

DR 98-128

CENTRAL WATER COMPANY, INC.

Rate Case

Order Granting Recovery of Additional Rate Case Expenses

O R D E R N O. 23,567

October 9, 2000

I. PROCEDURAL HISTORY

On September 25, 1998, Central Water Company (Central or the Company) filed with the New Hampshire Public Utilities Commission (Commission) proposed rate schedules which would have increased Central's revenues by 32.15%, or a total annual increase of \$84,681, for the 625 customers at the Locke Lake Development in Barnstead, New Hampshire. More extensive procedural history may be found in our Order No. 23,151 (February 22, 1999), Order No. 23,326 (October 25, 1999), Order No. 23,386 (January 7, 2000), and Order No. 23,455 (May 1, 2000).

By Order No. 23,326, the Commission granted Central a permanent rate increase of 12.2%, which equated to an increase in revenues of \$30,780 over pre-temporary rate levels. The effective date for the rates was set as December 1, 1999.

On November 19, 1999, just 25 days after the issuance of Order No. 23,326, and prior to filing a Motion for

Rehearing with this Commission pursuant to RSA 541:3, or an Appeal with the New Hampshire Supreme Court (Court) pursuant to RSA 541:6, Central filed a motion with the Court requesting suspension of the order pursuant to RSA 541:18. The Court ordered the State to file a reply by November 24, 1999. After receiving a timely filed response, the Court, on December 2, 1999, denied Central's motion.

On November 24, 1999, Central submitted one copy of its Motion for Rehearing with the Commission, in violation of the Commission's filing requirement in Puc 202.07(a) that parties file an original and eight copies of all pleadings. The remaining eight copies were filed on November 29, 1999. The Commission Staff (Staff) filed its objection to the motion on December 6, 1999. On December 9, 1999, Central filed a request for waiver with respect to the prior late filing of the requisite copies of its Motion for Rehearing. Central also filed, on December 13, 1999, a response to Staff's Objection to the Motion for Rehearing. On January 7, 2000, the Commission issued Order No. 23,386, denying Central's Motion for Rehearing and implicitly granting Central's request for waiver.

On November 5, 1999, Central filed its initial request for rate case expense recovery. The Company requested

the recovery of \$41,377.14 in expenses. After review, Commission Staff (Staff) concurred with the request. The Commission, by Order No. 23,455, approved recovery of that amount, offset by the difference between the temporary rate increase and the permanent rate increase of \$32,421.22, and over-collections of rate case expenses and temporary rate reconciliation amounts from prior proceedings of \$5,415.56. The Commission authorized Central to recover the remaining balance of \$3,540.36 over an eight-month period via a monthly surcharge of \$.70 to each of Central's 635 customers.

On May 26, 2000, Central filed a letter requesting recovery of additional rate case expenses in the amount of \$17,748.87. For the reasons set forth below, we adopt Staff's recommendations as discussed in detail below.

II. STAFF RECOMMENDATIONS

Staff reviewed the Company's request and recommends that the Commission approve only \$3,681.23 of rate case expenses as provided for in Order No. 23,326. Staff also recommends that the Commission deny the request for recovery of \$3,187.52 related to the Motion for Rehearing, deny \$7,385.00 related to the Motion for Suspension, and that the remaining amount, totaling \$3,495.12, be charged to other accounts. Staff further recommends that the Commission

reiterate its requirement that "the Company provide a complete accounting of rate case expenses, including copies of vouchers, as well as the front and back of the canceled checks". Finally, Staff recommends that the Rate Case Surcharge of \$0.70 applied to each customer's bill, approved in Order No. 23,455, not be increased but, rather, extended for an additional nine-month period or until the approved total rate case expenses are recovered, whichever comes first.

On November 25, 1999, Central submitted its first request for recovery of rate case expenses in the amount of \$41,377.14 which was approved by the Commission on May 1, 2000 upon the recommendation of Commission Staff. On May 26, 2000, more than five (5) months later, Central filed a letter requesting additional rate case expenses in the amount of \$17,748.87. Staff reviewed the request and categorized them as follows:

Rate Case Expenses	\$ 3,681.23
Motion for Rehearing	3,187.52
Supreme Court Motion for Suspension	7,385.00
Post-Hearing Non-Rate Case Expenses	<u>3,495.12</u>
Total	\$17,748.87

Staff recommends that recovery of expenses for the Motion for Rehearing and the Motion for Suspension is inappropriate in this proceeding as they were unreasonably

incurred and/or undue in amount, and, therefore, not just and reasonable and in the public interest. In addition, the submission includes expenses related to certain post-hearing matters ordered by the Commission which should not be construed as rate case expenses, but are chargeable to other accounts, as explained further below.

III. COMMISSION ANALYSIS

The Commission, in its Order No. 23,326 (October 25, 1999) approving an increase in Central's permanent rates stated:

FURTHER ORDERED, that the Company provide Staff with a summary and copies of all invoices for rate case expenses within (10) days of this order; and it is

FURTHER ORDERED, that Central shall submit tariff pages in compliance with this order within 25 days;

...

The Commission's review of a utility's request to recover the expenses of litigating a rate case requires the balancing of the utility's right to and opportunity to collect its legitimate costs with the Commission's responsibility to ensure as the reasonableness of the expenses and that the utility is sufficiently motivated to control those expenses. "If unreasonably incurred, if undue in amount, if chargeable to other accounts, they may to that extent be reduced." *State*

v. Hampton Water Works, 91 NH 278, 296 (1941). Although Commission orders awarding rate case expenses in the past have been silent as to whether they may include expenses for rehearing and appeals, the Commission has in the past occasionally allowed the recovery of expenses for Motions for Rehearing and Appeals. On the other hand, the Commission has disallowed or reduced rate case expenses for a variety of reasons. See *Re Pennichuck Water Work, Inc*, 71 NH PUC 351, 354 (1986); *Hampton Water Works Company* 77 NH PUC 455, 456 (1992). In addition, RSA 365:38-a, enacted in 1999, similarly provides:

The 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...

This Statute essentially codifies the standard expressed in *State v. Hampton*, and provides for the Commission's reasonable discretion to determine whether the expenses for which recovery is sought are "just and reasonable and in the public interest".

In this case, recovery of expenses related to the Company's Motion for Rehearing is inappropriate. As Staff argued in its Objection to Central's Motion for Rehearing,

although Central submitted its Motion within 30 days as required by RSA 541:3, the Company's first submission, dated November 23, 1999 and received November 24, 1999, was not properly filed in accordance with NH Code of Administrative Rules Puc 202.06 which requires that:

Any document submitted to the commission shall be deemed to have been filed **on the date the commission receives an original executed paper filing with the required number of copies**, pursuant to Puc 202.07. (emphasis added).

The Company did not file an original and eight copies of the motion until November 29, 1999, five days after the deadline for filing any such motion. Moreover, the Company failed to ask for, and did not receive, any waiver of the 30 day rule as required by Puc 201.05.¹ As such, the Motion could have been rejected outright. See *Daniel v. B & J Realty*, 134 N.H. 174 (N.H. 1991) (finding where time limit for filing appeal with an administrative body was statutorily set Board was required to apply rule literally and erred in exercising its discretion to allow appeal which was filed one day late) See also *In Re Petition of McHale* 120 NH 450 (1980). This is distinguishable from *Southern New Hampshire Water*

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A request for a waiver pursuant to Puc 202.07 was filed 16 days after the original submission on December 9, 1999. Hence, Central received no waiver prior to its faulty filing.

Company, Inc., 76 NH PUC 635 (1991) where the Commission allowed a late filed motion for rehearing when there was an acknowledged mathematical error and the Commission could have *sua sponte* reopened the case to correct the error. See *Petition of Ellis*, 138 NH 159, 160 (1993) ("We have recognized that administrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them...") (citations omitted).

Not only did the Company improperly file the motion for rehearing, it also failed to satisfy other filing requirements of the Commission. For example, the Company also failed to file a diskette copy of the filing as required in PUC Rule 202.07 (a)(2) and 202.08; it failed to serve a written copy by hand or by facsimile with the parties on the same day the motion was filed with the Commission, PUC Rule 202.07(a)(3), 202.18(d); and it failed to seek concurrence of all parties and Staff and certify that a good faith effort was made in seeking such concurrence, PUC Rule 203.04(d)(3), (e).

Although the Commission, in Order No. 23,386 (January 7, 2000) denied Central's Motion for Rehearing as it could "discern no basis for rehearing," and "...elected in this instance to exercise our discretion not to allow a procedural deficiency to stand as a barrier to a proper

substantive result" (at p. 6), and rejected the Motion on substantive rather than procedural grounds, Central should not be rewarded, and its customers penalized for a procedurally deficient filing which failed to provide any new or sufficient evidence that would lead the Commission to reexamine the case (at p. 7). Utilities, such as Central, are not allowed to charge its customers the costs of rearguing issues already decided by a previous Order. In this proceeding, the sum of the rate case expenses of \$41,377.14 already approved by Order No. 23,455 (May 1, 2000), and additional rate case expenses of \$3,681.23 approved in the current submission, exceed the permanent rate increase award of \$30,780. Under all of the circumstances of this particular case, we do not believe it is appropriate to approve expenses associated with a Motion for Rehearing which is replete with an apparent continuing disregard for procedure and little substantive merit. As we noted in Order No. 23,386, "...imprudent costs may not be recovered in the rate-making process...." (At p. 7, citing *Appeal of Public Service Company of New Hampshire*, 122 NH PUC 1062, 1073 (1982)).

On November 19, 1999, 25 days after the issuance of Order No. 23,326, and prior to the Company's filing of a Motion for Rehearing or an Appeal, Central filed a motion with

the Court requesting suspension of the Order pursuant to RSA 541:18. The Motion was docketed by the Court as 99-705. The Attorney General filed a timely objection to the Motion on November 24, 1999. The Supreme Court denied the Company's Motion on December 2, 1999. For many of the reasons noted above regarding the Motion for Rehearing, the Commission also rejects the Company's request for recovery of \$7,385.00 associated with the Motion for Suspension as rate case expenses. In addition, we note that the Motion for Suspension was not sent to Staff on the date it was filed with the Court, as averred in Central's Certification, nor was it provided to the Commission. Staff learned of the filing from the Court and had to make its own copies of the Court document in order to respond to the Court within the abbreviated schedule, five (5) days, it established for replies.

Although the Court did not provide a reason for its denial of the Motion, the State's objection was based, in part, upon the fact that no Appeal was pending, and no Appeal could be pending as no Motion for Rehearing had been filed. RSA 541:4 ("...No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided,") See *Blanchard v. Boston & Maine Railroad*, 86 NH 263, 264 (1933)

("By the terms of the statute the right to seek the suspension of an order of the commission is given only as an incident to proceedings for an appeal."); *Cumberland Farms v. NH Milk Control Board*, 104 NH 364, 366 (1963) ("If it should be determined that no satisfactory excuse exists for the plaintiff's failure to move for rehearing or to appeal within the time limit provided by RSA 541:3, 6 respectively, it would ordinarily be barred from any relief under the present petition..."), citing *Nashua v. Public Utilities Commission of New Hampshire*, 101 NH 503 (1959).

As a Motion for Suspension cannot be filed in the absence of a pending Appeal, the motion was clearly imprudent and Central's customers should not be responsible for the costs. Moreover, Central's counsel enlisted the assistance of two (2) other law firms which greatly inflated these costs.

Commission Order No. 23,326 required the Company to submit a plan setting forth the Company's short-term (one year) and long-term (five year) proposals for necessary capital improvements and retirements, the estimated dates on which the capital improvements are expected to be completed, the Company's best estimate of the potential rate impact of such improvements and retirements, the steps the Company will take to reduce its operating expenses, financing costs, and

cost of service, the potential of selling the system to a larger water utility and related impacts thereof, and compliance with the recent Staff Audit of the Company. These filings were to be made in order for the Commission to conduct a hearing to consider the Company's plan and whether the system should continue under the Company's management or be transferred to another, larger utility. The initial filing was made on January 31, 2000, with subsequent responses on March 23, 2000. This matter has been separately docketed as DW 00-167, and a hearing has now been scheduled for November 7, 2000 in order to provide the Company additional time to supplement its previous submissions.

Included in the Company's May 26, 2000 request for additional rate case expenses was \$3,495.12 related solely to compliance with the Commission's directive. Although emanating from a rate case proceeding, expenses related to compliance with this aspect of the Order are not rate case expenses. The Company is directed to seek the approval of the Commission Finance Director for the appropriate recording of these costs.

Based upon the foregoing, it is hereby

ORDERED, that Central Water Company's request for recovery of \$17,748.87 as rate case expenses is denied; and it is

FURTHER ORDERED, that Central Water Company shall be permitted to recover \$3,681.23 as final additional rate case expenses, by extending the existing Rate Case Surcharge of \$0.70 applied to each customer's bill, approved in Order No. 23,455, for an additional nine-month period or until the approved total rate case expenses are recovered, whichever comes first; and it is

FURTHER ORDERED, that the Company provide a complete accounting of rate case expenses, including copies of vouchers as well as the front and back of the canceled checks, as required by Order No. 23,455, for all rate case expenses approved for recovery in this proceeding; and it is

FURTHER ORDERED, that the Company file compliance tariff pages, if necessary, reflecting the revised rate case expense surcharge period, within ten days of the date of this Order; and it is

FURTHER ORDERED, that the request for recovery of \$3,187.52 related to the Motion for Rehearing, and \$7,385.00 related to the Motion for Suspension are hereby denied and

shall not be utilized by the Company in any future proceeding for ratemaking purposes; and it is

FURTHER ORDERED, that the remaining amount, totaling \$3,495.12, be charged to such other accounts as may be approved by the Commission's Finance Director.

By order of the Public Utilities Commission of New Hampshire this ninth day of October, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary