

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Hampstead Area Water Company

Request for Change in Rates

Docket No. DW 20-117

Opposition to Motion for Protective Order

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and requests that the Commission deny the Motion for Protective Order filed by the subject utility on September 27, 2021. In support of this position, the OCA states as follows:

This is a rate case involving Hampstead Area Water Company (“HAWC”), whose service territory is located in parts of 13 municipalities, one of which is the Town of Atkinson. Accordingly, the Town of Atkinson successfully gained intervenor status and is participating actively in the proceeding as it progresses toward hearing.

On September 27, 2021, HAWC filed a motion seeking a protective order that would direct the Town of Atkinson not to follow through on what is apparently the

municipality's intention to publish all of the discovery materials in this docket on the Town's web site. HAWC's request is devoid of merit and the Commission should deny it summarily.¹

In support of its position, beyond a cursory reference to a provision of the Right-to-Know Law (RSA 91-A:5, IV) in the opening paragraph, HAWC relies on N.H. Code Admin. Rules Puc 201.04 and what HAWC characterizes as the "long-established practice" of the Commission. Motion at 1. Neither provides a valid basis for the relief requested by the utility.

Section 201.04 of the Commission's procedural rules is entitled "Public Records" and establishes certain practices and procedures for the handling of documents submitted to the agency. Generally, the rule makes clear that "[a]ll documents submitted to the commission or staff in an adjudicative or non-adjudicative proceeding shall become matters of public record, subject to RSA 91-A, as of the day and time of the submission." Rule Puc 201.04(a). RSA 91-A is, of course, the Right-to-Know Law, the state's 'sunshine' statute that covers how state agencies and other instrumentalities of government in New Hampshire will make their records available for public inspection and copying.² The Commission is covered by the open records provisions of the Right-to-Know Law, RSA 91-A:4 and :5, because it is a "public agency" within the meaning of the statute. *See* RSA 91-

¹ The OCA is aware that on September 28, 2021, HAWC separately filed a Motion for Confidential Treatment and Protective Order, seeking confidential treatment of information provided in discovery that reveals salary information of HAWC employees. The OCA takes no position on this motion.

² The statute also contains provisions related to open meetings but they are not at issue here.

A:1-a, V (defining “public agency” as “any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision”). The Town of Atkinson is likewise such a public agency as is, indeed, the OCA.

This rule setting forth how *the Commission* will meet its obligations under RSA 91-A:4 and :5 is in no way dispositive of how a municipality can or should do likewise, even when that municipality comes into possession of documents by virtue of its participation in a Commission proceeding as a party. Accordingly, Rule Puc 201.04 cannot become the basis for the Commission to direct a municipality (or any other party to a PUC proceeding) to treat as confidential documents in a party’s possession even when such documents are obtained the course of a Commission proceeding.

A separate provision of the Commission’s procedural rules, Puc 203.08, does oblige parties to adjudicative proceedings at the Commission to treat certain documents obtained in the course of such dockets as confidential in some circumstances. Specifically, “[d]ocuments submitted to the commission or staff accompanied by a motion for confidential treatment shall not be disclosed to the public until the commission rules on the motion.” Rule Puc 203.08(c). As to materials provided in discovery, a party may likewise indicate an *intent* to submit such a motion “prior to the commencement of the hearing in the proceedings” and,

as long as the party has a “good faith basis for seeking confidential treatment,” the parties must likewise treat such materials as confidential. Rule Puc 203.08(d) and (e). The purpose of this provision is to allow for the circulation of discovery materials that *may* be confidential without slowing the process down via the immediate adjudication of motions for confidential treatment. Ultimately, if the Commission grants a motion for confidential treatment then the confidential information “shall not be subject to public disclosure.” Rule Puc 203.08(h).

Assuming *arguendo* that it is within the Commission’s authority to make confidentiality determinations under RSA 91-A that are binding on municipalities or other public bodies that are *independently* subject to the Right-to-Know Law,³ it is noteworthy that HAWC does not rely upon or even mention Puc 203.08. In other words, HAWC is not seeking protective treatment of documents furnished to the Town of Atkinson for which it intends to seek confidential treatment in the future or documents that are already subject to a protective order. Rather, the HAWK

³ We contend the Commission actually lacks such authority. None of the Commission’s enabling statutes give it independent authority to treat any of its records as non-public or the power to direct anyone else to do likewise. Thus, the only potential source of Commission authority to determine that records are confidential is RSA 91-A:5, which lays out certain “exemptions” to what is otherwise a statewide policy of unfettered disclosure of government records. It is the emphatically held view of the OCA that these “exemptions” are actually discretionary – i.e., no agency is ever *obliged* to invoke them – although this is a question that has yet to be resolved by the New Hampshire Supreme Court. *But see Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 338 (2020) (“we often look to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA exemptions”) (referring to the federal Freedom of Information Act, citation omitted); *Chrysler Corporation v. Brown*, 441 U.S. 281, 292-294 (1979) (FOIA is “exclusively a disclosure statute” that “does not foreclose disclosure” and does not “limit an agency’s discretion to disclose information”). Many New Hampshire cases have implicitly assumed otherwise (by not questioning the standing of third parties to force an agency to treat documents as confidential) but the question itself has apparently never been litigated. Obviously, if the exemptions are discretionary then the PUC cannot impose its confidentiality determinations on the Town of Atkinson. Fortunately, rejection of the HAWC motion does not require the Commission to address this admittedly thorny issue. We reserve the right to raise the issue in the future.

motion seeks an order requiring the Town not to disclose documents that are “government records” within the meaning of RSA 91-A:1-a, III and thus are expressly deemed public records pursuant to RSA 91-A:4, I. Such a ruling would fly in the face of both the plain meaning of RSA 91-A and its express purpose, which is “to ensure both the greatest public access to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91-A:1.

HAWC’s invocation of longstanding Commission practice is unavailing. The practice on which HAWC relies, of not posting discovery materials in the “virtual file room” of the Commission’s web site, has no logical connection to what the Town of Atkinson posts on its own web site. More importantly, Commission practices cannot justify a blatant violation of the Right-to-Know Law, which is what HAWC is asking the Commission to commit.

Finally, HAWC offers an alternative request for relief in the event the Commission denies its motion for a protective order. Specifically, HAWC seeks “14 days from the date it receives notice that this motion is denied by the PUC to review its past data request responses for confidential treatment.” HAWC Motion at 2.

The Commission cannot grant this relief. Puc 203.08(d) plainly requires that such a request must *accompany* the provision of the data request in question; there is no basis for an after-the-fact confidentiality bid grounded in the utility’s newfound fear of adverse publicity or scrutiny. Indeed, even that two-week delay

would be inconsistent with the plain and obvious meaning of RSA 91-A:4, which requires full public access to governmental records.

One might wonder: Why is the OCA inserting itself into a dispute between the utility and a municipal intervenor? In the view of the OCA, it is in the interests of the residential utility customers whose concerns we represent to dispatch the pending HAWC motion speedily and summarily for two reasons. First, we believe the core tenet of the Right-to-Know Law, “[o]penness in the conduct of public business,” RSA 91-A:1, is fully congruent with the interests of residential utility customers, who benefit from a PUC and a PUC process that is as amenable to general scrutiny, even skeptical scrutiny, as possible. Secondly, pursuant to Rule Puc 203.08(c), *supra*, the pendency of the HAWC motion technically means that all of the discovery documents in this proceeding must now be treated as confidential by all parties (including the OCA) until the motion is ruled upon.

For the reasons stated above, the Commission should swiftly, summarily, and unambiguously deny the groundless motion for confidential treatment interposed by the utility in this docket.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Deny the motion for confidential treatment submitted by Hampstead Area Water Company, and

B. Likewise deny the alternative request of Hampstead Area Water Company for a 14-day of opportunity to seek confidential treatment of materials already circulated in discovery.

Sincerely,



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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.



Donald M. Kreis