

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DW 20-117

HAMPSTEAD AREA WATER COMPANY, INC.

Request for Change in Rates

**OBJECTION OF THE TOWN OF ATKINSON TO MOTION FOR PROTECTIVE
ORDER TO PREVENT PUBLICATION OF DATA REQUESTS AND DATA REQUEST
RESPONSES**

NOW COMES the Town of Atkinson (“Atkinson” or the “Town”), an intervenor in the above-captioned docket, by and through its undersigned attorneys, and, pursuant to N.H. Admin. Rule Puc 203.07(e), respectfully objects to the Motion for Protective Order to Prevent Publication of Data Requests and Data Request Responses filed by Hampstead Area Water Company (“HAWC” or the “Company”) in this docket on September 27, 2021 (the “Motion”). In support of this Objection, Atkinson states as follows:

1. The Motion seeks to prevent the Town from publishing all data requests served by all parties to this docket and the Company’s responses to those data requests. The Company argues that the data requests and responses do not qualify as being part of the public record under the Commission’s rules because they were not submitted to either the Commission or staff as specified in Puc 201.04(a). The Company also argues that the data requests and responses should not be made available to the public because of the long-established practice of the Commission and the New Hampshire courts that discovery is only available to the discovery service list, not to the public in the virtual file room. The Company further requests that it should have 14 days from the date of a Commission order on the Motion, should it be denied, to review its responses for confidential treatment as provided in Puc 203.08(d).

2. Atkinson is a New Hampshire municipality, a body corporate and politic, pursuant to RSA 31:11, a public body within the meaning of the right to know law (RSA 91-A:1-a, VI), and a governmental body subject to the provisions of the New Hampshire Constitution, Part 1, Article 8. This provision of the NH Constitution requires that government be “open, accessible, accountable and responsive.” The Commission granted intervention to the Town in this docket, noting that the standard for intervention in RSA 541-A:32 had been met. *See* April 9, 2021 letter from Executive Director Howland to the Parties in DW 20-117. The Town’s interests in this docket are as a commercial customer and municipal fire protection customer of HAWC that would be adversely affected by the proposed rate increase. *See* Petition of Board of Selectmen on behalf of the Town of Atkinson for Intervention, filed in this docket on February 3, 2021. The Town is also interested in this docket and its outcome as a representative of individual ratepayers who live in the Town.

3. In determining whether confidential, commercial or financial information within the meaning of RSA 91-A:5, IV is exempt from public disclosure, the Commission employs the three-step analysis articulated in *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008) and *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005). Under this analysis the Commission first determines whether there is a privacy interest at stake, “whether the information is confidential, commercial or financial information, ‘and whether disclosure would constitute an invasion of privacy.’” If no privacy interest is at stake, disclosure is warranted. If a privacy interest is implicated, the Commission then assesses the public’s interest in disclosure and whether disclosure of the requested information would inform the public about the conduct and activities of their government. “Disclosure that informs the public of the conduct and activities of its government is in the public interest.” If it does not inform the public, then

“disclosure is not warranted.” Finally, the Commission balances the asserted private confidential, commercial or financial interest against the interest of informing the public of the government’s conduct. *Unitil Energy Systems, Inc.*, DE 10-055, Order No. 25,214 (April 26, 2011), p. 35. As the Court noted in the *Lamy* case: “ ‘To advance the purposes of the Right-to-Know Law, we construe provisions favoring disclosure broadly and exemptions narrowly.’ *City of Nashua*, 141 N.H. at 475. By so doing, we ‘best effectuate the statutory and constitutional objective of facilitating access to all public documents.’ *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997).” 152 N.H. at 108. The *Lamy* Court also noted that the “party resisting disclosure bears a heavy burden to shift the balance towards nondisclosure.” 152 N.H. at 109.

4. By seeking a blanket prohibition on publishing responses to all data requests, and not describing in any detail the information included in the responses or even providing redacted and unredacted versions of those responses to the Commission, the Company has failed to make even a prima facie case that meets the first prong of the test the Commission employs. The Company has failed to establish that publishing the data requests would constitute an invasion of a privacy interest. For this reason alone, the Motion should be denied. Compare this motion for blanket protection to the targeted motion that the Company submitted on September 28, 2021, which requests confidential treatment for two of the responses. The Town is filing an objection to that Motion as well, but at least in that motion there is a specific request for confidential treatment which can be rebutted and the Company provided redacted and unredacted copies of the responses.

5. Assuming for the purposes of argument that the Commission believes a privacy interest has been implicated for all of the data requests and responses, then it is clear the

Company cannot pass the second part of the test. Release of this information will clearly inform the public of the government's conduct and activities, i.e. the complicated process of evaluating a rate increase requested by a public utility, including all of the expenditures that are evaluated as part of the process to establish the rates. Public disclosure of this information would materially advance the public's understanding of the Commission and how it operates, as well as the specific ratemaking issues involved with this particular proceeding. Moreover, there are significant questions about whether any harm would occur to HAWC's interests. HAWC has chosen to be a "public utility" within the meaning of RSA 362:2, subject to the regulations established by the Legislature and the Commission, and as such it has certain rights or privileges, like the opportunity to earn a reasonable return on its investment through the rates that the Commission allows it to charge, but also certain responsibilities to its customers, like transparency in how those rates are arrived at. As such the Company does not have the same protections as any other private company. Even if the Company could argue that revealing this information would cause harm, it is clearly outweighed by the interest in public disclosure. Release of these responses to data requests will help to provide information to customers, not just intervenors who have already seen the information because of the Company's failure to follow the process spelled out in Puc 203.08(d). The Company has thus failed to show by a preponderance of the evidence that there is any basis under the right-to-know analysis for preventing the publication of these responses; it has not met the "heavy burden" of shifting the balance toward nondisclosure.

6. The Company's argument in support of this Motion also relies on a misreading of the Commission's rules, as well as the statutory and constitutional context in which they must be read. The Commission rules, citing the New Hampshire right to know law, RSA 91-A,

recognize that information is presumed to be public information unless there is a statutory exception which applies, in order for information to be kept confidential. This rule says: “All 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 with the following exceptions:” Puc 201.04(a). The rule then lists very specific and limited exceptions. As noted above, the Company has failed to present an argument that the entire package of responses fits within any of the exceptions specified in the rules. Moreover, under a strict reading of the rules, while the documents at issue have not yet been provided to the Commissioners, which is consistent with long-standing practice at the Commission, they have been provided to staff members of the Commission prior to July 1, 2021 (when the Department of Energy was created), and have thus been provided to the “commission”¹ as that term is defined in the rules. Since July 1, 2021, the requests and responses have been provided to certain Department of Energy employees, formerly staff members of the Commission, and to other parties in the docket. Many of the parties to the docket are municipal or state government bodies, either state agencies or municipalities, all of whom have obligations under the New Hampshire statutes and Constitution to be open and accessible.

7. Perhaps even more importantly, because there is nothing in the Commission rules or the statutes which prevents the publication of the responses, the default should be to allow the publication, given the strong language in favor of open access in RSA 91-A, the NH Constitution and New Hampshire Supreme Court decisions cited above.

¹ Pursuant to Puc 102.02 “Commission” is defined as “the public utilities commission of the State of New Hampshire, its commissioners and employees.”

8. Under Commission rules, if a party is providing a document in response to discovery that it wishes to remain confidential, it is required to accompany that document with a written statement indicating it has a good faith basis for seeking confidential treatment and that it intends to submit a motion for confidential treatment. Puc 203.08(d). Moreover, when the Company actually submits a motion seeking confidential treatment, it must follow very specific requirements in the rules which include the filing of redacted and unredacted copies. *See* Puc 201.04(b), (c), and (d). The Company failed to include any such documents with this Motion and for that reason it should not be granted. HAWC has been providing responses to data requests since March of this year and never once invoked these provisions in the rules until it filed the parallel, narrowly targeted, Motion for Confidential Treatment and Protective Order of two specific data requests and responses on September 28, 2021. Even if it had complied with the Commission rules and accompanied all of the responses which it has made over the last seven months with the required statements, it is extremely unlikely that the Company could have met the “good faith” test in the rules because there is no justification under the Commission rules or the right to know law for keeping all of this information confidential.

9. In terms of the Company’s argument that publishing the data requests and responses violates the longstanding practice of the Commission and the Courts, the Company has cited no Commission orders that indicate this is the case. It has only cited to the Commission practice of having a separate discovery service list. That in and of itself clearly is not sufficient to trump the fact that there are no rules or statutes which prohibit the release of data requests and responses, and that the right-to-know law and Supreme Court precedent favors disclosure and say that provisions favoring disclosure should be construed broadly, while exemptions should be construed narrowly, to facilitate access to all public documents. The Company, in this case the

party resisting disclosure, has failed to meet its heavy burden to shift the balance towards nondisclosure.

10. In terms of the Company's request that it be given 14 days from the date of a Commission order denying its Motion to review past data request responses for confidential treatment, the Town is opposed to this request. As noted above, the Company has been submitting responses to data requests in this docket since March and did not invoke the provision in the rules under which it can indicate its intent to seek confidential treatment of a response. The Town agrees with the position of the Consumer Advocate, stated in its Opposition to Motion for Protective Order filed on September 28, 2021, that there is no basis in the rules for an after-the-fact confidentiality bid, and a two-week delay would be inconsistent with RSA 91-A:4.

11. The right-to-know law, the New Hampshire Constitution, Supreme Court decisions, a strict reading of the Commission rules, and the interests of customers of public utilities all support a denial of the Motion.

WHEREFORE, Atkinson respectfully requests that this honorable Commission:

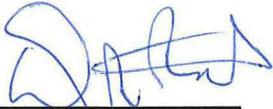
A. Deny the Company's request for a protective order to prevent publication of data requests and responses;

B. Deny the Company's request that it be given an additional 14 days after an order denying the Motion is issued to review past responses to data requests; and

C. Grant such additional relief as it deems appropriate.

Respectfully submitted,

Town of Atkinson, New Hampshire
By Its Attorneys



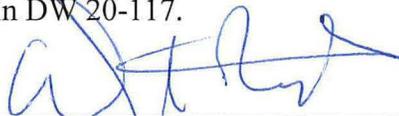
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Dated: October 6, 2021

Certificate of Service

I hereby certify that a copy of the foregoing Appearance has on this 6th day of October 2021 been sent by email to the service list in DW 20-117.

By:



Douglas L. Patch

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