

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DW 18-189

**PENNICHUCK WATER WORKS, INC., PENNICHUCK EAST UTILITY, INC., AND
PITTSFIELD AQUEDUCT COMPANY, INC.**

2018 CIAC Tariff Amendments

Pillsbury Realty Development, LLC Motion to Compel

Pillsbury Realty Development, LLC (“Pillsbury”) moves to compel responses to Pillsbury Data Request Nos. (“Request”) 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, and 1-9. In support of this motion, Pillsbury states:

Background

1. On December 19, 2018, Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. (“the Companies”) requested that the Commission amend their tariff pages to reflect recent changes in federal tax law.

2. On January 18, 2019, the Commission issued an order suspending the proposed tariffs filed by the Companies and scheduling a prehearing conference. Order No. 26,211. Within the order, the Commission noted that “[t]he filing raises, inter alia, whether the proposed tariff amendments would result in just and reasonable rates pursuant to RSA 378; whether the proposed tariff amendments would adequately address the Companies’ tax liabilities while providing fair compensation; and whether alternative tariff amendments are available.” Id.

3. Pillsbury filed a petition to intervene in this docket, requesting permission to intervene as a full participant. Pillsbury’s petition was granted. Thereafter, the Commission approved a procedural schedule that called for data requests to be propounded on the Companies

by February 15, 2019; objections to data requests by the Companies to be served by February 20, 2019; the Companies' responses to data requests by February 25, 2019; and a Technical Session/Settlement Conference to occur on March 1, 2019 at 9:00 AM.

4. Pillsbury propounded timely data requests on the Companies. See Pillsbury's Data Requests, attached hereto as Exhibit A. The Companies subsequently submitted objections to certain data requests. See Companies' Objections to Pillsbury's Data Requests, attached hereto as Exhibit B. Thereafter, the Companies provided responses to Pillsbury's other data requests to which the Companies did not specifically object¹ and also submitted responses to Staff's data requests. See Companies' Responses to Pillsbury's Data Requests, attached hereto as Exhibit C; Companies' Responses to Staff's Data Requests, attached hereto as Exhibit D.

Legal Standard

5. Data requests are proper when they seek facts that are admissible or reasonably calculated to lead to the discovery of admissible evidence. Public Service Co. of N.H., Order No. 25,646 (April 8, 2014) (citations omitted). Data requests are a "vehicle for developing factual information." Freedom Ring Communications, LLC d/b/a Bay Ring Communications, Order No. 24,760 (June 7, 2007). The Commission has recognized that:

In the context of civil litigation, New Hampshire law favors liberal discovery, see, e.g., Yancey v. Yancey, 119 N.H. 197, 198 (1979), and that discovery is regarded as "an important procedure 'for probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties.'" Johnston v. Lynch, 133 N.H. 79, 94 (1990) (citing Hartford Accident etc., Co. v. Cutter, 108 N.H. 112, 113 (1967)).

City of Nashua, Order No. 24,681 (Oct. 23, 2006).

¹ While the Companies initially objected to Pillsbury Request 1-8, they subsequently provided an answer in their responses dated February 25, 2019.

6. The Commission has broad discretion to manage discovery in a docket. It will weigh “the effort needed to gather [the requested information], the availability of the information from other sources, and other relevant criteria.” Public Service Co. of N.H., Order No. 25,595 (November 15, 2013). “If we perceive of no circumstance in which the requested data would be relevant, we will deny a request to compel its production.” Valley Green Natural Gas, LLC, Order No. 25,867 (Feb. 17, 2016).

Analysis

7. The Companies have objected to Pillsbury’s Requests 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, and 1-9. For the reasons set forth below, the Commission should compel the Companies to provide responses to these data requests.

Pillsbury 1-1

8. Pillsbury 1-1 requested a list and description of all methodologies the Companies considered to address the 2017 Tax Act changes to the tax treatment of CIAC. This Request included providing all documents related to the Companies’ consideration of these methodologies.

9. The Companies have objected to this Request, arguing that the Request is irrelevant for purposes of this docket. They further argue that the Request calls for attorney-client privileged information.

10. As a threshold matter, the requested information is highly relevant to the Commission’s analysis in this docket. The “Order Suspending Tariff and Establishing Prehearing Conference” (Order No. 26,211, January 18, 2019) noted that the Companies’ filing raised, among other issues, “whether alternative tariff amendments are available.” Order No. 26,211 (Jan. 18, 2019) at 2. Pillsbury simply seeks the list of methodologies that the Companies

considered as well as any documents related to their consideration. This information is relevant to the Commission's express examination of "whether alternative tariff amendments are available."

11. Moreover, even in the absence of this affirmative statement by the Commission, it is difficult to envision a situation where the Companies' analysis of other methodologies is not relevant for purposes of this docket. Put another way, this information is relevant to the ultimate disposition of this matter, which necessarily requires the analysis of various methodologies to determine how CIAC will be treated in light of the recent changes to the tax code. Alternative methodologies to be presented by both the Companies and Pillsbury will assist the Commission in making this determination and are relevant to the Commission's inquiry.

12. The Companies' reliance on the attorney-client privilege to withhold this information is without merit as well. Pillsbury is not seeking any lawyer or law firm advice or guidance provided to the Companies. Instead, it is seeking factual information related to what other methodologies the Companies considered to address the tax code revisions' impacts on CIAC. See Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981) ("The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). For this reason, the Commission should compel the Companies to respond to this Request.

Pillsbury 1-2

13. Pillsbury 1-2 asked whether Pennichuck Corporation has ever paid federal income tax since the City of Nashua acquired 100% of the stock of Pennichuck Corporation effective on or about January 25, 2012. The Companies objected, arguing that this information is irrelevant to this proceeding.

14. This Request is relevant to the Commission’s analysis. In the context of this docket, the Companies seek to have the contributor of CIAC pay the tax liability with respect thereto. The tax status of the Companies demanding payment of its tax due is highly relevant—perhaps, more so than any other characteristic of the Companies’ “unique structure.” Mr. Goodhue, as CEO, CFO and Treasurer, represented at the technical session held on February 6, 2019, in substance, that at some time during the next ten years, the Companies will likely become a federal income tax payer. It is important and relevant for the Commission to understand the total tax picture of the Companies in evaluating whether the Companies’ proposed methodology should be implemented, whether another methodology should be utilized, or whether no methodology (“no gross up”) should be allowed. This is consistent with the Commission’s prior evaluation of this issue. See Re Contribution in Aid of Construction, Order No. 19,055 (April 8, 1988) at 149. In that docket, the Commission noted:

[T]he effective tax rate for each utility can be different. For instance, PSNH has tax loss carryovers which could effectively exclude the payment of income taxes for years. Any tax payments by contributors would not be used to pay taxes as there would be no tax liability. Any gross up of a tax upon a tax would provide additional cash which would not be used to pay taxes. . . .

Given the Commission’s past precedent, such an inquiry necessarily requires an evaluation of the Companies’ tax status. See id.; see also Companies’ Response to Staff’s Data Request 1-1 (wherein Mr. Goodhue seems to state, indirectly, that the enterprise’s tax liability for 2018 is likely zero).

15. Additionally, the Companies have squarely placed their “unique structure” at issue in this matter. It remains their main argument in advocating for their proposed methodology. In so doing, the Companies cannot now claim that questions related to their tax status are not germane to the Commission’s analysis of the Companies’ proposed methodology.

A response to this Request is relevant and would constitute admissible evidence or, at least, would likely lead to the discovery of admissible evidence. It follows that the Commission should compel the Companies to respond to this data request.

Pillsbury 1-3

16. Pillsbury 1-3 provides as follows: “If Pennichuck has, in fact, paid federal income tax during any tax year since around January 25, 2012, please specify the year or years and the amount of federal income tax paid. Alternatively, you may provide copies of all relevant federal tax returns.” The Companies objected and referred back to their objections related to Pillsbury 1-2.

17. Similar to the above, this Request seeks relevant information. Mr. Goodhue has already discussed the Companies’ tax status at length in the context of his pre-filed testimony (see Pre-Filed Testimony of Larry Goodhue at pages 2–8) and, upon information and belief, may have already confirmed during the technical session of February 6, 2019 that federal income tax has never been paid since its “unique structure” was put in place. Similar to Pillsbury’s preceding argument related to Pillsbury 1-2, the information requested in Pillsbury 1-3 is relevant and germane to the present docket. As a result, the Commission should compel the Companies to respond to this Request.

Pillsbury 1-4, 1-5, and 1-6

18. Pillsbury 1-4 requested that the Companies confirm the accuracy of the 2017 and 2016 “effective income tax rate[s]” displayed on page 28 of the Independent Auditors’ Report in Pennichuck Corporation’s Annual Report to the Sole Shareholder dated March 27, 2018. The Request contained the effective income tax rate for each year that was listed in the Report and requested that the Companies confirm this information and, to the extent it was not accurate, to

please explain. Pillsbury 1-5 and 1-6 contain similar requests for confirmation of data contained in the Independent Auditors' Report in Pennichuck Corporation's Annual Report to the Sole Shareholder dated March 27, 2018.

19. The Companies objected to these Requests, asserting that the Requests called for expert opinions beyond the scope of data requests to the Companies. They further argued that "such confirmation is not relevant and is unlikely to lead to the discovery of admissible evidence."

20. Pillsbury is not seeking any "expert opinions" with respect to the Independent Auditor's Report, nor are any necessary to respond to the above requests. Notwithstanding the foregoing, Pillsbury notes that Mr. Goodhue, as CEO, CFO, and Treasurer, testified at length concerning the Companies' tax liability with respect to CIAC, gross up formulae, tax rates, depreciation, interest expense deduction limitation (then confirms it does not apply to water utilities under the recent IRS interpretation and Code Section 163(j)), net operating losses ("NOL"), and deferred tax liabilities. See Pre-Filed Testimony of Larry Goodhue at pages 2–8.; see also Companies' Responses to Staff's Data Requests 1-3, 1-4, 1-9, 1-10, 1-11 (containing Mr. Goodhue's analysis and illustrating various tax matters). Based on the expansive scope of this technical testimony and detailed responses to the tax-centric data requests propounded by the parties, Pillsbury asserts that Mr. Goodhue has the ability to respond to the aforementioned Requests and the "expert opinion" objection proffered by the Companies should be overruled.

21. Additionally, during the informal session referred to by the Companies in paragraph 13 of their objection, Attorney Pfundstein asked Mr. Goodhue about the "effective tax rates" (which were negative) contained in the Independent Auditor's Report and Mr. Goodhue's primary response was "That is misleading . . ." or words to that effect. Given the nature of Mr.

Goodhue's response, Pillsbury is entitled to know whether the highly relevant information sought in Pillsbury 1-4, 1-5, and 1-6 based on Pennichuck Corporation's Annual Report to Shareholder dated March 27, 2018 (which is signed by Mr. Goodhue) is also "misleading."

22. Moreover, the effort required to respond to these Requests is minimal and the best source of obtaining the desired information is from the Companies, which are in the best position to verify the information.

23. It follows that the information requested is relevant, as the Commission has previously found the total tax picture of utilities should be included in its analysis of this issue. See Re Contribution in Aid of Construction, Order No. 19,055 (April 8, 1988) at 149. As a result, the Companies should be compelled to respond to these Requests.²

Pillsbury 1-9

24. Pillsbury 1-9 requests information related to the five largest projects that would be subject to CIAC payments. The Companies have objected, arguing that this Request exceeds the scope of the present docket.

25. This Request is relevant to the present docket. The nature and scope of other forms of CIAC coming into the Companies will impact how the Commission analyzes the Companies' proposed methodology and whether that methodology, or some other methodology, is most appropriate under these circumstances. Thus, it follows that the Request is relevant. As a result, the Commission should compel the Companies to respond to this Request. See also Companies' Responses to Staff's Data Requests 1-1, 1-3, 1-14 (concerning contributions of property and/or cash).

² It bears noting that while the Companies objected to Pillsbury 1-4, 1-5, and 1-6 on the basis that these data requests called for "expert opinions, they did not object to Pillsbury 1-7 on the same ground.

Conclusion

26. For the reasons set forth above, Pillsbury requests that the Commission compel the Companies to provide complete and accurate responses to Pillsbury Data Request Nos. 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, and 1-9

27. Consistent with N.H. Admin. R. Puc 203.09(i)(4), counsel for Pillsbury attempted, in good faith, to resolve this discovery dispute with counsel for the Companies by telephone conference conducted on February 22, 2019. While the Companies have responded to Request 1-8, they have maintained their objections to the other Requests.

WHEREFORE, Pillsbury Realty Development, LLC requests that the Commission:

- A. Grant Pillsbury's motion to compel; and
- B. Grant such other relief that is just.

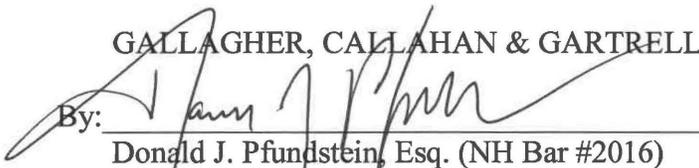
Respectfully submitted,

PILLSBURY REALTY DEVELOPMENT, LLC

By Its Attorneys

GALLAGHER, CALLAHAN & GARTRELL, P.C.

Dated: February 27, 2019

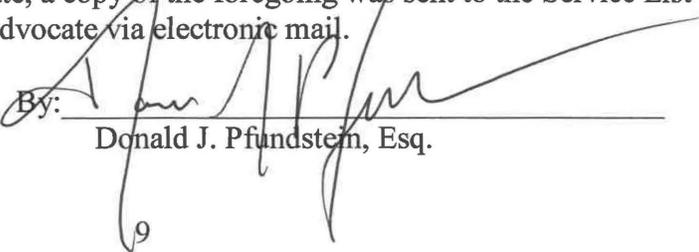
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Certificate of Service

I hereby certify that on this date, a copy of the foregoing was sent to the Service List as well as the Office of the Consumer Advocate via electronic mail.

Dated: February 27, 2019

By: 

Donald J. Pfundstein, Esq.