

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 10-090

PITTSFIELD AQUEDUCT COMPANY, INC.

Permanent Rate Proceeding

**Order Approving Temporary/Permanent Rate Recoupment,
Granting Motion for Confidential Treatment,
and
Granting Recovery of Certain Rate Case Expenses**

ORDER NO. 25,279

October 21, 2011

I. PROCEDURAL HISTORY

On June 8, 2011, by Order No. 25,229, the Commission approved a settlement agreement that, among other things, established new permanent rates for Pittsfield Aqueduct Company, Inc. (PAC) and called for PAC to file a reconciliation report to recover the difference between temporary and permanent rates in the proceeding. The Commission also authorized PAC to recover rate case expenses incurred in the proceeding and directed PAC to file within 30 days of the order a calculation of its rate case expenses as well as a proposed surcharge to recover the expenses.¹

A. Reconciliation

On June 20, 2011, PAC filed its tariff pages for permanent rates and filed a supplemental tariff concerning recoupment of the difference between temporary and permanent rates. PAC seeks to recoup \$44,175.18 from its metered customers, \$777.35 from its private fire protection customers and \$21,171.32 from its public fire hydrant customers. Private fire protection

¹ A more complete description of the procedural history of this proceeding may be found in Order No. 25,229.

customers would pay a surcharge based on service pipe size. On July 21, 2011, Staff recommended approval of the recovery amounts proposed by PAC.

B. Rate Case Expenses and Motion for Confidential Treatment

On June 20, 2011, pursuant to the settlement agreement, PAC submitted to Staff and the Office of the Consumer Advocate (OCA) its proposal to recover \$44,997.18 in rate case expenses. PAC also supplied copies of invoices supporting its request. On July 21, 2011, the OCA requested the Commission wait to make a determination on PAC's rate case expense filing until after it received the OCA's response to PAC's filing.

On August 4, 2011, Staff filed a letter recommending the Commission approve PAC's request for recovery of rate case expenses, with the exception of \$550.50 that Staff argued related to a different docket. On August 9, 2011, the OCA filed its response to the PAC request for rate case expenses, to which the OCA replied on August 19, 2011.

On August 16, 2011, PAC filed a Motion for Protective Order for hourly billing rate information that was contained in copies of invoices submitted in support of its rate case expense filing. On August 23, 2011, Staff refiled its August 4, 2011 recommendation letter and redacted hourly billing information that PAC deemed confidential in its August 16, 2011 motion for confidential treatment; the substance of the recommendation did not change.

II. POSITIONS OF THE PARTIES

A. PAC

PAC provided its calculation of the difference between temporary and permanent rates and seeks to recoup a total of \$66,123.85 as follows: \$44,175.18 from its metered customers; \$777.35 from its private fire protection customers; and \$21,171.32 from its public fire hydrant customers. PAC proposes a twelve-month recoupment period, consistent with the approved

settlement agreement. According to the tariff, recoupment of the \$44,175.18 from its 627 metered customers would result in an average monthly surcharge of \$5.87 per customer for twelve months. For PAC's public fire hydrant customer, the Town of Pittsfield, the recoupment would result in a monthly surcharge of \$1,764.28 for twelve months. Private fire protection customers would pay a surcharge based on service pipe size.

In its motion for confidential treatment, PAC requests the Commission grant confidential treatment to hourly billing rate information contained within its rate case expense invoices submitted to Staff and the OCA. PAC argues that the information is competitively sensitive and is expressly exempt from public disclosure pursuant to RSA 91-A:5, IV. PAC states that the information sought to be protected is not publicly available and that disclosure would put PAC's attorneys and consultants at a competitive disadvantage by divulging to competitors the rates they charge for their services. PAC stated by way of example that release of hourly billing rates would harm their consultants' competitive position when bidding or negotiating for business in the future.

PAC also requested the Commission waive Puc 203.08 and the provision requiring that motions for confidential treatment be filed prior to hearing. PAC states that the rule does not prescribe or contemplate a time period for those instances where confidential information is submitted as part of discovery that occurs following a hearing. PAC states that the purpose of the rule is satisfied in that the motion is being filed prior to the Commission's issuance of an order relating to the rate case expense phase of the proceeding. PAC argues that waiver of the rule will not disrupt the orderly, efficient, and timely resolution of this matter and that the public will not be prejudiced by the waiver.

With respect to rate case expenses, PAC argues that the OCA is barred from challenging the process PAC used for seeking recovery of its rate case expenses since the plain language of the settlement agreement approved by the Commission laid out the process for submitting rate case expenses for consideration. The settlement agreement required PAC to submit its expenses in the manner that it did and made clear that the issue reserved for subsequent review and consideration was the amount of the reasonable and prudent rate case expenses, not the process for submitting those expenses. PAC argued that the OCA, having participated in the proceeding, which included a hearing, and having chosen not to seek reconsideration of the order approving the settlement agreement, cannot now argue that the process is improper.

PAC disputed the OCA's characterization of the rate case expense phase of this docket as a separate adjudicative proceeding and stated the OCA had an opportunity to conduct discovery on PAC's rate case expenses and to file its position with the Commission; thus the elements of an adjudicative proceeding, which the OCA argues for, have been satisfied. PAC stated that there is no legal basis for OCA's argument that a hearing must be held prior to Commission approval of the rate case expenses as a matter of law. PAC stated that a Commission decision on rate case expenses without a hearing does not violate state or federal due process rights. Further, PAC argued that any change in the process for requesting recovery of rate case expenses should be applied to all utilities on a prospective basis.

PAC defended its rate case expenses as reasonable and prudently incurred and that the expenses comprised legal, consulting, administrative, and notification expenses that related only to Docket No. DW 10-090 and were direct expenses that are not otherwise recovered by PAC through its existing rates. PAC stated that the amount of the expenses is reasonable given the length of the case and nature of the issues involved.

PAC requested that the Commission reject the OCA's argument that PAC's rate case expenses ought to be reduced based on the timing of the rate case filing. PAC stated that the Commission's approval of rate increases indicates the prior rates in effect were no longer just and reasonable. PAC stated that if the OCA believed PAC should not have filed another rate case, it could have opposed the rate increase rather than agree to it in the settlement agreement. PAC stated that the OCA provided no basis for the position that PAC's consultant expenses should be disallowed because the consultants were used in prior cases. PAC argued it would be improper for the Commission to impose new standards, such as an RFP process for rate case services, retrospectively. PAC denied that, absent a written agreement between PAC and its outside legal counsel, there would be no objective basis by which the Commission could verify that outside legal counsel performed in accordance with any pre-defined terms of service and scope of work. PAC cited the fact that Staff was able to discern from the invoices that approximately \$540.00 in legal costs were not properly within the scope of the proceeding. PAC stated that the detailed invoices were more probative than any written contract.

PAC objected to the OCA's argument that its legal consultant should not be able to raise fees during the pendency of the rate case and stated that the OCA has provided no basis to assert that a private law firm should not be allowed to adjust its prices periodically simply because it is engaged by a client in a regulatory proceeding. PAC referred to the OCA's arguments concerning \$151.16 in mileage reimbursement and other expenses and argued that they were unfounded. PAC objected to the OCA's allusions to possible charges for first-class air travel, courier delivery, and limousine services. PAC stated that it did not have any travel costs for consultants and that the only travel expenses incurred were for minimal employee mileage

expense. PAC stated that if the Commission adopts the review of the minutia the OCA seeks then utilities will lose discretion on how best to run their affairs.

PAC objected to the OCA's request that the Commission deny PAC interest on the amount of rate case expenses because PAC failed to abide by the Commission's rules regarding the filing of motions for confidential treatment. PAC stated it did comply with the Commission's rules but that the rule for filing motions for confidential treatment is ambiguous. It stated that the remedy the OCA seeks is far beyond the bounds of any remedy previously imposed by the Commission for such a procedural matter. PAC requested the Commission deny the OCA's request in its entirety, approve the rate case expenses recommended by Staff, and grant PAC leave to file additional rate case expense information for PAC's efforts to respond to the OCA's filing regarding rate case expense.

B. OCA

The OCA took no position on PAC's proposed temporary/permanent rate recoupment filing and did not oppose the granting of PAC's motions for protective order.

The OCA requested that the Commission deny PAC recovery of \$29,237.77 in rate case expenses. The OCA contends that PAC had received authorization to recover \$105,779.72 in rate case expenses in February 2010 and less than two months later PAC filed its notice of intent to further increase its rates; did not competitively bid any of its contracts for outside consultants; has no written agreement for services provided by its outside legal counsel; and included excessive mileage expenses. The OCA recommended that the Commission allow PAC to recover no more than \$15,759.41 in rate case expenses and requested that the Commission deny PAC interest on this amount for PAC's failure to abide by the Commission's rules. Specifically,

the OCA noted that PAC failed to file its rate case expense with the Executive Director and failed to serve all parties to the docket. *See*, Puc 203.02, .03, .04, and .05.

The OCA stated that PAC's filing of a new rate case and incurrence of rate case expenses so soon after its last rate case concluded was not just, reasonable, or in the public interest. The OCA stated that PAC's consultant's charges for the 2010 rate case should have reflected economies for having worked on PAC's 2008 rate case. The OCA characterized allowing PAC to recover the rate case expenses as akin to allowing PAC a blank check for rate case expenses. The OCA objected to PAC's use of sole-source contracts for its consultants and, by way of comparison, stated that the OCA and the Commission must use formal public competitive bidding when procuring consultants.

The OCA stated that PAC's lack of a written contract for its outside legal counsel makes it difficult to have an objective basis by which to verify that PAC defined any terms of service or scope of work before the consultant began providing services. The OCA recommended the Commission disallow 50% of legal fees, or \$12,776.70, and split the remaining cost between shareholders and ratepayers. The OCA requested the Commission require PAC to formally memorialize all contracts, including terms and scope of service, for all future rate cases.

The OCA requested that the Commission disallow \$151.16 in mileage expenses associated with multiple PAC employees traveling to the Commission in separate cars rather than carpooling. The OCA argued the Commission should replace that expense with one round trip from PAC's offices in Merrimack to the Commission at the mileage rate set by the IRS for 2010, or 50 cents per mile. The OCA argued that the Commission should split four other mileage expenses between PAC's rate case and Pennichuck Water Works, Inc.'s rate case,

Docket No. DW 10-091, since the employees' attendance at the Commission was for both companies.

The OCA requested the Commission deny other expenses as inappropriate. It requested disallowance of costs related to first-class air travel, courier delivery, limousine or private car service, hotel room service, and alcohol, among other things. The OCA also requested that the Commission order PAC to affirmatively deny or confirm whether its proposed recovery amount includes these costs. The OCA stated that it propounded discovery upon PAC on this issue but that PAC merely directed the OCA to its rate case expense summary. The OCA also requested that the Commission require PAC to retain and produce itemized receipts in the future.

The OCA requested that the Commission require in all future rate cases that PAC use a competitive bidding process and require PAC to engage the provider with the lowest bid unless there is an adequate justification otherwise. In light of PAC's failure to competitively bid for services, the OCA requested that the Commission not allow PAC to recover interest on its approved rate case expenses.

Lastly, the OCA stated that PAC failed to comply with Commission rules relative to its motion for confidential treatment and that the Commission should not allow PAC to recover the costs associated with that filing. The OCA also requested that the Commission require PAC to file all future rate case expense filings with the Commission as it does with all other pleadings and that the Commission should consider penalizing PAC pursuant to RSA 365:41. The OCA also requested that the Commission formally commence rulemaking pursuant to RSA 365:8, X relative to standards and procedures for determination and recovery of rate case expenses.

C. Staff

Staff reviewed PAC's calculation of temporary/permanent rate recoupment and agreed with PAC's calculation and recommended that the Commission approve the recoupment surcharges. With respect to rate case expenses, Staff recommended that the Commission disallow \$550.50 in expenses and authorize PAC to recover \$44,446.68 in expenses. Staff explained that \$540.00 in expenses related to legal services that were actually performed for Pennichuck Water Works, Inc. and that another charge for \$10.50 was a minor misallocation of expenses for court reporter services. Staff recalculated the surcharge and stated the per-customer charge would now be \$5.80 rather than the \$5.87 proposed by PAC.

III. COMMISSION ANALYSIS**A. Reconciliation**

Upon the final disposition of a rate proceeding in which temporary rates were in effect, RSA 378:29 requires the utility to reconcile the difference between temporary rates and the permanent rates finally determined in the proceeding. The proposed surcharge is based on usage between October 8, 2010, the effective date of temporary rates pursuant to Order No. 25,154, and June 8, 2011, the date permanent rates were approved by Order No. 25,229. The surcharges for the general metered, private fire protection, and public fire hydrant classes are proposed for twelve equal monthly installments consistent with the approved settlement agreement. Having reviewed PAC's calculations and Staff's recommendation, we find the temporary/permanent recoupment amounts to be just and reasonable and consistent with RSA 378:29 and RSA 378:7. Based on the above, we will approve the rate recoupment surcharges proposed by PAC.

B. Motion for Confidential Treatment

RSA 91-A:5, IV states, in relevant part, that records of “confidential, commercial, or financial information” are exempted from disclosure. *See Unital Corp. and Northern Utilities, Inc.*, Order No. 25,014, 94 NH PUC 484, 486 (2009). In determining whether commercial or financial information should be deemed confidential, we first consider whether there is a privacy interest that would be invaded by the disclosure. *Id.* Second, when a privacy interest is at stake, the public’s interest in disclosure is assessed. *Id.* Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.* This is similar to the Commission’s rule on requests for confidential treatment. *See* N.H. Code Admin. Rules Puc 203.08.

The Commission has previously found hourly billing rate information exempt from disclosure. *See, Unital Energy Systems, Inc.*, Order No. 24,746, 92 NH PUC 109, 114 (2007). Disclosure of PAC’s legal consultant’s hourly billing rate information could cause harm as release of the information would likely result in a competitive disadvantage to its legal consultant. Further, there is no indication that disclosure of the information would inform the public about the workings of the Commission. In balancing the interests of PAC and its consultants’ interest in protecting the information with the public’s interest in disclosure, we find that the privacy interests in non-disclosure outweigh the public interests in disclosure and, therefore, we grant PAC’s motion. Consistent with Puc 203.08(k), our grant of this motion is subject to our on-going authority, on our own motion, on the motion of Staff, or on the motion of any member of the public, to reconsider our determination.

We next address PAC's waiver request. N.H. Code Admin. Rules Puc 203.08(d) states that "[i]n lieu of immediately filing a motion for confidential treatment, a party providing a document to the commission staff" in discovery may accompany the submission with a statement that the party has a good faith basis for seeking confidential treatment of the document and that prior to hearing, the party intends to submit a motion for confidential treatment. In this instance, the motion was submitted concerning information that was not subject to the hearing on the merits. The determination of the reasonableness, prudence, and amount of the rate case expenses was not the subject of the April 26, 2011 hearing; that issue was deferred. Thus, the motion has preceded any hearing, should one be held, and no waiver is needed.

C. Rate Case Expenses

The Commission has historically treated prudently incurred rate case expenses as a legitimate cost of business appropriate for recovery through rates. *Hampstead Area Water Company, Inc.*, Order No. 25,025, 94 NH PUC 563, 565 (2009). After a review of PAC's rate case expenses, Staff recommends disallowance of two expenses, reducing the total of expenses to \$44,446.68. Staff recommends the Commission disallow \$540.00 for a legal invoice it deems related to Pennichuck Water Works, Inc. and \$10.50 for a minor misallocation of expenses for the court reporter. The OCA recommends that the Commission disallow \$29,237.77 and approve for recovery from ratepayers no more than \$15,759.41 in expenses. PAC objects to the OCA's recommendation.

In its relief requested in sections A, B, and C.c., from its August 9, 2011 filing, the OCA requests that the Commission require PAC to "affirmatively deny or confirm" whether expenses include costs for first-class air travel; courier delivery; limousine or private car services; hotel room service; entertainment; recreational activities or services; personal services; and alcoholic

beverages, and if any such costs exist, reduce PAC's rate case expenses for those costs. In its August 19, 2011 response to the OCA, PAC cites its response to Data Request OCA 4-6 and states that it informed the OCA in discovery that the only travel it incurred was for minimal employee mileage expense and for minimal mileage expense for its attorney.

Data Request OCA 4-6 asks that PAC identify and explain any charges included in PAC's proposed rate case expense recovery total related to the list set forth above. PAC's response states: "[t]he only expenses related to the above are overnight mail through Unishippers. As the Company performs much of the rate case filing preparation and discovery internally to reduce costs, the Company will need to occasionally send time sensitive documents to its consultants." The response to Data Request OCA 4-6 is sufficiently clear that costs of the type listed by the OCA are not included in PAC's proposed rate case expenses. It would be unnecessary to make PAC reiterate the point. Accordingly, we deny the related OCA requests.

In section C.a., the OCA proposes a reduction of \$12,776.70 in outside legal costs for PAC's "failure to memorialize the terms or scope of service." PAC counters that the scope of work is set forth in extensive detail in the bills. Having reviewed the bills, we are satisfied that the detail reflects the terms of service and scope of work in a manner that allows an assessment of the reasonableness of the work provided and the fees charged. While there may be better methods of memorializing the scope of work, the facts before us do not warrant a disallowance. Accordingly, we deny the OCA's request to disallow \$12,776.70 related to PAC's outside legal counsel.

In section D., the OCA appears to argue that PAC's expenses should be further reduced by an amount equal to 50% of the OCA's proposed reductions in order, among other things, to incent PAC to control its costs and encourage it to give more scrutiny to the frequency of its rate

cases. RSA 378:7 provides that the Commission is "under no obligation to investigate any rate matter which it has investigated within a period of two years, but may do so within said period at its discretion." *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 568 (1980).

Notwithstanding RSA 378:7, the Commission is under an "obligation to fix a rate of return which will meet the constitutional standards not only at the time the order is made but for a reasonable period of time thereafter." *Id. citing New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 96, (1973). The "[C]ommission attempts to adhere to the general rule of waiting the two years unless there are unusual circumstances or a possible confiscation of property." *Public Service Co. of New Hampshire*, 64 NH PUC 295, 296 (1979). In light of PAC's statutory and constitutional rights to seek rate increases, and having found it just and reasonable to increase PAC's revenue requirement in the instant docket, we cannot agree that PAC should be penalized for making its filing. Furthermore, arbitrarily reducing PAC's rate case expenses by half as an incentive to control future expenses is not supported by the record or legally sound. We therefore deny OCA's request.

In section E., the OCA urges the disallowance of interest on the amount approved for recovery due to the Company's purported failure to abide by Commission rules and in section G. OCA requests that the Company "formally file" its rate case request pursuant to the rules related to filings in adjudicative proceedings. The proposed disallowance appears to relate to the fact that the Company submitted its rate case expense request and supporting documentation directly to Staff and OCA for review, did not copy the other parties or the Commission's Executive Director, and did not include a motion for confidentiality. The Company's submission to Staff and OCA did not violate the Commission's rules and was consistent with the Settlement Agreement approved in this case and with past practice. Furthermore, the Company did not seek

to recover interest. Accordingly, the request to disallow interest is not supported by the record. At the same time, we conclude that the better practice is for companies to provide copies of their rate case requests not only to Staff and OCA but to the parties to a proceeding and we will take the steps necessary to implement this practice prospectively.

In section F., the OCA proposes requirements for future rate cases and in section K. it proposes a rulemaking. Though we have denied the bulk of requests for reduction in rate case expenses as they have been presented, we share the concerns of the OCA that the expenses in this and many cases are a burden on ratepayers and that the standards for recovery could benefit from greater delineation. In Docket No. DG 08-009, a National Grid rate case, the Commission directed Staff to review rate case expenses in New Hampshire by industry “with attention to factors such as use of inside versus outside counsel and experts, use of competitive bidding practices, and possible models in use elsewhere.” Staff filed its report on June 30, 2010. While it would be beyond the scope of this proceeding to implement the OCA’s specific proposals, some may have merit and a rulemaking docket, which we will undertake, is the appropriate forum to consider the Staff report and proposals such as those made here by the OCA.

In sections H., I., and J., the OCA focuses on the posting of the Company’s rate case request on the Commission’s website and on the confidential treatment of the request. To the extent such issues are not moot, they will be addressed separately as administrative matters.

In conclusion, we will approve PAC’s requested rate case expenses as reduced by Staff. This results in a total approved rate case amount of \$44,446.68. The surcharge to PAC’s 639 total customers would amount to \$5.80 per customer for twelve months. We find the surcharge to be just and reasonable and we will authorize PAC to recover this amount via surcharges to customer bills.

Based upon the foregoing, it is hereby

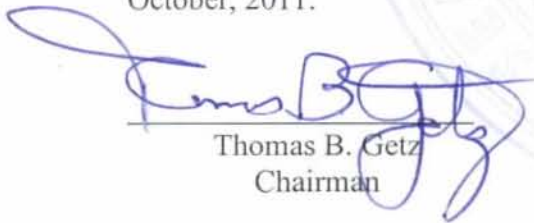
ORDERED, that Pittsfield Aqueduct Company, Inc. is authorized to recover a total of \$66,123.85, which represents the difference between the temporary rates approved in Order No. 25,154 and the permanent rates approved in Order No. 25,229, through a surcharge to customer bills as discussed above; and it is

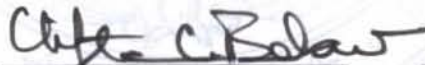
FURTHER ORDERED, that Pittsfield Aqueduct Company, Inc.'s motion for confidential treatment is hereby granted; and it is


FURTHER ORDERED, that Pittsfield Aqueduct Company, Inc. is authorized to recover \$44,446.68 in rate case expenses through a surcharge to customer bills of \$5.80 per customer for twelve months, as discussed above, or until the approved total rate case expense amount is fully recovered, whichever comes first; and it is

FURTHER ORDERED, that Pittsfield Aqueduct Company, Inc. file a compliance tariff within 10 days of the date of this order.

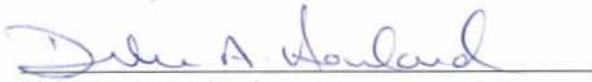
By order of the Public Utilities Commission of New Hampshire this twenty-first day of October, 2011.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director