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COURT OF APPEALS

STATE OF NEW YORK

PROMETHEUS REALTY CORP.,

Respondent,

-against-

No. 130

NEW YORK CITY WATER BOARD,

Appellant.

20 Eagle Street
Albany, New York
November 16, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The last case on this
2 afternoon's calendar is appeal number 130, Matter of
3 Prometheus Realty Corp. v. the New York City Water Board.
4 Counsel. Good afternoon, counsel.

5 MS. WEST: Good afternoon, Your Honor. May it
6 please the court, Melanie West for the New York City Water
7 Board and Department of Environmental Protection. I'd like
8 to reserve three minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: Three?

10 MS. WEST: Yes.

11 CHIEF JUDGE DIFIORE: Very well.

12 MS. WEST: We are here because petitioners have
13 challenged the New York City Water Board's decision to
14 issue a one-time 183-dollar credit to New York City small
15 homeowners.

16 JUDGE RIVERA: So - - - so what - - - why - - -
17 why is the board imposing the 2.1 rate increase which is
18 based on the rent that has to be paid to the City when the
19 City has said you don't have to pay your rent?

20 MS. WEST: Well, the 2.1 rate increase was set
21 before the rent forbearance but it wasn't based entirely on
22 that. It was based on a five-year projection of - - - of
23 the Water Board's budget. And so - - -

24 CHIEF JUDGE DIFIORE: So when the City proposed
25 the rent forgiveness, why wasn't the gap closed, the



1 financial gap, that seventy-six million dollars or whatever
2 it was?

3 MS. WEST: Right. The question that this court
4 has to answer is whether the only rational that the Water
5 Board could do - - - whether in face the Water Board was
6 compelled to close the gap simply because after it had
7 proposed a 2.1 percent rate increase, based on a number of
8 factors, the City decided to forbear from collecting the
9 rent. It's simply not the case that there's anything in
10 the statute or anything anywhere else that compels the
11 Water Board to have used that money in this one fashion
12 alone.

13 JUDGE RIVERA: Well, what - - - what does the law
14 authorize you to - - - what's the basis under law for a
15 rate increase?

16 MS. WEST: Well, the statute simply gives the
17 Water Board broad authority to fix rates, it doesn't
18 enumerate any particular factors. The system is supposed
19 to be self-sustaining. But certainly, the Water Board is
20 allowed to and has throughout its - - - throughout its
21 existence planned rate increases with a long-term view in
22 mind.

23 JUDGE RIVERA: And - and if the Water Board makes
24 a determination that we need the 2.1 because we want to
25 close a gap and then that gap doesn't exist, can the Water



1 Board change its mind and say well, we still want - - -
2 we're still going to go ahead with the 2.1? Is there
3 anything in the law that prohibits it from doing that?

4 MS. WEST: There's nothing that prohibits it, and
5 I think the record reflects that while - - -

6 JUDGE RIVERA: What would the 2.1 go to if you no
7 longer have the gap?

8 MS. WEST: So the - - - the record reflects that
9 when the Water Board decided to retain the rate increase
10 and they held the public hearings that - - - that was
11 addressed, and so the - - - the board explained that there
12 were numerous capital projects and infrastructure projects
13 that the rate increase would go towards. It would also
14 help to ensure that future rate increases were incremental
15 rather than drastic.

16 JUDGE RIVERA: So after deciding the 2.1, could
17 the Water Board have said, you know, we've decided it's
18 going to be 20 percent?

19 MS. WEST: Well, I think that goes to the
20 rationality is - - - is looking at the actual substance of
21 any decision - - -

22 JUDGE RIVERA: Yeah. But you said they have - -
23 - they can - - - the board can look and have a long-term
24 vision. So I want to look at the next forty years.

25 MS. WEST: Right. I mean - - -



1 JUDGE RIVERA: - - - twenty percent. Can they do
2 that?

3 MS. WEST: Theoretically, yes, if - - - if some
4 rational basis could be offered for that. But, you know,
5 the - - - the more drastic something like that gets the - -
6 - the less on its face it appears rational. And 2.1
7 percent - - -

8 JUDGE RIVERA: Why is it rational if the board
9 has articulated that the 2.1 rate increase is to address
10 this shortfall that then no longer exists - - -

11 MS. WEST: Well, that's one - - -

12 JUDGE RIVERA: - - - to continue to impose the -
13 2.1- - you know, it's not even shifted.

14 MS. WEST: Well, that's one - - -

15 JUDGE RIVERA: It's not even a - - -

16 MS. WEST: - - - minute entry into the record,
17 Your Honor, but the record does reflect that there were
18 other - - - that there were other factors in play, and so
19 when you look at the public hearing transcripts, which
20 post-date the budget shortfall being filled, you know, the
21 - - - the Water Board officials addressed that by
22 explaining that in their view it was in - - - in the best
23 interests of everybody to maintain the rate increase in
24 order to fund capital projects, to ensure that rate spikes
25 - - - sorry, that rate increases remained incremental and



1 to use this amount of money for something else. In this
2 case for 183-dollar credit for class one homeowners.

3 CHIEF JUDGE DIFIORE: Is this the first time that
4 the board has ever granted, for lack of a better word, a
5 blanket credit to an entire class based on their tax
6 classification?

7 MS. WEST: My understanding is it's the first-
8 class based credit. There have been other credits and
9 there has been - - -

10 JUDGE FAHEY: What are some of the other credits?
11 Aren't there a series of other credits that the board has
12 given to commercial developers, to - - - to class two
13 members, to senior citizens - - -

14 MS. WEST: Yes.

15 JUDGE FAHEY: - - - to frontage transition users?
16 Hasn't it been a number of times and other policy
17 alternatives that the board has engaged in?

18 MS. WEST: Absolutely, Your Honor. There's a
19 long history of differential rates, some of which have
20 taken the form of credits. For example, there are credits
21 for seniors, for individuals with physical disabilities.
22 And some of which have taken the form of rate mitigation.
23 So for example, the frontage transition program for over
24 two decades afforded rate relief in the form - - - form of
25 a choice to remain on flat rate billing.



1 JUDGE FAHEY: And who did that benefit, what
2 class did that benefit?

3 MS. WEST: That benefitted the bulk of class two
4 owners. The frontage transition program benefitted anyone
5 - - -

6 JUDGE FAHEY: And describe for those of us who
7 live outside of New York City what - - - what class two
8 owners are.

9 MS. WEST: So class two is four-plus units in a
10 home.

11 JUDGE FAHEY: So these are - - -

12 MS. WEST: The frontage transition program
13 benefitted six-plus users in a home, and then when it was
14 transitioned into the multi-family conversation program it
15 was applied to all class - - -

16 JUDGE FAHEY: Right. And class one, of course,
17 is three or less units. Is that - - -

18 MS. WEST: Three or less, that's right.

19 JUDGE FAHEY: I see.

20 CHIEF JUDGE DIFIORE: But you said the bulk of
21 the class members? Is that what you said?

22 MS. WEST: Yes, six-plus units.

23 CHIEF JUDGE DIFIORE: What - - - what does that
24 mean? Six-plus units?

25 MS. WEST: The frontage transition program



1 applied to six-plus units. When that was phased over into
2 the multi-family conversation program which effectively - -
3 -

4 JUDGE FAHEY: So not a - - -

5 MS. WEST: - - - a very - - -

6 JUDGE FAHEY: The frontage transition unit, this
7 arose because of the transition from a flat-water rate to -
8 - -

9 MS. WEST: To metered billing.

10 JUDGE FAHEY: - - - to metered water rate; is
11 that correct?

12 MS. WEST: Correct.

13 JUDGE FAHEY: All right. And - - -

14 MS. WEST: And that - - - that was - - -

15 JUDGE FAHEY: What would the financial impact of
16 that be? Do you have any idea?

17 MS. WEST: It as anticipated that the impact
18 would be large, particularly on larger buildings because
19 they use more water. And in order to lessen that impact,
20 and particularly with the goal of protecting affordable
21 housing from being severely impacted by the switch to
22 metered billing, the board introduced these programs of
23 rate relief that were available not specifically to
24 affordable housing but generally to buildings with six-plus
25 units.



1 JUDGE STEIN: Is there a difference - - -

2 JUDGE FAHEY: I see.

3 JUDGE STEIN: - - - between giving a credit or as
4 you say a rate mitigation or just differential rate
5 treatment? Are those things the same or are they
6 different, an impact in - - -

7 MS. WEST: Well, I think the difference of the
8 impact is that a credit enables money to go to the pockets
9 of New Yorkers immediately. A rate mitigation is - - -
10 takes longer and can have lesser impact, particularly when
11 you're talking about a fairly modest pool of funds like we
12 are here.

13 JUDGE STEIN: But in - - - in terms of the
14 authority of the board, is there any legal distinction
15 between those things?

16 MS. WEST: No, Your Honor. There's not, and the
17 - - - the lower court, the Appellate Division did hold that
18 there was nothing in the statute or elsewhere that
19 prevented the board from issuing credit and indeed they had
20 issued credits before.

21 JUDGE FAHEY: Well - - - well, I guess at its
22 core, though, you'd have to say is - - - is this rate - - -
23 or reduction any different than a property tax rebate that
24 we do on a statewide basis? It seems to be very similar to
25 that kind of a give-back. And I - - - the only thing that



1 strikes me about, the - - - the only thing that I would say
2 is the one question that had come up before which is that
3 the justification for the - - - for the rate and decrease
4 has to be linked to the services of the - - - of the Water
5 Board. So if the money isn't being used for the fire
6 department or - - - or for something like that then you - -
7 - you have a stronger policy argument, and that doesn't
8 seem to have occurred here, has it? Has it?

9 MS. WEST: No, Your Honor. So certainly not.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.
11 Counsel.

12 MR. BERENGARTEN: Good afternoon, Michael
13 Berengarten of Herrick Feinstein on behalf of the
14 petitioner-respondents. I want to talk - - - address some
15 of the questions raised about what the rational options
16 available to the - - - to the Water Board were after the
17 City announced a rent forbearance which obviated the stated
18 justification for this particular rate increase. But
19 first, let me just basically give you the big picture in
20 terms of our arguments on the merits. We principally argue
21 on the merits, and two courts have now agreed, that there's
22 no rational basis to single out only one - - - class one
23 property owners, the minority of residential households in
24 the city, to receive a bill credit without regard to their
25 income, their economic need, their property value, or any



1 rational water-related - - -

2 JUDGE FAHEY: Yet, there are a number of programs
3 that are - - - are already doing that now, that benefits
4 were given to people on the basis of - - - in the frontage
5 transition program the basis of the class they belonged to.

6 MR. BERENGARTEN: That - - - that's actually not
7 correct.

8 JUDGE FAHEY: Okay.

9 MR. BERENGARTEN: Because if you consider the
10 frontage transition program, as a threshold matter it had
11 eligibility criteria designed to serve a specific purpose.
12 The eligibility criteria initially were directed based on
13 the diameter of your service line and then - - - and then
14 subsequently extended to property owners having six or more
15 units - - -

16 JUDGE FAHEY: Right.

17 MR. BERENGARTEN: - - - excluding new
18 construction and the purpose - - -

19 JUDGE STEIN: Some of those property owners were
20 very, very wealthy, right? And some were probably of - - -
21 of very limited means, correct?

22 MR. BERENGARTEN: So that question is - - - has
23 the assumption built into it that all property owners
24 eligible to participate in the transition program actually
25 received an economic benefit from this program. Unlike the



1 bill credits, that's not true. It wasn't a giveaway to an
2 entire tax class because savings based on the metered rate
3 were only principally realized by more densely populated
4 buildings where, you know, buildings are typically
5 overcrowded. So when you have more densely populated
6 buildings, in that instance you're likely to utilize more
7 water.

8 JUDGE STEIN: But do you agree that the Water
9 Board could charge different rates to class one versus
10 class two or six-plus units or whatever? They could charge
11 different rates, right? Is that right? For the same - - -
12 for the same service could charge different rates?

13 MR. BERENGARTEN: No, actually they're - - -

14 JUDGE STEIN: No?

15 MR. BERENGARTEN: Water is charged generally
16 based on consumption such that all accounts pay the same
17 metered rate because it's based on the cost of delivery.
18 With the - - -

19 JUDGE STEIN: What about sewer? Is that - - - is
20 that also based on consumption? Sewer, water and sewer?

21 MR. BERENGARTEN: You know, this - - - this
22 petition doesn't present those issues with respect to sewer
23 charges, but water is charged based on consumption. So all
24 accounts are charged the same metered rate with the
25 exception of those rational programs that were previously



1 instituted by the board.

2 JUDGE STEIN: So it doesn't have to be charged
3 directly based on consumption?

4 MR. BERENGARTEN: It - - - no, it doesn't have
5 to. Just for example - - -

6 JUDGE STEIN: Okay. So - - - so just bear with
7 me - - -

8 MR. BERENGARTEN: Sure.

9 JUDGE STEIN: - - - for a second. So if it's - -
10 - if it's not based on consumption and if it's - - - you -
11 - - if the Water Board can make a choice to charge
12 different groups differently then - - - then what is the
13 practical difference between lowering the rates, giving
14 them a rate abatement or - - - or whatever versus giving
15 them a one-time credit as they did here?

16 MR. BERENGARTEN: Well, the question is what is
17 the - - - the - - - what is the reason for the rate
18 variance? What - - - the Water Board can distinguish
19 between and among customer classes but there has to be a
20 rational basis for - - -

21 JUDGE FAHEY: Well, but isn't that a policy
22 choice that the board makes to - - - to say I want to
23 benefit homeowners that have three or more units and this
24 is how I'm going to do it, and I - - - I've given these
25 benefits to senior citizens, I've given these benefits to



1 people that have six-plus units. Why can't they make a
2 policy choice to give a particular benefit in a particular
3 form to a particular class of property owners? Why aren't
4 those pure policy choices and not legal questions?

5 MR. BERENGARTEN: Well, that - - - that just - -
6 -

7 JUDGE FAHEY: I mean you can certainly dispute
8 the policy choices. I'm not saying that. But these - - -
9 how does this become a legal question for us to get
10 involved in?

11 MR. BERENGARTEN: That just states the action
12 taken. It doesn't state the rational basis for the - - -

13 JUDGE FAHEY: You tell me how it's not a policy
14 question as opposed to a legal question.

15 MR. BERENGARTEN: The reason why - - - the - - -
16 it's not - - - it's not a policy question because - - -
17 because water is a charge based on consumption and in order
18 to issue these credits - - -

19 JUDGE WILSON: But - - - but it's not really
20 charged on consumption, right, because there's still 10,000
21 class two units out of the 26,000 that are charged on
22 frontage.

23 MR. BERENGARTEN: Well, that - - - that's no
24 longer the case. That ended a long time ago. But again,
25 the frontage program benefitted an entire class.



1 JUDGE WILSON: Is that in the record somewhere?
2 I'm sorry. Is that in the record somewhere you can point
3 me to that there are no class two units that are charged on
4 frontage now?

5 MR. BERENGARTEN: Yes. The - - -

6 JUDGE WILSON: They're all - - - they're all
7 metered?

8 MR. BERENGARTEN: The frontage program ended in
9 2012.

10 JUDGE WILSON: I'm sorry. Is there somewhere in
11 the record you can point me to?

12 MR. BERENGARTEN: The - - - the reason it's not
13 in the record is because the frontage program was first
14 raised - - -

15 JUDGE WILSON: So the answer is no? There's
16 nowhere in the record you can point me to?

17 MR. BERENGARTEN: The - - - that's correct.

18 JUDGE WILSON: Okay.

19 MR. BERENGARTEN: Because the frontage program
20 was first raised on appeal by - - - by appellants. It was
21 never even brought to the lower courts attention. And my -
22 - - the principal point with respect to frontage is that it
23 - - - it didn't bestow a benefit on an entire tax class
24 even to all eligible participants. The - - - the frontage
25 rate was deemed only more beneficial to more densely



1 populated buildings typically housing lower income tenants
2 and that's why its policy was consistent with the home
3 water assistance policy which directed relief from the
4 metered rated to more densely populated - - - you know, to
5 more vulnerable customers to the system.

6 JUDGE WILSON: But now it sounds like you're
7 answering Judge Fahey's question as this is a policy
8 matter.

9 MR. BERENGARTEN: So the question is what is the
10 rational basis to - - - to increase rates on the majority
11 of residual households in the city just as class one owners
12 include wealthy homeowners, so do class two owners include
13 persons of moderate and low income who are required to pay
14 increased water rates to fund this credit.

15 JUDGE FAHEY: Sure. I understand - - - I
16 understand the inequities in any policy choice. I'm not
17 arguing that with you. I think that you have a legitimate
18 point there and they were pointed out in the lower court's
19 opinion. But that - - - that's understandable. The only
20 question is who should make the call, really. You have
21 these set series of costs and they're distributed. How - -
22 - how are those costs distributed and who should make the
23 call to make those costs? And you don't like the way
24 they've distributed the costs here. And those seem to me
25 to be fundamental policy questions and really not legal



1 questions unless it's so irrational that it violates some
2 constitutional right which I don't see here. I guess I
3 just don't see it. I don't see it as ultra vires I guess
4 is my point, and that's why I'm asking you these questions.
5 I want you to point to me how it is.

6 MR. BERENGARTEN: Well, Your Honor, the question
7 is how is it rational to just give - - - to just give away
8 122 million dollars to an entire tax class if it's not
9 consistent - - -

10 JUDGE FAHEY: My God. I could run through - - -
11 I could run through tax breaks that people get every single
12 day.

13 MR. BERENGARTEN: Right.

14 JUDGE FAHEY: Both of us could do that until the
15 cows went home and those tax breaks would seem really
16 egregious to me and I'd say why can't I get that tax
17 benefit?

18 MR. BERENGARTEN: Because - - -

19 JUDGE FAHEY: Why can't I write those off?

20 MR. BERENGARTEN: - - - doesn't have tax and
21 authority. They have the ability to implement service
22 charges.

23 JUDGE STEIN: Well - - - well, yes, we're talking
24 about rights. But - - - but do you agree that - - - that
25 the board could say, okay, well, there's no deficit next



1 year but we're anticipating a deficit two, three years out
2 and it's going to be probably substantial and so - - - so
3 rather than hit everybody at that time we're going to - - -
4 we're going to do just it in increments, in stages?

5 MR. BERENGARTEN: Absolutely, so - - -

6 JUDGE STEIN: Okay. So if - - - if the board can
7 do that why can't they still implement this 2.1 percent
8 even though it may not be necessary for this coming, you
9 know, year?

10 MR. BERENGARTEN: Right. Because they - - - the
11 board had two options available to it. One, the most
12 expedient option, not raising rates, moving to the next
13 fiscal year with a 46-million-dollar surplus, and then
14 readjust your baseline rate and set your rates for future
15 incremental rate increases to the extent necessary. That
16 option was available to it and in fact, it's required on
17 its financing agreement to revisit its rate every single
18 year and reconsider the conclusions in the annual report
19 its rate proposal. Alternatively, the board could have
20 gone back to the drawing board and thought of whether or
21 not that rate increase may support rational programs,
22 projects, reserve requirements that were not budgeted. The
23 Water Board didn't do that. Under this rate schedule, what
24 the Water Board proposed to do is simply increased rates in
25 order to take that seventy-six-million-dollars in revenue



1 together with the forty-six-million dollars from the
2 projected surplus and then give that away to class one
3 owners. And - - -

4 JUDGE STEIN: Well, could - - - could they have
5 done something else with it? Could they have taken that
6 surplus and applied it to something that they - - - they
7 didn't budget for because they didn't think that it was
8 absolutely necessary but it was certainly a desirable thing
9 to do? And it - - - it didn't involve giving money back to
10 anybody. It involved putting it somewhere else in the
11 system. Could they have done that?

12 MR. BERENGARTEN: Absolutely, and that's why - -
13 -

14 JUDGE STEIN: And so then why was that not a
15 policy choice?

16 MR. BERENGARTEN: It's - - - because the Water
17 Board - - - the trial court - - - they didn't enjoin - - -
18 the trial court didn't enjoin the Water Board from doing
19 that. They only enjoined the Water Board from implementing
20 this particular rate schedule providing for these bill
21 credits until further action. So my point was that the
22 board could just go back to the drawing board and budget
23 for rational reserve programs to the extent they desire to
24 increase rates. But they didn't to do that here. And just
25 briefly to get back to your question - - -



1 JUDGE RIVERA: But can I - - - can I - - -
2 counsel says that they did actually explain this 2.1
3 increase was not solely to - - - to close the gap. Do you
4 agree with that?

5 MR. BERENGARTEN: Absolutely not. The document -
6 - -

7 JUDGE RIVERA: So where in the record does it
8 show otherwise?

9 MR. BERENGARTEN: Well, for example, the board's
10 minute - - - minute meetings explain that the 2.1 percent
11 rate increase - - -

12 JUDGE RIVERA: Yeah, but she said beyond the
13 minutes there's other documentation that shows otherwise.

14 MR. BERENGARTEN: No, that's not correct. The
15 only argument that Mr. Lowitz made in his affidavit was
16 that the board desired to adhere to a five-year plan of
17 projections. However, everyone knew at the time that
18 projections - - - those projects were invalid because they
19 were based on the assumption that rents would be owed for
20 fiscal year 2020 when, in fact, the - - - the rent
21 forbearance was announced applied for those five years. So
22 the board would necessarily have to, in the ensuing fiscal
23 year, go back to their rate proposal and set a new baseline
24 rate and adjust their projections. But - - -

25 JUDGE RIVERA: But if they had - - - if they had



1 indeed - - - indeed showed somewhere else in this record
2 that they were taking into consideration future - - -
3 future costs or as she said want to make it self-
4 sustaining, we want to look across the board at other
5 programs we want to do, if that is actually in the record
6 do they win?

7 MR. BERENGARTEN: Do they win? I - - - I would
8 need to under - - - I don't - - - there's nowhere in the
9 record that would indicate that this rate increase was
10 designed to support reserves or any other - - - from
11 rational projects or programs exclusive of these bill
12 credits. And the Water Board is not a taxing authority.
13 It - - - it doesn't have the ability to say we as a
14 policymaking body want to issue a tax credit. The Water
15 Board is - - - is authorized to issue service charges. And
16 so, yes, its - - - to the extent its charges are not based
17 on consumption they have to be consistent with rational
18 purposes, consistent with the board's mission here. And
19 the board's mission wasn't served by getting - - - by
20 raising rates on the majority of residential households to
21 get seventy-six-million dollars and then drawing down a
22 forty-six-million-dollar surplus solely to give it away
23 with - - - without regard to whether it supports water
24 conservation, assisting vulnerable customers of the system,
25 system efficiency. In what realm did it - - -



1 JUDGE RIVERA: So - - - so if the mayor indicates
2 what he wants to happen with this money can't they take
3 that into consideration? And can't they fear that if they
4 don't there won't be future forbearance regardless of what
5 has been said now in the moment?

6 MR. BERENGARTEN: So if - - - to answer that
7 question - - -

8 JUDGE RIVERA: Yes, please.

9 MR. BERENGARTEN: - - - while the mayor proposed
10 the bill credits it's the board statutory duty to apply its
11 independent judgment consistent with its mission. And the
12 mayor, didn't - - - the mayor didn't - - -

13 JUDGE STEIN: But I think the point is if they -
14 - - if they did that, an independent analysis, they may
15 have thought that it was a pretty good idea to do what the
16 mayor had proposed because it would be to the board's
17 benefit in the long run. They would get more out of that
18 than - - - than they would lose.

19 MR. BERENGARTEN: Your Honor, proper
20 determinations can't be based on presumptions or fears that
21 are unsubstantiated in the record. And here the City
22 already announced the rent forbearance not just in fiscal
23 year 2017 but through fiscal year 2020 when the mayor
24 proposed these credits for the board's independent
25 judgment. And - - -



1 JUDGE RIVERA: Well, let's say - - - let's say
2 they would not renege on the 2020 but there's water after
3 2020.

4 MR. BERENGARTEN: I'm - - - I'm sorry.

5 JUDGE RIVERA: They might worry about what would
6 happen post-2020, correct?

7 MR. BERENGARTEN: But if you consider why the
8 mayor proposed the rent forbearance it has nothing at all
9 to do with these credits. The City stated that the rent
10 forbearance was intended to limit water bills to the cost
11 of water and dedicate fees solely to the system which is
12 entirely consistent with the Water Board's mandate and
13 entirely inconsistent with raising rates and drawing down a
14 surplus to give them to class one owners.

15 JUDGE FAHEY: Well, you - - - you see why before
16 I was bringing the property tax rebate issue up, not on a
17 taxing question. Because to underline your arguments, some
18 government agency is taking my money away and then - - -
19 that they don't really need and they're giving it back to a
20 certain group of people rather than to everybody in this
21 particular forum. Let me finish. State tax, same thing,
22 state takes the tax money and then they give us a rebate on
23 property taxes. Why don't they just not take it to begin
24 with? Why are they picking and choosing? Those decisions,
25 like the property tax, they've been consistently upheld as



1 policy choice. I'm trying to see how this is much
2 different as a policy matter. Even though it's not a
3 taxing question directly, it - - - it has to do with a
4 water bill, it's a little different. It still amounts to
5 the same thing. They're taking money away and then they're
6 giving some back to a selected group of people.

7 MR. BERENGARTEN: So the answer is why.

8 JUDGE FAHEY: A policy choice, why? You mean
9 what are the motivations?

10 MR. BERENGARTEN: What is the - - - what are the
11 reasons for that policy decision? Is it based on the
12 notion that - - - that class one owners are neither or more
13 deserving because these credits weren't in any way tied to
14 financially - - -

15 JUDGE STEIN: Well, it seems to be that it was
16 because the class one owners hadn't gotten any of the other
17 kinds of relief that any of the other owners had, and a
18 substantial portion of the class one owners were people of
19 more limited means and it may not have been
20 administratively feasible to go to a complicated
21 application process for 183-dollar credit. So - - -

22 MR. BERENGARTEN: So those - - -

23 JUDGE STEIN: - - - that's answering your why.

24 MR. BERENGARTEN: That's factually inaccurate
25 because many of the Water's - - - Water Board's prior



1 water-related initiatives were open to class one accounts.
2 We cited, for example, the home water assistance program,
3 the freeze of the minimum charge, the cap for all
4 residential premises that comply with certain conservation
5 measures. In fact, if you consider that the home water
6 assistance program is only open to eligible class one
7 through four homeowners based on the legitimate objectives
8 it serves, you know, that program was primarily directed to
9 class one accounts. Same with the freeze of the minimum
10 charge in that it was based on consumption thresholds,
11 approximately ninety-five gallons a day in order to obtain
12 the right to be billed based on fiscal year 2014 rates.
13 Most larger buildings didn't qualify for those accounts.
14 And again, while there are certain programs, you know, that
15 likewise served rational purposes which weren't open to
16 class one accounts like for example the MCP which required
17 in order to achieve - - - or in order to be billed at the
18 flat rate investment and cooperation in conservation
19 efforts, right, and was designed to be revenue neutral to
20 the system and as a whole and the transition program which
21 didn't bestow benefits - - -

22 JUDGE RIVERA: Counsel, if - - - if there was no
23 forbearance - - - no forbearance on - - - on the rent
24 charges and the board had decided we're going to give a
25 credit but to pay for that we're going to charge 3.1



1 instead of 2.1 could they have done that?

2 MR. BERENGARTEN: The question is what is the
3 rational purpose for the - - - for the credit. In other
4 words, is there a rational - - - is it consistent with the
5 board's mission? Does it promote its policy objectives?

6 JUDGE RIVERA: We want to put this group on equal
7 footing considering all the past credits and programs that
8 we've had in the past.

9 MR. BERENGARTEN: So is - - - is that - - - is
10 that supported by the record, by reason because here it's
11 not - - -

12 JUDGE RIVERA: If it was - - - if it was could
13 they have done that?

14 MR. BERENGARTEN: If - - - if it was - - -

15 JUDGE RIVERA: Yes.

16 MR. BERENGARTEN: In other words, make rational
17 value-based determinations, sure. It could. But here they
18 - - - it - - - the record clearly shows that this was not a
19 rational value-based determination.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel.

22 MS. WEST: Thank you, Your Honor. I just want to
23 start by pointing the court just a quick record cite of
24 page 457 of the record is where during public hearings the
25 2.1 percent was explained and this was after the rent



1 forbearance was announced. The other quick thing I want to
2 point the court to is on page 181 of the record you can see
3 the rate schedule, the current rate schedule, and you can
4 see that the multifamily conversation program is still
5 based on frontage-based billing so that still exists. What
6 petitioners - - -

7 JUDGE RIVERA: If there was no forbearance - - -

8 MS. WEST: I'm sorry?

9 JUDGE RIVERA: If there was no forbearance - - -

10 MS. WEST: Yes.

11 JUDGE RIVERA: - - - could you have given the
12 credit and just raised the - - - the rates a little higher?
13 Could you have done that?

14 MS. WEST: I think so. I think the forbearance
15 helps to explain better why such a - - - such a credit
16 would make sense. There was an unexpected pool of funds
17 that the - - - that the board was faced with the question
18 of what - - - what to do with them after it had set the
19 rate schedule. Things might look a little different in a
20 different scenario. I think, yes, they still had the
21 ability to do it.

22 JUDGE RIVERA: Let me ask a different kind of
23 question. Could - - - could the City have sent 183-dollar
24 checks, not give you the forbearance just sent off the
25 money? Could they have done that? You may not be able to



1 answer that, but I figured you're from corp. counsel, maybe
2 you have some thoughts.

3 MS. WEST: I'm not sure, but certainly I don't
4 know anything that says they couldn't.

5 JUDGE RIVERA: The selective - - - right,
6 selecting a particular tax group to give them 183-dollar
7 checks.

8 MS. WEST: Right.

9 JUDGE RIVERA: The City could have done that?
10 Okay.

11 MS. WEST: I - - - I'm not - - - I'm not aware of
12 any reason that they couldn't. What petitioners have
13 argued throughout, including here today, is that the most
14 expedient solution was a rate freeze. That may be the
15 case. Even if it were true, that doesn't mean that the
16 Water Board was compelled to do it. At bottom, this case
17 is about deference, about what it means to subject an
18 administrative agency's decisions to rational basis
19 scrutiny. Here, the board was faced with an unexpected
20 fairly modest sum of money. It decided to target class one
21 homeowners who had been excluded from decades of rate
22 relief available only to class two homeowners. It decided
23 to do so in a way through the form of a credit that - - -
24 that would deliver immediate meaningful financial relief.
25 And it decided to do so to an already established class of



1 users so as to avoid administrative costs associated with
2 trying to enforce eligibility criteria or some other, you
3 know, application process for the credit. All of that is
4 rational and petitioners have never explained why the board
5 was compelled to take the action that they found - - - they
6 find preferable. This court has recognized time and time
7 again that a perfect fit is not required for rational
8 basis. That you can point to exceptions to a class and
9 that doesn't invalidate the rational basis for the class.
10 And so affirming this case - - - affirming here would - - -
11 would invite judicial second-guessing of every decision by
12 a rate-setting agency that involved a differential rate.
13 This court should reverse.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.
15 (Court is adjourned)

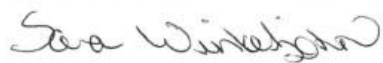
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Prometheus Realty Corp. v. New York City Water Board, No. 130 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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