STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

RE: PITTSFIELD AQUEDUCT COMPANY, INC.

DOCKET NO. DW 10-090

PITTSFIELD AQUEDUCT COMPANY, INC.'S RESPONSE TO OCA'S POSITION ON RATE CASE EXPENSE

In compliance with the settlement agreement dated April 21, 2011 (the "Settlement Agreement") approved by this Commission in its Order No. 25,229, on June 20, 2011, Pittsfield Aqueduct Company, Inc. ("PAC" or the "Company") submitted a calculation of its rate case expense, including supporting detail and documentation, to the Commission's staff ("Staff"). Pursuant to the Settlement Agreement and the Commission's order, a copy of the same information was provided to the Office of the Consumer Advocate ("OCA"). On August 4, 2011, after Staff and the OCA had conducted discovery on the rate case expense information provided by PAC, Staff submitted its recommendation to the Commission. On August 9, 2011, the OCA filed a response to the Staff's recommendation, asking the Commission to apply a new process for reviewing rate case expense and disallow approximately 65% of the rate case expense incurred by the Company in this case.

PAC requests that the Commission reject the OCA's position on the rate case expense in its entirety because the OCA's position is contrary to the approved Settlement Agreement in this case and contrary to any established Commission policy or precedent, and because adoption of the processes recommended by the OCA is likely to substantially increase rate case expense and the complexity and length of rate cases and the rate case expense review process without any discernable benefit to customers.

I. OCA is Estopped and Barred from Challenging the Rate Case Expense Process Established under the Settlement Agreement Approved by the Commission in Order No. 25,229; The Rate Case Expense Submission and Review Process Approved by the Commission in this Case is Adequate and Proper.

The Settlement Agreement approved by the Commission in this case provides in relevant:

> *The Settling Parties agree that Pittsfield should be allowed to recoup its reasonable and prudent rate case expenses for this docket through a surcharge*, which shall be included with the temporary rate reconciliation surcharge described in Section II.E. Rate case expenses are estimated to be approximately $85 per customer and may include, but shall not be limited to, Pittsfield's legal expenses and consultant expenses, and incremental administrative expenses such as copying and delivery charges. *Pittsfield agrees to submit its final rate case expense request to Staff for review and recommendation to the Commission.*
>
> Upon receipt of the Commission's final order, the Company agrees to file a compliance tariff supplement including the approved surcharge relating to recoupment of the difference between the level of temporary rates and permanent rates and the recovery of rate case expenses.

Settlement Agreement, Section II.F, at pp. 4-5 (emphasis added).

The Settlement Agreement makes clear that the issue that was reserved for subsequent review and consideration was the *amount* of rate case expense that PAC should be authorized to recover and that the standard to be applied was whether the expenses incurred by the Company were reasonable and prudent. The plain language of the Settlement Agreement laid out the process for submission of the expense for consideration—PAC was to submit its rate case expense to Staff, and Staff would then make a recommendation to the Commission. Although the OCA was not a party to the Settlement Agreement in this particular case, the OCA fully participated in this proceeding and at no point in time raised any concerns regarding the rate case expense process laid out in the Settlement Agreement. There is no reasonable basis for the OCA to now argue that the process itself is improper given that the process was laid out in detail in the Settlement Agreement, the settlement was the subject of a hearing before the Commission in

which the OCA actively participated, the Commission approved the Settlement Agreement, and the OCA failed to seek reconsideration of that order. Notably, the OCA entered into a settlement agreement which provided for a similar rate case expense process as the process in this case in *Pennichuck Water Works, Inc.*, Docket No. DW 10-091 (2010). Although a settlement in one case may not be evidence of what is reasonable in another, it is inappropriate to argue that a process that was agreed to and then approved by the Commission in the same timeframe as the settlement in this docket is so outside the norm and accepted practice that it must be determined to be illegal.

Even assuming that the OCA could now reopen the issue of the process for reviewing rate case expense after the Commission has approved the Settlement Agreement, the OCA's claim that the process followed in this case is contrary to what is required by New Hampshire law is baseless. The rate case expense phase of this case is not a separate adjudicative proceeding, as the OCA appears to argue. Rather, PAC's rate case expense request was made as part of its overall general rate proceeding, which is itself an adjudicative proceeding that culminated in a negotiated settlement of all issues including the rate case expense review process.

The OCA had an opportunity to contest the Settlement Agreement during the hearing on the merits, and in fact raised a number of questions regarding rate case expenses. Tr. at 72:5-20, 89:19-90:10 (April 26, 2011). The OCA also had the opportunity to and did propound discovery concerning the rate case expenses. Further, the OCA had an opportunity to and did file a pleading setting forth its position on the issue, so that the Commission will have the benefit of all of the foregoing before it renders a determination on the issue. Thus, the filing and adjudicative proceeding elements that the OCA seeks have all been satisfied.

The process adopted by the parties to the Settlement Agreement conformed with prior practice accepted by the Commission in numerous other cases in which the OCA has actively participated -- many of which involved settlement agreements that the OCA supported and which provided for rate case expense review and approval processes that were substantially similar to the process approved in this case -- and was in all respects consistent with due process and statutory requirements and the administrative rules of the Commission. RSA 365:38-a, which expressly governs recovery of costs associated with utility proceedings before the Commission, such as rate case expenses, does not provide a hearing requirement. Even RSA 378:7, governing rates and charges, does not require a hearing in all instances. Rather, the New Hampshire Supreme Court has ruled that the statute "*sometimes* require[s] that the PUC provide notice and a hearing before rendering a decision." *Appeal of Office of Consumer Advocate*, 148 N.H. 134, 138 (2002) (emphasis added). Specifically, RSA 378:7 provides that the Commission shall render a determination concerning rates "after a hearing had upon its own motion or upon complaint. . . ."

Here, the OCA did not request a hearing on the rate case expenses at any point during this proceeding or in its filed response, and did not oppose the rate case expense approval process under the Settlement Agreement that indisputably did not require a hearing. Thus, there is no basis to argue that a hearing on the issue is required as a matter of law. Furthermore, a Commission decision on rate case expenses without a hearing does not otherwise violate any state or federal due process rights. The New Hampshire Supreme Court has recognized that "utility customers do not have a vested property interest in the setting of utility rates sufficient to invoke procedure protections of the [due process clause]" of the state and federal constitution. *Appeal of Office of Consumer Advocate*, 148 N.H. at 139. Thus, the rate case expense

submission, review and approval process approved by the Commission in its Order No. 25,229 and followed by PAC and Staff in this case is adequate and proper.

If the Commission ultimately determines, as urged by the OCA, that a different process for requesting rate case expenses should be implemented for other policy reasons, the proper mechanism for addressing the matter would be by a rulemaking process that would create rules that apply to all utilities on a prospective basis, not by modifying the process that the Commission has already approved in this case and that comports with long standing practice before the Commission.

II. PAC's Rate Case Expenses were Prudently Incurred, Are Reasonable and Satisfy RSA 365:38-a and RSA 378:7.

It is well settled law that a utility must be allowed to recoup reasonable rate case expenses to avoid rendering the resulting rates unconstitutionally confiscatory. *See Driscoll v. Edison Co.,* 307 U.S. 104, 120-22 (1939); *see generally State v. Hampton Water Works Co.*, 91 N.H. 278, 296-97 (1941). "Prudently incurred rate case expenses are legitimate costs of service of a utility and are properly recovered through rates." *Hampstead Area Water Company, Inc.*, DW 08-065, Order No. 25,025 (October 9, 2009). In addition, as discussed above, RSA 365:38-a provides that '[t]he commission may allow recovery of costs associated with utility proceedings before the commission, provided that recovery of costs for utilities and other parties shall be just and reasonable and in the public interest." RSA 378:7 similarly requires that "the commission shall determine the just and reasonable or lawful rates, fares and charges" to be observed by regulated utilities.

The Commission evaluates requests for recovery of rate case expenses from customers according to the same "just and reasonable" standard applicable to all rates charged by public utilities pursuant to RSA 378:7. *Kearsarge Telephone Company*, DT 01-221, Order No. 24,372

(September 17, 2004). "The touchstones are the magnitude of the expenses and assurance that they do not cover expenses that are attributable to routine operating expenses." *Id.* The magnitude of rate case expenses may be appropriate depending on the length of the case and whether it was fully contested. *Id.*

PAC's rate case expenses in this case were prudently incurred and, on that basis, Staff has recommended recovery of $44,446.68 after a detailed review of the supporting documentation and discovery responses submitted by the Company. Although PAC requested recovery of a total of $44,997.18, it does not contest the dollar amount recommended by Staff. The expenses are comprised of legal, consulting, administrative and notification expenses which relate only to this proceeding and are direct expenses that are not otherwise recovered by PAC through its existing rates. For example, the expenses do not include any compensation for work performed by employees of the Company—only for outside professional services and reimbursement for expenses directly related to the rate case.

The legal and consulting services for which PAC seeks recovery were necessary to address a number of complex issues raised by this case, including in a number of significant instances, issues raised by the OCA itself. These matters included, among others, issues concerning rate design and the proposed water infrastructure and conservation adjustment ("WICA"). Although the OCA unquestionably has the right to oppose any utility proposals that it believes are contrary to its clients' interests, much of the expense for which PAC now seeks recovery resulted from the need to respond to the OCA's very active involvement in this case and, in some cases, its aggressive opposition to the Company's proposals. One notable, but certainly not the only, example was the OCA's dogged opposition to the adoption of a WICA, even though the OCA had only recently supported the adoption of an essentially identical

mechanism for another water utility. The Company does not believe it is appropriate for the OCA to first add substantially to the burden and cost of a rate case such as this through significant additional discovery and litigation and then object to the costs incurred by the utility in responding to that aggressive approach.

The amount of the expenses submitted by the Company and recommended by Staff is reasonable given the length of this case and the nature of the issues involved and, in particular, in light of the fact that the Company was required to prepare for and participate in a litigated hearing on a major issue in its filing even after a settlement was reached on all remaining issues. To date, this case has been actively pending for almost a year and a half. It is time to bring it to an end without further litigation or expense.

III. The OCA's Policy and Other Arguments Concerning the Amount of Rate Case Expense Should be Rejected.

The OCA's arguments for reducing the amount of PAC's authorized rate case expenses based on the timing of the rate case filing, PAC's method of engagement of outside consultants and legal counsel, issues concerning certain itemized expenses, and issues concerning PAC's motion for protective treatment lack merit and should be rejected.

A. The Fact that PAC Required Rate Relief Soon after the Conclusion of its Prior Rate Case Provides No Basis to Reduce the Amount of Rate Case Expense that Can be Recovered

The OCA argues that PAC's rate case filing was unreasonable because PAC obtained a rate increase shortly before the instant rate case filing and, on that basis, the OCA seeks to reduce PAC's requested expenses by nearly 65%. This argument is plainly contrary to fundamental principles of ratemaking and borders on being frivolous. The Commission approved a rate increase for PAC in this case, indicating that the rates previously in effect were no longer just and reasonable. Given the fact that the Commission's ratemaking process relies

primarily on an historic test year, it is not surprising that during periods of ongoing capital expenditures, little or no growth in consumption, and rising expenses, rates that are based on historic costs would quickly become inadequate.

If the OCA believed that PAC should not have filed another rate case, it was free to oppose the increase agreed to under the Settlement Agreement. It did not, and should not be allowed to reverse course and complain through the rate case expense process that the Company should be denied legitimate costs because the OCA now apparently believes that PAC should either have held out for higher rates in its prior case or gone without an increase in this one. Penalizing the Company for obtaining new rates that are just and reasonable would be confiscatory, a violation of fundamental concepts of substantive due process, and manifestly unreasonable.

The OCA also claims that a portion of PAC's consultant expenses should be disallowed because the use of the same consultants in both the current and prior cases should have resulted in lower cost than was actually incurred. The OCA provides no basis for its position other than asserting that the Company's witness, Ms. Hartley, stated that it retains service providers based on their in-depth knowledge of the Company, the quality of their work, their ability to respond in a timely manner, and their industry experience. *See* PAC Response to Data Request OCA 1-19 (enclosed with the OCA Response). The OCA's position on this issue is plainly designed to try to require PAC and other utilities to engage in an RFP process for rate case consulting services, rather than engage advisors with whom they have an existing relationship. As discussed below, the Commission has never imposed such a requirement, and doing so retroactively in this case would be improper.

PAC can only and should only be required to demonstrate through the supporting documentation provided to Staff and the OCA the nature and extent of the work that its consultants did in fact perform and, thereby, demonstrate that the work was appropriate in light of the issues presented by this case. Demonstrating that the work performed in this case was more efficient than the hypothetical work of consultants who were not retained would be impossible and, even if possible, would be wholly irrelevant.

B. Competitive Bidding and Other Issues Regarding PAC's Contractual Relationship with its Consultants and Legal Counsel

Contrary to the OCA's proposal, there is no legal basis for disallowing any portion of PAC's rate case expense based on the grounds that PAC used sole-source contracts for its outside consultants, did not have a written procurement process for consultant services, did not have a written contract with its outside legal counsel, and did not use a competitive bidding process to retain outside rate case service providers. The OCA plainly is seeking through this case to establish new standards for rate case expense recovery that have never before been articulated by the Commission. The proposals are not only ill-advised, particularly for a relatively small company such as PAC, which operates with a lean administrative staff (many of whom already play multiple roles), it would be fundamentally unfair and improper to apply such standards with no prior notice.

The reasons for which the Company selected the consultants and attorneys utilized in this case were adequately explained by the Company in its response to Data Request OCA 1-19, wherein Company witness Ms. Hartley stated:

> The Company selects certain outside consultants for legal services and specific studies based on their expertise and familiarity with details relative to the Company's operations. The Company reviews the scope of the work with each consultant before the engagement of their service. In the case of the Cost of Service Study, the Company has used AUS

> Consultants for many years based on their in depth knowledge of the Company's structure, the quality of their work, their ability to respond in a timely manner, and their industry expertise. Legal services are similarly engaged providing continuity and efficiency. Fees are deemed to be consistent with prior services and other industry professionals. The Company reviews and approves all invoices to ensure that the charges are consistent with the approved scope of work.

What the Company did not state, which is also true, is that by using counsel and consultants who are familiar with the Commission's processes and precedents, the Commission's own review of rate cases is greatly facilitated. It is not clear what result the OCA is truly seeking in attempting to force utilities to conduct a competitive bidding process for work that is performed by its consultants and attorneys who already have an established relationship with the Company and are knowledgeable regarding matters before the Commission, but such a process is certain to add to the burden on the Company of preparing for a rate case filing before the Commission and will inevitably lead to additional discovery and litigation before the Commission. One can only imagine that if such a process is imposed it is nearly certain to bring additional discovery regarding the RFP issued by the utility, the responses received from bidders (which are likely to require protective treatment, extensive redacting, and other time, attention and expense to address other procedural requirements), questions regarding why certain bidders were not selected and the nature of any negotiations with the bidders, etc. All of that will add to the cost and time of the case, and the Commission can be sure that the utility will still select the professional advisors that it believes will best understand its business and represent its interests.

The OCA also argues without any basis that the lack of a written agreement between PAC and its outside legal counsel in this matter is a basis to reduce allowable rate case expense because, the OCA claims, there is no objective basis upon which the Commission or the OCA can verify that its outside counsel performed in accordance with any pre-defined terms of service

and scope of work. The scope of legal counsel's work, however, is set forth in extensive detail in the bills provided to the Company and submitted for review by Staff and the OCA. As previously stated, the Company reviews and approves all invoices to ensure that the charges are consistent with the approved scope of work. *See* PAC Response to Data Request OCA 1-19. Had the Company determined that the work performed was not appropriately related to the case, it could and would have addressed the matter with its counsel. Similarly, if Staff believed that the scope of work performed by legal counsel was inappropriate or otherwise should not be included in rate case expense in this case, it could have removed that expense from its recommendation. In fact, Staff did identify a small amount of legal costs, approximately $540.00, that it believed were not properly within the scope of this proceeding. Simply put, the detailed invoices describing the legal services that PAC provided for review in this case are more probative than any written contract regarding whether the scope of work provided related to this rate case and thus, should be recoverable by PAC.

The OCA also seeks to attack the Company's legal expense by asserting that the Company's attorneys had no basis to increase their rates during the pendency of this case. To the contrary, 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 has been engaged for a regulatory proceeding that takes well more than a year to prepare, litigate and bring to final resolution. If the rate change were inconsistent with industry practice or the ongoing historical relationship between PAC and its counsel, the Company might understand the basis for the OCA's objection. But there has been no suggestion that that is the case, and there is no basis for such a position. The OCA's suggestion that any portion of the Company's rate case expense should be disallowed on such a basis is unfounded and should be rejected.

C. Mileage Reimbursement and Other Expenses

The OCA makes similarly unfounded arguments in an effort to attack what it calls excessive mileage, which totals $151.16. It also makes vague arguments regarding what it says are "possible" charges 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. *See* OCA Response, at 7-8. The only travel expense submitted by the Company was for minimal employee mileage expense and for minimal mileage expense for its attorney. The Company did not incur any travel costs for consultants. Mr. John Palko, of AUS Consultants, who represented the Company did so only via phone conference. Although the claimed "excessive" mileage costs total $151.16, the Company takes particular offense at the OCA's position on this item. The issue here is not the dollars involved, but rather the principle of allowing the Company some minimal discretion in determining how best to run its affairs. The OCA's position simply demonstrates the level of minutia that lies ahead if the Commission accepts the OCA's urging to adopt its proposed standards for rate case expense, rather than conducting the kind of rational review that has historically been conducted by Staff and the Commission. Rather than being criticized by the OCA, the Company should be cited for its prudent judgment and careful cost control, whether looking at the costs associated with the current case or its entire history of rate case expense. Rate case expenses should be viewed in their totality, and by that measure the Company's expenses in this case are well within reason. As previously stated, the Company performs most of its own rate case preparation, testimony, exhibits, and responses in-house. *See* PAC Response to Data Request OCA 4-6, attached hereto. Consultants and legal counsel are judiciously selected and utilized by teleconference whenever possible. There is no basis for the kind of broadside that the OCA has leveled in this case.

D. Motion for Confidential Treatment

Puc 203.08 permits a party seeking confidential treatment of material produced in discovery to assert the confidentiality of the material and subsequently submit a motion for protective treatment prior to the hearing in the relevant matter. At the time PAC submitted its rate case expenses to Staff and the OCA, PAC stated that the supporting documentation contained confidential and propriety rate information and that it would be filing a motion for protective treatment. Consistent with its prior statement, PAC submitted such a motion on August 13, 2011, together with redacted and confidential materials that were compliant with the Commission's interim rules. The motion included a request for a waiver, to the extent determined to be necessary at all, of Puc 203.08 as it relates to the timing of the motion because the timing requirement under Puc 203.08(d) is ambiguous as it relates to the rate case expense materials. The OCA's allegations that PAC has failed to abide by the Commission's rules are incorrect and its request that the Commission deny interest on the amount the Commission ultimately authorizes it to recover from ratepayers must be rejected. Regardless, such a remedy would go far beyond the bounds of any remedy previously imposed by the Commission for a procedural matter of this nature.

Conclusion

The OCA is barred from challenging or raising any issues concerning the rate case expense review process set forth in the Settlement Agreement and approved by the Commission. Moreover, PAC's rate case expenses were prudently incurred and are reasonable, just and in the public interest in accordance with RSA 365:38-a and RSA 378:7. Accordingly, the Commission should deny the OCA's request to adjust PAC's rate case expenses in its entirety and adopt the recommendation submitted by Staff. In addition, given the lack of any basis in existing law or

policy for the OCA's position and the fact that the bulk of the OCA's positions are contrary to law and the Settlement Agreement approved in Order No. 25,229, PAC requests leave to submit additional supporting information to enable it to recover the expense incurred in responding to the OCA's position.

WHEREFORE, Pittsfield Aqueduct Company, Inc. respectfully requests that the Commission:

A. Deny the OCA's request to adjust PAC's rate case expenses in its entirety;

B. Approve the rate case expenses submitted by PAC to the extent supported by the Commission staff;

C. Grant the Company leave to submit additional rate case expense information for a determination of the amount to be recovered relating to responding to the OCA's filing regarding rate case expense; and

D. Grant such other relief as is just and equitable.

Dated: August 19, 2011

Respectfully submitted,

PITTSFIELD AQUEDUCT COMPANY, INC.

By Its Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON, P.A.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response has been forwarded to the parties on the service list this 19th day of August 2011 by electronic mail.

Steven V. Camerino

DW 10-090
Pittsfield Aqueduct Company, Inc.'s Responses to
OCA Data Requests – Set 4

Date Request Received: 7/21/11 Date of Response: 8/01/11
Request No. OCA 4-6 Witness: Bonalyn J. Hartley

REQUEST: Please identify and explain any charges included in the Company's proposed rate case expense recovery total related to first-class air travel; courier delivery; overnight mail; limousine or private car services; hotel room service; entertainment; recreational activities or services; personal services or alcoholic beverages.

RESPONSE: On June 20, 2011, the Company provided a summary of rate case expenses that includes a description of services rendered. The 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.