

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 23-088

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.

Consolidated Permanent Rate Proceeding

OBJECTION TO DEPARTMENT OF ENERGY MOTION TO DISMISS

NOW COMES, Pennichuck Water Works, Inc., (PWW); Pennichuck East Utility, Inc. (PEU); and Pittsfield Aqueduct Company, Inc. (PAC) (together, the Companies), in accordance with N.H. Admin. R. Puc 203.07(e), and hereby objects to the Department of Energy's (DOE) motion to dismiss. In support of this objection, the Companies state as follows:

Summary of Facts

1. On September 26, 2023, in contemplation of consolidating PWW, PEU, and PAC's rates, the Companies held in-person pre-filing meetings with both the DOE and the Office of the Consumer Advocate (OCA) at which the Companies presented its proposal to file a merger petition, a petition to consolidate the rates of the Companies, and also stand-alone rate filings for PEU and PAC. The Companies solicited comments from DOE and OCA on this process and concept. The Companies received no comments indicating either DOE or OCA objected to the proposed sequence of filings.

2. On October 13, 2023, the Companies filed their notice of intent to file the consolidated rate case and merger petition.

3. On November 21, 2023, the Companies filed their consolidated rate case and noted in the cover letter to that filing that the merger petition would be forthcoming.

4. On November 27, 2023, after soliciting how many hard copies the parties needed, the DOE reported that it needed 5 copies. DOE made no mention that it objected to the process presented on September 26, 2023.

5. On November 28, 2023, PEU and PAC filed their respective notices of intent to file rate schedules. Those rate cases have been docketed as DW 23-096 and DW 23-097, respectively.

6. On December 11, 2023, the DOE expressed to the Companies its concern that it would not have the staff to consider all of the filings.

7. On December 11, 2023, the Companies also informed the DOE and OCA that although its merger filing had been delayed, it intended to file the merger petition no later than Friday, December 15, 2023.

8. On December 15, 2023, the DOE filed a motion to dismiss the consolidated rate case in this instant docket. In that motion, the DOE argues that Order No. 25,292 (November 23, 2011) in Docket No. DW 11-026 requires the Companies to stay as separate legal, regulated entities; that the Companies and Commission have not previously considered merging the Companies¹; and that the precondition of a merger approval prior to consolidation of the Companies' rates is hypothetical thereby implying that the matter is not justiciable before the Commission. The DOE notes that pursuant to RSA 378:6, the Commission is afforded 12 months to suspend the taking effect of rates and investigate whether those rates are just and

¹ The DOE avers that the Commission has not considered consolidation of the Companies since the acquisition by the City of Nashua. Although the Companies have not formally proposed a merger or consolidation, the issue arose in PWW's rate case hearing in DW 19-084. Commission Bailey inquired about the possibility of municipalizing the Companies. Hearing Transcript of July 1, 2020 at page 137. PWW replied that keeping the separate companies was the result of Docket No. DW 11-026. Before that, consolidation was raised by Commission Staff in DW 11-026 but there was no unified willingness at the time to pursue that issue in that docket.

reasonable, but that pursuant to RSA 374:33, mergers are not bound by the same time limits for investigation. DOE argues that the logical process calls for completion of the merger first before consideration of the consolidated rate case. Finally, DOE argues that Chapter 378 does not contemplate “that a single utility will have multiple rate cases before the Commission at the same time.”

9. On December 15, 2023, the Companies filed their merger petition.

10. On December 18, 2023, the Commission issued an order suspending the taking effect of the Companies’ consolidated rate tariff schedules and extended the Companies’ response to the DOE motion to December 29, 2023².

Legal Authorities

11. Pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution as well as Part I, Article 12 of the New Hampshire Constitution, the taking of a utility’s property without just compensation is unconstitutional. A utility cannot be forced to provide utility service at rates that do not cover costs, otherwise those rates are confiscatory and constitute an unconstitutional taking. Public Service Company of New Hampshire, 130 N.H. 265, 268 (1988) (rates must “produce neither confiscatory nor exploitative rates.”). Appeal of Pennichuck Water Works, 120 N.H. 562, 567 (1980) (“public utilities have a right not to be forced to accept rates that are so low as to be confiscatory.”) Bluefield Waterworks v. Pub. Serv. Comm’n, 262 US 679, 690 (1923) (“Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory.”)

² See Order No. 26,914 (December 18, 2023) in Docket No. DW 23-088.

12. Pursuant to RSA 378:3, a utility has the right to manage its financial affairs and change its rates if need be “after 30 days’ notice to the commission and such notice to the public as the commission shall direct.”

13. Pursuant to RSA 378:7, the Commission has jurisdiction over rates imposed by regulated utilities and is required by the legislature to ensure that a regulated utilities’ rates, fares, and charges are “just and reasonable”.³

14. Pursuant to RSA 541-A, the Commission has discretion on how it conducts adjudicative proceedings⁴ and how to manage the orderly and prompt conduct of the proceedings.⁵

15. Justiciable rights are when facts and requested relief are not hypothetical or speculative. In such cases, a regulated entity is entitled to due process before an executive branch administrative agency operating in a quasi-judicial capacity to hold an adjudicative proceeding on the matter. See RSA 541-A:31 (“[a]n agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case or, if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party.”) See also, In re Public Serv. Co., 125 N.H. 595, 597 (1984) (“the authority of the [Commission] is limited to those occasions ‘when justiciable rights are involved and the question arises in adversary proceedings before the Commission.’”) In re Support

³ “[T]he commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed.” RSA 378:7.

⁴ See, In re State Employees’ Ass’n, 127 N.H. 89, 91 (1985) (Agency (N.H. Personnel Commission) had discretion on whether to adopt a class action rule and associated procedures so long as the exercise of that discretion “provides fair, orderly, and expeditious resolution of matters committed to it.”)

⁵ See, RSA 541-A:32, II, regarding management of intervenors in proceedings, “[t]he presiding officer may grant one or more petitions for intervention at any time, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.”

Enforcement Officers I, 147 N.H. 1, 5 (2001) (in order to determine whether adjudicative proceeding requirements of RSA 541-A apply in “contested cases”, it is necessary to determine whether an agency hearing is required by law.) In light of the joint petition filed on December 15, 2023, the proposed consolidation of PWW, PEU, and PAC, as well as PWW’s provision of service in PEU and PAC’s franchise territories, requires a hearing pursuant to RSA 374:26.

16. Pursuant to Order No. 26,586 (February 18, 2022), PEU is required to maintain a three-year rate case cycle which means it is required to file a rate case in 2023.

Argument

The DOE’s Argument that the Merger Proceeding is Hypothetical is Moot

17. The DOE’s argument that the consolidated rate case should be dismissed because the merger, which is a condition precedent to the consolidation of rates, was only hypothetical is moot because the Companies filed the merger petition on December 15, 2023. On December 11, 2023, the Companies contacted the DOE to explain the delay in the merger filing but also stated the merger filing would be filed no later than Friday the 15th. Notwithstanding that information, the DOE still filed the motion based on the hypothetical argument. Further, the DOE did not argue that a ‘public interest exception’ exists in the instant case. Such an exception, if it existed, would otherwise allow the Commission to act on DOE’s motion. See Proctor v. Butler, 117 NH. 927, 380 A.2d 673, 675 (1977) (finding an exception to mootness given the pressing issue and public interest where courts were applying inconsistent standards of proof for involuntary commitments and curtailment of personal liberty) see also In re S.N., 181 Vt. 641, 644, 928 A.2d 510 (2007). In contrast, by allowing DOE’s motion to proceed, it would work against the public interest of allowing the consolidated rate case and joint merger petition to proceed and be adjudicated on the merits before the Commission.

18. As the merger filing itself reflects, the Companies request specific Commission approval to merge PWW, PEU, and PAC and to approve the merger so that consolidated rates can take effect on January 1, 2025. The requested relief in the consolidated rate petition and joint merger petition are decidedly not hypothetical nor based on speculative facts. RSA 374:26 indeed requires a hearing to approve the merger and allow PWW to operate in the PEU and PAC systems. By requesting specific relief and basing the request on specific facts, the Companies satisfy the justiciability requirement.

The DOE's Relief Requested would cause an Unconstitutional Result

19. PEU is in dire need of rate relief. This fact is well established in the consolidated rate filing. As such, PEU has a constitutional right to adjust its rates to raise revenues to cover its expenses. See RSA 378:3, see also, Bluefield Waterworks v. Pub. Serv. Comm'n, 262 US 679, 690 (1923); Public Service Company of New Hampshire, 130 N.H. 265, 268 (1988); and Appeal of Pennichuck Water Works, 120 N.H. 562, 567 (1980). PEU intends to file the stand-alone rate case to avoid an unjust result and confiscatory rates in the event the consolidated rate filing and joint merger petition are unsuccessful.

20. The fact that PEU proposes two methods to obtain that rate relief does not diminish its constitutional right to propose rates that enable it to cover expenses. PEU proposes a consolidated rate case which would increase the combined revenue requirements for PWW, PEU, and PAC by 9.95%. PEU proposes a stand-alone rate increase that would raise its allowed revenue requirement by 24.10% resulting in an increase in PEU's current rates by an overall increase of 24.10%, but based on the Cost of Service Study and rate proposal, the average single family residential PEU customers would experience an increase by approximately 31.94%. Dismissing PEU's consolidated rate case and not allowing PEU the rate relief would violate New Hampshire's constitutional protection against uncompensated takings and confiscatory rates.

21. This is not the first time a utility has proposed multiple rate options or that the Commission has entertained simultaneous multiple rate options. For example, exercising its discretion under RSA 541-A to manage fair, orderly, and prompt proceedings, the Commission considered two rate options depending on the results of PWW's bond issuance in Docket Nos. DW 19-084 (PWW's rate case) and companion financing docket, DW 20-070.⁶ In DE 99-099, the Commission considered multiple rate design proposals by parties in the restructuring of Public Service Company of New Hampshire.⁷ The Commission considered simultaneous alternate rate options for the North Country customers of PAC and PEU in the context of two separate, but conjoined, dockets (DW 08-052 and DW 09-051). The Commission's past practice dispels DOE's contention that the Commission can only consider one rate proposal at a time.

Path Forward

22. In line with the procedural proposal aired to DOE and the OCA on September 26th, the Companies propose that the Commission act on the merger and consolidated rate petitions.

23. The choice of this path forward is not offered in isolation. The Companies' proposal has been informed by the Companies' vast experience in working with the Commission and stakeholders to bring about fair, just, and reasonable changes in rates and rate structure. For example, during 1997-1998⁸, the Companies actively aided the Commission when the Town of Hudson acquired the Hudson-only assets of the former Consumers New Hampshire Water

⁶ Pennichuck Water Works, Inc., Order No. 26,383 (July 24, 2020) in Docket Nos. DW 19-084 and DW 20-070.

⁷ Public Service Company of New Hampshire, Order No. 23,443 at 121 (April 19, 2000) in Docket No. DE 99-099.

⁸ *Consumers New Hampshire Water Company*, Docket No. DE 96-227, 82 NH PUC 814, Order No. 22,792 (November 21, 1997). *Consumers New Hampshire Water Company*, Docket No. DE 96-227, Order No. 22,880 (March 23, 1998).

Company and left the non-Hudson assets in need of separate acquisition. Pennichuck Corporation formed PEU to acquire the non-Hudson assets and created wholesale contracts to manage the water supply wells (located in Litchfield) so that both Hudson and the non-Hudson customers could obtain safe and adequate service at just and reasonable rates. In 2008 and 2009, the Companies again grappled with rates and rate design issues when PAC's newly acquired North Country customers faced a 311% rate increase. The Companies worked collaboratively with the Commission's Staff and other stakeholders to transfer the North Country systems to PEU.⁹ This solution involved a full rate case, an acquisition/partial rate case docket, and consolidation of the two for procedural efficiency reasons. Thus, the North Country customers were subject to two simultaneous rate proceedings. The Companies bring this deep historical understanding of the issues and process to its proposal for the merger, consolidated rate case, and individual PEU rate case.¹⁰

24. The Companies' proposal to closely mirror the 2008-2009 PAC-PEU proceeding model is also aided by its understanding of the alternatives. The Companies discussed municipalization in its testimonies. Municipalization does not produce a better outcome for the Communities investigating municipalization if the proposed merger is approved according to models the Companies has run. If communities pursue municipalization, it will require the municipalities to make payment for the assets taken, trigger payment of PEU's share of the City of Nashua's bonds obtained to acquire Pennichuck Corporation, result in a loss of PEU's real

⁹ Docket Nos. DW 08-052 and DW 09-051.

¹⁰ To simplify the process, the Companies have decided to forego filing the individual rate case for PAC at this time, awaiting the results of the consolidated rate case filing, and as there is no requirement currently in place for PAC requiring that Company to file a rate case every three years. Upon completion of the consolidated rate case and merger, there will no longer be a need for a stand-alone rate filing by PAC. However, if consolidated rate filing and merger are not approved and completed, PAC will then re-notice and file an individual rate case.

estate tax payments to those communities, cause the acquiring municipality to incur proceedings costs under RSA 38, and may strand other PEU customers if they are not taken by the acquiring municipality (such as what happened in Hudson's acquisition). The Companies expect these issues to be more fully vetted in discovery.

25. For these informative reasons, the Companies aired its proposal to DOE and OCA in September, filed a notice to file the consolidated rate filing on October 13, 2023, and filed the consolidated rate filing on November 21, 2023. The Companies followed through with filing notices for the proposed PEU and PAC stand-alone rate filings in Dockets DW 23-096 and Docket DW 23-097 on November 28, 2023 so as to preserve their constitutional right to protect against confiscatory rates. As noted above, the Companies agree and PAC plans to withdraw its notice of intent to file its stand-alone rate case.

26. Consistent with the process outlined, the Companies intend to file PEU's stand-alone rate case but propose that the Commission act on the PEU stand-alone rate filing up to the point of approving conditional temporary rates. The Companies would ask the Commission to stay PEU's rate case until the joint merger and consolidated rate petitions are adjudicated. Thus, if the merger and consolidated rates are approved, then the Companies will obtain the rate relief needed such that the stand-alone rate case for PEU can be dismissed as moot or withdrawn by the Company. As noted in the consolidated rate petition and supporting testimony, in the event the Commission does not approve the merger or consolidated rate case, then PEU, in particular, must be able to recover recoupable revenues via its stand-alone rate case.

27. The Companies, remain prepared to coordinate with DOE, OCA, and other parties to agree on comprehensive scheduling orders for the consolidated rate and joint merger petitions to provide time for the necessary investigation and review on the merits for both, while the PEU stand-alone rate case is stayed. Discussion should also cover staffing needs and options such as

the Companies retaining independent outside consultants to assist. This will afford the ability of all parties and other stakeholders the opportunity to participate and weigh in on the pending petitions; but preserve PEU's rights to seek just and reasonable rates, as well as protection against confiscatory rates if the consolidated rate or joint merger petition are unsuccessful.

28. Under DOE's proposal, the Commission would consider the merger and PEU and PAC's rate filings first and then delay rate relief for PEU's customers until a consolidated rate case is fully adjudicated. That process will take more time, use more Commission and party resources, and delay rate relief to PEU customers. Although the Companies would be made whole eventually, the Companies do not believe it is in the best interest of the Companies' customers to proceed in such a truncated way or with additional expense to adjudicate the merger petition and stand-alone PEU rate case. The Companies believe the best course is for the Commission to entertain both the consolidated rate and merger petitions and vet multiple rate options at the same time as proposed.

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WHEREFORE, for the reasons stated above, the Companies respectfully request that the Commission:

- A. DENY the DOE's motion to dismiss; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

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

By its Attorney,

N.H. Brown Law, PLLC

Date: December 21, 2023

By: *Marcia A. Brown*
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Certificate of Service

I hereby certify that a copy of this objection has been emailed this day to the Docket-Related Service List for this proceeding.

Date: December 21, 2023

Marcia A. Brown
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