

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DW 18-189

Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., and Pittsfield Aqueduct
Company, Inc. 2018 CIAC Tariff Amendments

OBJECTION TO PILLSBURY REALTY
DEVELOPMENT'S MOTION TO COMPEL

NOW COME Pennichuck Water Works, Inc. ("PWW"), Pennichuck East Utility, Inc. ("PEU") and Pittsfield Aqueduct Company, Inc. ("PAC") (collectively the "Companies"), and respectfully object to Pillsbury Realty Development LLC's ("Pillsbury") Motion to Compel responses to Data Requests Nos. 1, 2, 3, 4, 5, 6 and 9.

INTRODUCTION AND BACKGROUND

1. On December 19, 2018, the Companies filed a Technical Statement asking the Commission to amend their tariff pages to reflect changes to federal tax law. Prior to the 2017 changes to the Federal Tax Act described as the Tax Cuts and Jobs Act, 26 U.S.C. §118 ("TCJA"), federal tax law included special rules for regulated utilities that received contributions in aid of construction ("CIAC") (either in the form of cash payments given to the Company or property constructed and transferred by the developer to the Company) whereby CIAC payments to regulated water utilities were excluded from taxable income if they were not incorporated into the regulated utility's rate base. In late 2017, as a part of the TCJA, Congress amended Section 118 to remove the exclusion from taxation for CIAC payments to regulated water utilities.

2. As the Commission is aware, the Companies are unusual when compared to other regulated utilities in that the shareholder of the parent company is a municipality,

the City of Nashua. It is also unusual in that it is funded entirely by revenues from customers and debt. There is no equity source of funding, and the rates for the Companies do not include a component of return on investment. Currently, at least, there is no mechanism in the Companies' ratemaking methodologies to collect for federal income taxes and state business enterprise taxes.

3. The Companies' objective in this Docket is to obtain approval of a tariff amendment that does not cause the tax burden created by new developments to be funded by current ratepayers. To impose this new tax burden on current ratepayers would result in a rate increase that is unwarranted and should properly be a cost associated with new development. Although an equity-based water utility could simply reduce current returns on investment to fund the tax burden, the Companies have no such option.

4. On January 18, 2019, the Commission issued Order No. 26,211 scheduling this matter for a hearing and technical session on February 6, 2019. That Order also provided that any person seeking to intervene must file a motion by February 4, 2019 and any objections to such motions to intervene are due by February 6, 2019.

5. On February 1, 2019, Pillsbury filed a timely motion to intervene. Pillsbury argued it is a developer directly impacted by the potential costs Pillsbury would incur for payment of taxes on a CIAC contribution covered by the Companies' proposed tariff amendments. The Companies objected.

6. At the preliminary hearing on February 6, 2019, the Commission granted Pillsbury's Petition to Intervene. The Companies requested that Pillsbury's intervention be limited to participation in technical sessions and presenting argument at hearing, but the Commission declined to place limits on Pillsbury's data requests, without prejudice to

further consideration of that decision.

7. At the technical session on February 6, 2019, the parties reached an agreement on a procedural schedule, which was filed with the Commission on February 6, 2019. That schedule provides for one round of data requests, to be filed by February 15, 2019 and to be answered by February 25, 2019. Due to the time sensitive nature of this docket, the parties agreed that objections would be filed by February 20, 2019.

8. On February 15, 2019, Pillsbury submitted 17 data requests. On February 20, 2019, the Companies objected to Pillsbury's data requests 1, 2, 3, 4, 5, 6, 8 and 9. On February 25, 2019, the Companies filed responses to Pillsbury's data requests and withdrew the objection to Pillsbury's DR 1-8, but continued the objections to the other requests listed. On February 27, 2019, Pillsbury filed a Motion to Compel seeking responses to DRs 1 through 6 and 9. This objection follows.

Standard of Review

9. In Order No. 25,997 (March 7, 2017), the Commission described, in detail, the standard for data requests. The Commission wrote

To prevail on their Motion, the Labor Intervenors must demonstrate that their data requests seek facts that are admissible or are 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). "Discovery is not the time to argue policy or advocate for the final result but merely to seek and respond to factual matters that may lead to admissible evidence." City of Nashua, Order No. 24,485 (July 8, 2005) at 4. 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) at 2. We have long recognized that:

In the context of civil litigation, New Hampshire law favors liberal discovery, ... 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.'" ... Consistent with Superior Court Rule 35(b) regarding the scope of discovery, we require parties to show that the information being

sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.

City of Nashua, Order No. 24,681 (October 23, 2006) at 2.

In ruling on a motion to compel, we “enjoy ‘broad discretion in the management of discovery.’” We 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) at 3-4; City of Nashua, Order No. 24,485 at 4. 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 (February 17, 2016) at 5.

Order No. 25,997, emphasis added, some citations omitted.

10. The petition that gives rise to this docket is a request to amend the Companies’ tariffs to collect for taxes on contributions in aid of construction (“CIAC”). The Companies have described the proposed formula it is seeking permission to apply when developers and other CIAC contributors, to fully and adequately fund the tax liability associated with the CIAC property and/or monies being contributed to the Companies. Absent the ability to provide for this in the tariffs, the Companies’ current ratepayers will bear the burden for those tax payments, even though the value of the CIAC being provided has no association with them and brings no financial benefit to them going forward. See prefiled testimony of Larry Goodhue at 2.

11. For the reasons described in more detail below, the Companies object to the referenced data requests from Pillsbury as irrelevant to the proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

SPECIFIC OBJECTIONS

Pillsbury 1-1

12. Pillsbury 1-1 seek a list and description of all methodologies the

Companies considered to address changes to the tax treatment of CIAC.

13. The Companies first objection is based on attorney-client privilege. In order to develop an understanding of the implications of the changes to the taxation of CIAC and the formula for how the Companies should collect the tax, the Companies developed the proposed formula with the advice of legal counsel. All options for collecting the tax were discussed with legal counsel and the approach on how to present the formula was developed with legal counsel's advice. Thus, the Companies object on the basis of attorney-client privilege.

14. Second, the data request is irrelevant and unlikely to lead to the discovery of admissible evidence. Prior to receiving Pillsbury's petition to intervene, the Company met with Attorney Pfundstein to answer questions he may have and to explain the reasoning behind the formula. The Companies expressed a willingness to consider alternative formulas. In fact, the Companies modified the requested formula based on that conversation. *See* prefiled testimony of Larry Goodhue. As is described above, however, discovery is not the time to argue policy or advocate for the final result but merely to seek and respond to factual matters that may lead to admissible evidence. To the extent Pillsbury wishes to propose an alternative formula it can do so. Seeking an understanding of what the Companies considered, however, is not relevant to the proceeding and is not likely to lead to the discovery of admissible evidence.

15. The Intervenor further alleges it is simply seeking "factual information related to what other methodologies the Companies considered to address the tax code revisions' impacts." Motion to Compel at ¶12. To the extent the Companies considered alternative formulas, it was in the context of communications with legal counsel to figure out how the tax law can be applied under current tax law and ratemaking methodologies that

apply to the Companies. There was no dropdown list of formulas from which the Companies could choose, but instead, the formula that has been proposed is the result of discussions with legal counsel. There is no “factual information” that can be severed from attorney-client communications.

16. The Intervenor further alleges that alternative formulas are relevant to the Commission’s consideration of the Companies’ proposed tariff amendments. By virtue of their intervenor status, Pillsbury is not restricted in any way from proposing an alternative formula. The Companies have encouraged Pillsbury to provide such a formula that meets the objective of not shifting the burden of a developer’s CIAC tax burden onto existing ratepayers.

Pillsbury 1-2 and 1-3

17. Data request number 2 seeks information on whether Pennichuck Corporation (“Penn Corp”) has ever paid federal income tax since 2012. Whether or not Penn Corp has paid federal income tax since the City of Nashua became Penn Corp’s sole shareholder is irrelevant to this proceeding. The questions before the Commission in this proceeding are (1) what are the tax implications of the TCJA on CIAC; (2) how should those taxes be funded; and (3) is it fair for existing ratepayers to pay for a developer’s profit-making projects and/or should those ratepayers lose tax credits they previously earned. The question of past payment of federal taxes is not relevant nor is it likely to lead to the discovery of admissible evidence.

18. In Mr. Goodhue’s prefiled testimony, he stated that “[t]he tax liability may generate a cash payment due on the CIAC assets in the current year, or will result in the consumption of Net Operating Loss Carry forwards or Deferred Tax Liabilities, all of which were generated by temporary or permanent differences paid for by the rate payers

and/or the shareholder, and as such, are not the entitlement of the CIAC contributor or developer.” Goodhue testimony at 6-7. Thus, as was noted by Mr. Goodhue, the CIAC tax results in either an actual payment or the consumption of NOLs earned by existing ratepayers, not the developer.

19. Data request number 3 is related to number 2 and asks for the years and amounts of federal income tax paid. For the reasons described in the previous paragraphs, the Companies object.

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

20. Data request number 4 asks the Companies to confirm the accuracy of the Independent Auditor’s Report dated March 27, 2018. Pillsbury has stated no basis to believe they are inaccurate, and the Companies have no reason to believe they are not accurate. Indeed, if the Companies were to learn of any substantive inaccuracy in its reports it would file a corrected report. It has not done so and has no reason to believe at this time that corrected reports are necessary.

21. To the extent the data report seeks information about the methodologies and accuracy of independent auditor’s methodology, the question seeks expert opinions beyond the scope of data requests to the Companies. Furthermore, such confirmation is not relevant and is unlikely to lead to the discovery of admissible evidence. To the extent Pillsbury wishes to make an argument based on the numbers and data contained in the Independent Auditor’s report, it should do so and can do so without the need to propound this data request.¹

22. Although not dispositive to the motion to compel, the Companies feel it is

¹ The 2017 Independent Auditor’s Report is available publicly at <https://pennichuck.com/wp-content/uploads/2017/05/Pennichuck-AnnualShareholderRptAuditedFinancials30Mar2017.pdf>.

necessary to respond to Pillsbury's claim in its Motion that Mr. Goodhue told counsel for Pillsbury when asked about "the effective tax rates' (which were negative) contained in the Independent Auditor's Report", "Mr. Goodhue's primary response was 'That is misleading ...' or words to that effect." Pillsbury Motion at ¶21.

23. Counsel's representation of Mr. Goodhue's comment is incomplete and inaccurate. In fact, what Mr. Goodhue told counsel was that the table in the footnotes of the Independent Auditor's Report would be misleading if Counsel did not fully understand the intent of the table and/or the underlying amounts that support the table. The reconciliation in the footnote is intended to reconcile the statutory tax rate to the effective tax rate, on a book basis, not on an effective tax basis or cash impact basis. Included in that rate is the generation and/or usage of NOL carryforwards and other credits against tax, which have been earned and funded by ratepayers. An example of how this table could be misleading without fully understanding the underlying numbers is the table for the 2017 results, in which it reconciles the statutory Federal rate of 34% and the statutory net State rate of 6.2% to the effective tax rate of -20.8%. -45.8% of that rate reconciliation is due exclusively to the write-down of Deferred Taxes on the balance sheet related to the effective tax rate change under TCJA, from 34% to 21%, in that those Deferred Tax liabilities (funded by ratepayers) were materially impaired by the tax rate change. And, this factor as well as the other Permanent Differences between book and tax basis income (-15.8%), caused the Company to have a Tax Provision (expense) in lieu of the fact that the Pre-Tax Earnings were a loss; as such the true effective rate is misleading when looked at without the underlying facts, as a -21.8% rate would lead the reader to believe that the Company had derived a benefit, rather than actually incurred a

disproportionate expense for income taxes as it relates to their earnings.

24. Data requests 5 and 6 are similar to 4 but request confirmation of other data contained in the Independent Auditor's Report. For the reasons described in the previous paragraph, the Companies object.

Pillsbury 1-9

25. Data request number 9 asks for information on the five largest projects which are likely to be subject to CIAC payments. Similar to previous objections, this data request exceeds the scope of what is at issue in this docket. If the Intervenor has an alternative formula it wishes to present, it is free to do so. Seeking the identity of other companies that are likely to deliver taxable CIAC assets is not going to assist the Commission with its deliberations. Indeed, the Commission, and by extension anyone else who reviews the Commission's dockets, can see all of PEU's and PWW's anticipated projects on a going forward basis in their respective Qualified Capital Project Annual Adjustment Charge filings.

26. As Mr. Goodhue described in his testimony, the Companies regularly receive contributed CIAC. It is that regular receipt of CIAC that makes this docket time sensitive. Seeking information about specific developer contacts for future potential CIAC only serves to delay the proceeding. Delays if the tariff change only erode the Company's available NOL's and Deferred Tax Liabilities, to the detriment of ratepayers.

WHEREFORE, the Companies request that the Commission:

- A. Deny Pillsbury's Motion to Compel; and
- B. Grant such other relief as the Commission feels is just and equitable.

Respectfully submitted,

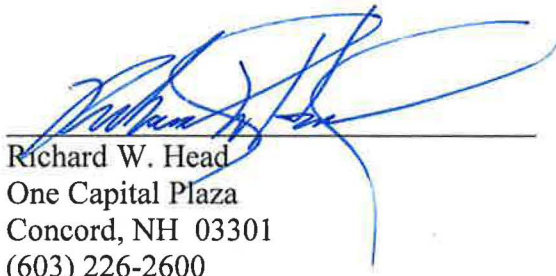
PENNICHUCK WATER WORKS, INC.,
PENNICHUCK EAST UTILITY, INC., AND
PITTSFIELD AQUEDUCT COMPANY, INC.

By its Attorneys,

RATH, YOUNG AND PIGNATELLI, PC

Date: March 7, 2019

By:



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Certificate of Service

I hereby certify that on this 7th day of March 2019, a copy of this motion has been served electronically to the Docket No. DW 18-189 Discovery Service List.



Richard W. Head