

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 23-088

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

Request for Change in Rates

Order on Motion to Dismiss

ORDER NO. 26,942

February 6, 2024

This order GRANTS the Department of Energy's (DOE) December 15, 2023 motion to dismiss without prejudice.

I. PROCEDURAL HISTORY

Pennichuck Water Works, Inc. (PWW), Pennichuck East Utility, Inc. (PEU), and Pittsfield Aqueduct Company, Inc. (PAC) are three separate public utilities that have a common owner, Pennichuck Corporation (Penn Corp). Pursuant to a 2011 settlement agreement in Docket No. DW 11-026, the Commission approved the City of Nashua's purchase of Penn Corp while maintaining separate legal entities for PWW, PEU and PAC. See Order No. 25,292 (November 23, 2011). Since 2011, PWW, PEU and PAC have sought multiple individual rate adjustments.

On October 13, 2023, PWW, PEU and PAC (together Petitioners) filed a notice of intent to file a single, consolidated rate case. On November 23, 2023, the Petitioners filed their petition, with schedules and testimony, to support the rate change. The Petitioners indicate that PWW was filing a full rate case for a consolidated rate that included servicing customers of PEU and PAC. See November 21, 2023 filing. Furthermore, the Petitioners indicated that they would be filing a merger petition whereby PAC and PEU's assets and liabilities would be merged with PWW. On

December 15, 2023, the Petitioner's filed the merger petition. *See* Docket No. DW 23-101.

On December 15, 2023, the DOE filed a motion to dismiss in this matter. On December 21, 2023 the Petitioners filed an objection to the motion to dismiss. On January 10, 2024, the Commission issued a notice of adjudicatory proceeding and scheduled a hearing on the DOE's motion for January 31, 2024. All parties¹ appeared for the January 31 hearing.

II. POSITIONS OF THE PARTIES

A. Department of Energy

On December 15, 2023, the DOE filed a motion to dismiss the petition. The DOE asserts that moving forward with the consolidated rate docket concurrently with the merger docket does not promote an orderly and efficient process.

The DOE noted that although the Petitioners have a common owner, they are three separate legal entities that operate as water utilities in three different franchise areas of New Hampshire. *See* Motion to Dismiss at ¶ 3. Prior to December 2023, the Petitioners had not presented a request to consolidate or merge the three separate utilities into a single, uniformly regulated public water utility.

The DOE argues that the merger docket, which is not limited in time, should occur prior to the consolidated rate docket which is subject to RSA 378:6 (a) which limits the period to investigate rate filings to twelve months. The DOE argued that the consolidated utility that is putting forth the consolidated rate must exist prior to the filing of a petition for consolidated rates otherwise, a review of rates for a consolidated company not yet approved is an exercise in the hypothetical. *See* Id at ¶8.

¹ The towns of Litchfield, Londonderry and Bedford have been granted intervenor status in this matter. Representatives for the towns appeared at the January 31, 2024 hearing. The towns took no position concerning the DOE's motion to dismiss the petition for consolidated rates.

At hearing, the DOE noted that the articles of incorporation for Penn Corp require its shareholder, the City of Nashua, to approve the merger. The merger docket requires many different municipalities and parties to receive notice. Only after the Commission and the City of Nashua have approved the merger can the petition for consolidated rates move forward. The DOE asserts that without approval of the merger, any work done on rates is theoretical and will be an exercise in futility unless the merger occurs.

B. Pennichuck Utilities (PAC, PEU & PWW)

The Petitioners object to the motion to dismiss. The objection is based on the necessity of the consolidated rates to proceed at the same time as the merger docket. The Petitioners assert that their shareholder, Penn Corp, which is wholly owned by the City of Nashua, will not review and approve the merger documents without an approved consolidated rate in place. Furthermore, without a consolidated rate, the Petitioners argue that PEU will be forced to put forth a petition for rate relief that will increase the average single-family residential customer by 31.94 percent which is above the EPA affordability threshold. See Objection to Motion to Dismiss at ¶ 20 & November 21, 2023 Petition at ¶ 9.

The Petitioners acknowledged that their request to move forward with a consolidated rate case prior to approval of the merged entity is unique. However, the Petitioners assert that the Commission is often faced with unique situations. At hearing, the Petitioner proposed consolidation of the two dockets (Docket Nos. DW 23-101 and DW 23-088) and agreed to waive the statute of limitations contained in RSA 378:6 (a) thereby making the DOE's argument that there is insufficient time to review and investigate the matters moot.

C. Office of the Consumer Advocate

On November 22, 2023 the Office of the Consumer Advocate (OCA) filed a letter of participation in this matter. The OCA assented to the DOE's motion to dismiss. At hearing the OCA asserted that there appears to be a sequencing issue in approving the petition for consolidated rates for an entity that does not exist. At hearing, the OCA represented that it was concerned about the viability and status of PEU.

III. COMMISSION ANALYSIS

In ruling on a motion to dismiss, we determine whether the facts alleged in the petition and supporting pleadings and testimony, and all reasonable inferences, could support the relief sought. Decisions on such motions are made before a factual record is developed. This requires us to assume that all of the Petitioner's assertions in their pleadings are true. *See Public Serv. Co. of N.H.*, Order No. 25,213 at 71 (Apr. 18, 2011). However, we need not assume the truth of the statements in the pleadings that are merely conclusions of law. *See Clark v. N.H. Dep't of Emp't Sec.*, 171 N.H. 639, 645 (2019). We engage in a threshold inquiry that tests the facts in the complaint against the applicable law. *See id.*

Having reviewed the petition, pre-filed testimony, and arguments made at hearing, the Commission is mindful of the complex issues surrounding the viability of PEU and PAC. The Petitioners, three separate legal entities, request consolidation of PEU and PAC into PWW. The proposed solution would result in one operating company offering customer rates under a consolidated single tariff. While a consolidated company is likely to create a more efficient and centralized utility capable of providing safe and reliable water service through just and reasonable consolidated rates, and provide improved viability for customers currently under PEU jurisdiction,

the proposed sequencing of events is neither consistent with New Hampshire statute nor Commission past practice.

The consolidated rate petition was filed contemporaneously with a petition for approval of the merger that would subsume PAC and PEU into PWW. As a basis for its petition to consolidate rates, the petitioners cite RSA 378:7, which authorizes the Commission to fix rates for public utilities. The basis for the consolidated rate and merger petition include “significant challenges regarding viability of PEU and PAC” if the companies are to remain standalone entities. *See* November 21, 2023 testimony of John Boisvert at 18. Specifically, PEU and PAC have limited access to capital, PEU does not have access to the bond market, and therefore cannot issue tax-exempt or taxable bonds for its debt capital needs, and based on a 2022 test year, PEU’s proposed rate would exceed the EPA’s recommended affordability index for water rates. *See id* at 19.

It is a well-established principle of statutory construction that one must read statutes so as to avoid an unjust, unreasonable or absurd result. *See Appeal of Town of Lincoln*, 172 N.H. 244, 247–48 (2019). A plain language reading of RSA 362:2, 378:7 and N.H. Code of Administrative Rules, Puc 1602.09 requires that only an established “public utility” can petition for rate relief under RSA 378:7. The request made in the petition is for a consolidated entity that is not yet fully constructed. Specifically, a consolidated rate for a merged PWW that includes all assets and customers previously held by PEU and PAC. Because of its unfinished status, the law does not allow for the rate making petition to occur before the merger petition.

Article IX of the Penn Corp bylaws, clearly outlines that prior to PWW acquisition of PEU and PAC assets and liabilities, Penn Corp must approve the merger. If approved as requested, the newly formed consolidated PWW, that possesses

the combined assets and liabilities of PAC and PEU, can petition the Commission for rate making. Prior to approval of a consolidated rate, after merger, PWW, PAC and PEU's current tariffs will remain in full force and effect.

Approval of utility consolidation agreements are not unknown to the Commission. In Docket No. DE 01-247 the Commission approved a multi-phase approach to allow for merger of Unitil companies followed by the separate phase for approval of new rates. See Order No. 23,935 (March 15, 2002). Given the practice, as developed by Docket DE 01-247, the Commission does not desire to deviate from this practice in the interest of administrative efficiency and due process and requires that the parties put forth a phased approach for merger and then approval of subsequent consolidated rates.


Based upon the foregoing, it is hereby

ORDERED, the motion to dismiss the Petitioner's rate case filing is GRANTED without prejudice.

By order of the Public Utilities Commission of New Hampshire this sixth day of February, 2024.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 23-088

Printed: 2/6/2024

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