

DW 04-056

PENNICHUCK WATER WORKS, INC.

Petition for Permanent and Temporary Rate Increase

**Order Denying Motion to Suspend and
Approving Interventions and Procedural Schedule**

ORDER NO. 24,371

September 17 , 2004

APPEARANCES: McLane, Graf, Raulerson & Middleton, P.A. by Steven V. Camerino, Esq. for Pennichuck Water Works, Inc.; Upton & Hatfield, L.L.P. by Robert Upton, II, Esq. for City of Nashua; Drescher & Dokmo, P.A. by William R. Drescher, Esq. for Town of Amherst; Ransmeier & Spellman, P.C. by Dom D'Ambruoso, Esq. for Anheuser-Busch; Office of the Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Marcia A. B. Thunberg, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On March 3, 2004, Pennichuck Water Works, Inc. (Pennichuck) filed with the New Hampshire Public Utilities Commission (Commission) a Notice of Intent to File Rate Schedules as well as a Motion for Waiver for Certain Provisions of Puc 1604.01(a). Specifically, Pennichuck sought waiver of N.H. Admin. Rule Puc 1604.01(a)(12) which requires a list of management audit and depreciation studies performed within the last five years and Puc 1604.01(a)(18) which requires balance sheets and income statements for the previous three years. Separately docketed is the Petition for Valuation filed by the City of Nashua (Nashua) in which Nashua seeks to acquire the assets of Pennichuck and two related water utilities, Pennichuck East Utility and Pittsfield Aqueduct Company. *See DW 04-048.*

On April 6, 2004, the Office of the Consumer Advocate (OCA) notified the Commission of its intent to participate in this docket on behalf of residential ratepayers. On April 8, 2004, the Commission's Staff (Staff) recommended the Commission grant Pennichuck's waiver

request with respect to Puc 1604.01(a)(12) and Puc 1604.01(a)(18). The Commission granted Pennichuck's waiver request by secretarial letter dated April 15, 2004.

On May 28, 2004, Pennichuck filed revised tariff pages as well as a Petition for Temporary Rates, along with supporting prefiled testimony and exhibits. The Commission, by Order No. 24,338 (June 18, 2004) suspended the proposed tariffs, scheduled prehearing and technical conferences for July 27, 2004, and ordered Pennichuck to notify all persons desiring to be heard at the prehearing by publishing a copy of the order.

The following municipalities requested intervention: Nashua (July 15, 2004), Raymond (July 16, 2004), Amherst (July 21, 2004), and Bedford (July 26, 2004). The following residential and commercial customers requested intervention: Anheuser-Busch, Inc. (July 1, 2004) and Barbara Pressly (July 7, 2004). There were no objections to any of the intervention requests.

On July 23, 2004, Nashua filed a Summary of Position as well as a Motion to Suspend Consideration of Permanent Increase in Rates (Motion to Suspend), to which Pennichuck objected on July 27, 2004. The Commission held a duly noticed prehearing conference on July 27, 2004 and took oral arguments on Nashua's Motion to Suspend. The Commission requested interested parties file briefs by August 9, 2004, on whether RSA 38 and RSA 378:6 give the Commission discretion to suspend tariffs for longer than twelve months.

Also on July 27, 2004, Staff, on behalf of itself and the Parties, filed a proposed procedural schedule to govern the filing of briefs relating to the Motion to Suspend and for review of the temporary rate and permanent rate filings. The Commission, by secretarial letter dated August 3, 2004, approved the schedule, pending resolution of the issues raised in the Motion to Suspend.

On August 9, 2004, Pennichuck filed a Memorandum on Application of RSA 378:6 to Request for Permanent Rate Increase. On August 12, 2004, Nashua filed a Memorandum on the Effect of RSA 378:6.

As scheduled, the Commission took evidence on the request for temporary rates on August 24, 2004. That request is still pending and will be addressed separately.

II. POSITIONS OF THE PARTIES AND STAFF

A. Pennichuck Water Works, Inc.

Pennichuck states that it is earning 231 basis points below its allowed rate of return of 8.58 percent. Pennichuck attributes the shortfall in earnings to 1) investments required to comply with federal Safe Drinking Water Act requirements and Nashua's mandated water main relocation for purposes of Nashua's Combined Sewer Overflow Project; 2) necessary capital improvements to replace aging infrastructure; 3) the addition of new employees; and 4) increased operating costs. Pennichuck seeks additional gross revenues of approximately \$2.4 million. Pennichuck proposes that this increase apply to general metered customers only, and not to fire protection customers. Pennichuck also seeks temporary rates.

In response to Nashua's request that the Commission take no action on the permanent rate filing, Pennichuck argues that Nashua is wrong to suggest that temporary rates provide the company adequate protection. Unless permanent rate relief is ultimately granted, Pennichuck believes it will have no right to collect and retain any revenues greater than those authorized in Pennichuck's last rate case. Delaying implementation of permanent rates, it contends, may lead to rate shock when temporary rates cease and a recoupment surcharge is added. Pennichuck also asserts that Nashua will attempt to conduct discovery that is not relevant to the rate issues and is placing additional pressure on Pennichuck to force it to transfer all of its

utility assets to Nashua. Pennichuck argues that valuation issues in DW 04-048, including which assets to take and the amount to be paid for those assets, should not be considered in this docket. Lastly, Pennichuck argues Nashua's Motion to suspend is not in the public interest because it impedes Pennichuck's cash flow and thus its ability to provide safe and reliable service.

In its brief, Pennichuck argues the Commission should deny the Motion to Suspend because it would be contrary to the plain language of RSA 378:6, I. Pennichuck argues that the language of RSA 378:6, I is plain and unambiguous and, therefore, one should not look further to discern legislative intent. By the plain language of RSA 378:6, the Commission has authority to suspend the effective date of permanent rates for a maximum of twelve months, unless there is investment that exceeds fifty percent of the total capital investment of the utility. That circumstance is not present.

According to Pennichuck, Nashua wrongly argues that because Nashua may end up taking Pennichuck's assets, there is no need for a rate case. In Pennichuck's view, the argument fails to recognize that utility rates are set on the basis of historical costs pursuant to RSA 378:28 and 378:30-a. A future change in ownership of any of these assets will have no bearing on the current request for a rate increase, which is based on assets owned by Pennichuck during the 2003 test year.

Pennichuck states that Nashua does not expect to acquire assets until January 2006 and that the rate case will be concluded by June 18, 2005 (the end of the 12 month statutory deadline). Given that rates would be determined in advance of any possible outcome in the RSA 38 docket, and that the municipalization effort raises no recoupment issues that bear on this docket, Pennichuck asserts that the Motion to Suspend is an improper use of the rate docket to advance the municipalization effort and should be denied.

Pennichuck also asserts that if it is denied access to revenue from customers, it will have to take on more debt or, if necessary, turn to the equity markets. Accessing the equity markets for a utility in an eminent domain process, in Pennichuck's view, will likely be more costly to ratepayers.

B. City of Nashua

Nashua's Motion to Suspend asks that the Commission take no action on Pennichuck's permanent rate filing for the following reasons: 1) it is illogical to engage in a lengthy and expensive process to set rates for Pennichuck based on assets the company may no longer own; 2) Nashua's acquisition of any of the Pennichuck's assets may have an impact on the rates for Pennichuck's remaining assets and thus the valuation docket should proceed first; 3) Nashua has offered to acquire Pennichuck's assets at a premium above rate base and it is unreasonable for Pennichuck to receive a rate increase as well; and 4) Pennichuck's rate case is an effort to increase its rate base in order to increase the acquisition value.

In its supporting memorandum, Nashua argues that it filed the valuation petition with the Commission prior to the Pennichuck rate case and, therefore, Pennichuck is merely raising procedural barriers to the acquisition. Nashua asks the Commission to put Pennichuck on notice that it will review whether Pennichuck's pursuit of a permanent rate increase at this time is prudent and in the best interest of its customers. Nashua does not object to temporary rates, and states Pennichuck has not demonstrated that the implementation of temporary but not permanent rates will result in substantive harm or failure to recover just and reasonable rates. Nashua suggests the Commission might address rates in the context of the RSA 38 valuation proceeding.

Nashua states that RSA 378:6 does not anticipate a simultaneous rate case and takings case under RSA 38. Given the two pending matters, Nashua argues RSA 378:6 should not apply as 1) Pennichuck's assets after the taking will be different; 2) after the taking there will be fewer ratepayers, and 3) temporary rates are sufficient to prevent harm to Pennichuck. Lastly, Nashua states that nothing in RSA 378:6 suggests that Pennichuck customers should bear the costs of a rate proceeding.

C. Office of the Consumer Advocate

The OCA agrees that to proceed immediately with the permanent aspects of this rate case while the valuation docket is proceeding may be an academic exercise and not a wise use of limited resources. OCA agrees that concurrent proceedings under RSA 378:6 and RSA 38 were not envisioned by the legislature. OCA stated that there was at least certainty concerning the assets contained in the 2003 test year and concluded that if a transfer of assets were to occur prior to permanent and temporary rates being reconciled, it would complicate reconciliation.

D. Staff

Staff objects to Nashua's Motion to Suspend on the basis that RSA 378:6 authorizes the Commission to suspend tariffs for only twelve months. Considering the amount of time needed to investigate a rate case of this size, Staff suggested the Commission might suspend consideration of the rate case for two to three months and still allow Staff time to conduct a reasonable review, but it could not suspend the rate case proceeding for longer than that. Staff disagreed with Nashua that temporary rates alone would protect Pennichuck, pointing out that RSA 378:29 sets forth a recoupment (or refund) formula that requires a comparison between temporary and permanent rates. Finally, Staff asserts Nashua should clarify whether it envisions test year assets changing as a result of the valuation docket

III. COMMISSION ANALYSIS

A. Interventions

New Hampshire RSA 541-A:32 and N.H. Admin. Rules, Puc 203.02 (b) require a petitioner to demonstrate that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Upon such a showing, the Commission may allow the intervention if it finds that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by the intervention. We find all requests for intervention to meet these standards and will grant the requests of Ms. Pressly, Anheuser-Busch, Inc., the Towns of Amherst, Bedford and Raymond and the City of Nashua. We further find that the interests of justice and the orderly and prompt conduct of the proceedings will likely not be impaired by the interventions. In the event it becomes necessary in the future, we will consider whether to impose conditions or limitations on these interventions in order to promote the orderly conduct of this docket.

B. Motion to Suspend Proceeding

After consideration of the arguments presented by Nashua and Pennichuck, we find no legal basis that would allow us to suspend this proceeding in order to complete DW 04-048, Nashua's valuation petition. Like Nashua and OCA, we surmise that the legislature did not contemplate concurrent or even intertwined proceedings when enacting RSA 378:6 and RSA 38. We agree with Pennichuck, however, that these statutes provide separate and distinct rights which each party is free to pursue in the respective dockets.

The rights provided by RSA 378 are substantive rights and are not mere procedural rights or barriers as Nashua contends. RSA 378:6 plainly states the Commission has authority to

suspend the effectiveness of filed schedules for a period “not to exceed 12 months in all.” Even if we were to agree that it would be more efficient to consider the dockets *seriatim*, we lack the authority to suspend the rate case beyond the 12-month statutory limitation. Because the valuation docket could not be concluded in a matter of a month or two, we will proceed with the rate case concurrently with the RSA 38 proceeding.

Nashua has made no argument that RSA 378:6 is ambiguous and it has offered no evidence of legislative intent that the filing of a petition pursuant to RSA Chapter 38 would obviate the 12-month requirement of RSA 378:6. Ambiguity is a prerequisite to interpreting a statute in a manner other than by its plain meaning. *See, Appeal of Booker*, 139 N.H. 337, 341 (1995). Accordingly, inasmuch as the meaning of RSA 378:6 is clear and incontrovertible, we deny the Motion to Suspend.

With respect to Nashua’s argument that the rate case will involve assets that Pennichuck may no longer own, we have the ability to adjust a utility’s rate base if assets are no longer appropriately included. *See e.g., Appeal of Eastman Sewer Co.* 138 N.H. 221 (1994). If the assets are prudently incurred, used, and useful in the provision of utility service, pursuant to RSA 378:28 during the test year, it is appropriate to consider them in a rate proceeding, even if circumstances may change in the future. Moreover, it is not certain at this time that Nashua will at some future date in fact acquire the Pennichuck assets.

The Commission, furthermore, traditionally uses a historical “test year” methodology to establish a utility’s revenue requirement. The Commission examines a thirteen point average of the utility’s rate base during the twelve month test year with pro rata modifications to operation and maintenance expenses for “known and measurable” changes in the twelve months following the test year. This methodology produces just and reasonable rates to both utilities and their

customers, absent extraordinary circumstances. *See, EnergyNorth Natural Gas, Inc.*, 78 NHPUC 117, 120 (1993). Thus, the acquisition of Pennichuck's assets by Nashua after the test year and the twelve months following the test year does not bear on this rate case.

With respect to Pennichuck's concern that Nashua or others may use discovery in the rate case to pursue issues that are more properly reserved for the valuation docket, we expect the Staff and parties to confine their discovery to the issues noticed in Commission Order No. 24,338 (June 18, 2004) relating to rates, fares, and charges allowed under RSA 378. We will exercise our authority to manage DW 04-048 and DW 04-056 to preserve the interests of justice and the orderly and prompt conduct of those proceedings.

Based upon the foregoing, it is hereby

ORDERED, that the intervention requests of Barbara Pressly, Anheuser-Busch, Inc., the City of Nashua, and the Towns of Amherst, Bedford, and Raymond are **GRANTED**; and it is

FURTHER ORDERED, that that the City of Nashua's Motion to Suspend Consideration of Permanent Increase in Rates is **DENIED**; and it is

FURTHER ORDERED, that the procedural schedule approved on August 3, 2004, shall continue as delineated therein.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of September 2004.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary