’n 2017).

NYPSC does not regulate government-owned utilities, including water and wastewater authorities, and municipal- or county-owned utilities. *N.Y. Pub. Auth. Law art. 5* establishes 24 water and/or wastewater authorities throughout the state (such as, Buffalo County Water Authority, New York City Water Finance Authority, and Albany Water Authority). Together, these entities serve the majority of New York state residents. In general, individual statutes provide broad authority for these entities to fix rates and collect charges that provide revenues sufficient to pay all expenses.<sup>261</sup> However, in most cases, the law does not expressly authorize or prohibit low-income assistance programs and/or cross-subsidization.<sup>262</sup>

Under *N.Y. County Law § 266(1)*, the administrative head or body of county water and wastewater utilities may establish wholesale and retail rates for water and wastewater services.<sup>263</sup> Such rates should be “determined on any equitable basis,” and classifications are allowed based on service characteristics.<sup>264</sup> The allowance of only service related characteristics could potentially create grounds for legal challenges against low-income CAPs funded by rate revenues.

In New York, all incorporated cities in the state operate pursuant to a home rule charter. Therefore, government-owned utilities may have some leeway to establish low-income CAPs funded by ratepayer revenues, subject to any limitations found in individual

charters.<sup>265</sup>

The NYC Department of Environmental Protection (DEP), which is governed by the New York City Water Board pursuant to *N.Y. Pub. Auth. Law art. 5*, offers several low-income assistance programs funded by customer revenues, including a *Home Water Assistance Program* (HWAP), which provides a bill discount via an annual credit of \$115.89 to senior and disabled homeowners who make less than \$37,500 per year.

261. See, e.g., *N.Y. Pub. Auth. Law § 1154*.

262. One exception is that the N.Y. Compilation of Codes, Rules & Regulations specifically authorize the Buffalo Water Authority to establish rates for low-income senior citizens. *N.Y. Comp. Codes R. & Regs. tit. 21, § 10085.12* states that “water rates for all homeowners who, by virtue of their age, are eligible for real property tax exemption pursuant to the New York Real Property Tax Law, section 467 shall be eligible for exemption or reduction in water rates as set forth in the board schedule of rates.”

263. There are 62 counties in New York; 5 of these counties fall under the jurisdiction of the City of New York, 19 operate pursuant to home rule charters, and 38 are governed by general law.

264. Under *N.Y. County Law § 266(1)*, classifications, “for purposes of establishing differential rates, charges or rentals, may [be] allocate[d] among areas within the district designated by the administrative head or body, the costs of establishment of the district, the furnishing of improvements therein and operation and maintenance of district facilities or any combination thereof.”

265. Some recent New York case law supports the authority of water and wastewater authorities to establish rate classifications based on income. On June 7, 2016, three Tax Class 2 property owners and the Rent Stabilization Association of NYC sued DEP and the Water Board challenging the Water Board’s adoption of the FY 2017 rate schedule, which included a 2.1 percent rate increase to be used to fund a \$183 rebate to all class one property owners. On June 20, 2016, the Manhattan Supreme Court invalidated the Water Board’s resolution approving a new rate schedule finding “that the Water Board exceeded its authority and acted in an arbitrary, capricious, and unreasonable manner in adopting the FY 2017 Rate Schedule” by adopting “the Mayor’s proposal to issue credits to certain rate payers, i.e., one, two, and three family homeowners in the City” rather than using the surplus for costs of furnishing water services and/or avoiding the need to increase water rates. See *Prometheus Realty Corp. v New York City Water Bd.*, 37 N.Y.S.3d 362, 366 (N.Y. Sup. Ct. 2016). The Water Board appealed the decision, and the Supreme Court for New York County upheld the lower court’s opinion, finding that the one-time rebate lacked a rational basis. See *Matter of Prometheus Realty Corp. v New York City Water Bd.*, 147 A.D.3d 519 (N.Y. App. Ct. 2017). Specifically, in reaching its holding, the court articulated “[a]lthough the Water Board claims that the credit would be more financially meaningful for class one property owners, the credit is not in any way tied to financial need. There is no rational basis for the conclusion that class one ratepayers have traditionally borne a disproportionate burden of water and sewage fees. While the Water Board argues that some members of class one rate payers experience financial hardship in paying for water, the application of the credit does not in any manner take into consideration an owner’s ability to pay or customers’ need for this benefit, solely relying on the classification of the property for tax purposes, which bears little relation to the stated objective.”