BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission

v. :

R-2023-3043189, et al.

Pennsylvania-American Water Company

Pennsylvania Public Utility Commission

v. : R-2023-3043190, et al.

Pennsylvania-American Water Company –

Wastewater Division

PREHEARING ORDER # 3 PUBLIC VERSION

On November 8, 2023, Pennsylvania-American Water Company (PAWC or Company) filed Supplement No. 45 to Tariff Water-PA. P.U.C. No. 5 (Supplement No. 45) with the Pennsylvania Public Utility Commission to become effective January 7, 2024. Supplement No. 45 would increase PAWC's total annual operating revenues for water service by approximately \$199.2 million, or 24.2%.

Also on November 8, 2023, the Pennsylvania-American Water Company – Wastewater Division (PAWC-WD or Company) filed Supplement No. 47 to Tariff Wastewater PA P.U.C. No. 16 (Supplement No. 47) with the Commission to become effective January 7, 2024. Supplement No. 47 would increase PAWC-WD's total annual operating revenues for wastewater service by approximately \$4.7 million, or 2.5%.

Formal Complaints have been filed against PAWC and PAWC-WD's tariff filings by the Office of Consumer Advocate, the Office of Small Business Advocate, as well as various

PAWC and PAWC-WD customers. Additionally, Petitions to Intervene have been received by the Commission on Economic Opportunity, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania, Cleveland-Cliffs Steel, the City of Scranton, Victory Brewing Company, and Exeter Township.

On December 21, 2023, by separate Orders, the Commission suspended the filings by operation of law until August 7, 2024, pursuant to Section 1308(d) of the Public Utility Code, unless permitted by the Commission to become effective at an earlier date. In both Orders, the Commission stated that investigation and analysis of the proposed tariff supplements and the supporting data indicate that the proposed changes in rates, rules and regulations may be unlawful, unjust, unreasonable and contrary to the public interest. The Commission also determined that consideration should be given to the reasonableness of PAWC's and PAWC-WD's existing rates, rules and regulations. As a result, the Commission ordered that an investigation be instituted in response to both filings to determine the lawfulness, justness, and reasonableness of the rates, rules, and regulations contained in the proposed tariff filings, as well as a consideration of the lawfulness, justness and reasonableness of the exiting rates, rules, and regulations. The Commission assigned the cases to the Office of Administrative Law Judge for Alternative Dispute Resolution, if possible, and for the prompt scheduling of hearings as may be necessary culminating in the issuance of Recommended Decisions.

On December 21, 2023, a hearing notice was issued for both filings establishing a telephonic prehearing conference for these matters for Wednesday, January 3, 2024, at 10:00 a.m. and assigning us as the Presiding Officers. A Prehearing Conference Order was issued on December 22, 2023, setting forth rules that would govern the prehearing conference.

On December 28, 2023, prehearing memoranda were filed by the following parties: PAWC and PAWC-WD (Collectively, PAWC), I&E, OCA, OSBA, CAUSE-PA, CEO, PAWLUG, Cleveland Cliffs, and the Borough of St. Lawrence.

Separately on December 28, 2023, PAWC filed its Petition of Pennsylvania-American Water Company for Protective Order at docket numbers R-2023-3043189 and R- 2023-3043190. Additionally, PAWC filed its Petition of Pennsylvania-American Water Company for Consolidation or Rate Proceedings at the aforementioned dockets.

The prehearing conference convened on January 3, 2024, as scheduled. The following parties were present and represented by the following counsel: Brooke McGlinn, Esquire, for PAWC; Erin Gannon, Esquire, for OCA; Carrie Wright, Esquire, for I&E; Steve Gray, Esquire, for OSBA; Ria Pereira, Esquire, for CAUSE-PA; Joseph Vullo, Esquire, for CEO; Adeolu Bakare, Esquire, for PAWLUG; Joan London, Esquire, for the Borough of St. Lawrence; Kailie Melchior, Esquire, for West Norriton Township; and J. Chadwick Schnee, Esquire, for Exeter Township. Eighteen consumer Complainants were also present. During the Prehearing Conference, we granted PAWC's Motion to Consolidate these proceedings.

On January 5, 2024, we issued Prehearing Order #1 for the proceedings at Docket Numbers R-2023-3043189 and R-2023-3043190.

On January 5, 2024, we issued an order granting PAWC's Petition for Protective Order.

On January 11, 2024, the OCA filed its Motion to Dismiss Objection and to Compel Answer to Interrogatory of the Office of Consumer Advocate (Motion to Compel #1). In Motion to Compel #1, the OCA requested that we dismiss the written objection filed by PAWC on January 8, 2024, and compel PAWC to provide the full and complete information requested in Interrogatory OCA Set 25, Question No. 3 on the grounds that the information sought in this interrogatory is relevant.

On January 12, 2024, the OCA filed its Motion to Dismiss Objection and to Compel Answer to Interrogatory of the Office of Consumer Advocate (Motion to Compel #2). In Motion to Compel #2, the OCA requested that we dismiss the written objection filed by PAWC on January 10, 2024, and compel PAWC to provide the full and complete information requested to Interrogatories OCA Set 26, Question Nos. 6-7, 12, 17-19, and 21, subparts a. and b., on the grounds that the information sought in these interrogatories is relevant.

On January 18, 2024, the OCA filed a letter with the Commission advising that PAWC informed the OCA that it would answer Interrogatory OCA-25-3, and that Motion to Compel #1 is now moot. Accordingly, the OCA withdrew its Motion to Compel #1 in its entirety.

Separately on January 18, 2024, the OCA filed a letter with the Commission that it was also withdrawing, in part, its Motion to Compel #2 as it relates to OCA Set 26, Question Nos. 17, 18, and 19. However, the OCA further advised that it maintains Motion to Compel #2 as to Interrogatories OCA-26-6, 26-7, 26-12, and 26-21, subparts a. and b.

On January 19, 2024, PAWC filed its Answer of Pennsylvania-American Water Company in Opposition to the Office of Consumer Advocate's Motion to Dismiss Objections and Compel Answers to Interrogatories (Set XXVI).

On January 25, 2024 we issued Prehearing Order #2, which granted in part and denied in part OCA's Motion to Compel #2.

On January 19, 2024, the OCA filed its Motion to Dismiss Objection and to Compel Answer to Interrogatory of the Office of Consumer Advocate (Motion to Compel #3). In Motion to Compel #3, the OCA requested that we dismiss the written objection filed by PAWC on January 16, 2024, and compel PAWC to provide the full and complete information requested to Interrogatories OCA Set 27, Question No. 14, subpart b., on the grounds that the information sought in these interrogatories is relevant and not privileged. On January 22, 2024, PAWC filed an Answer to the OCA's Motion to Compel #3.

In accordance with the Prehearing Order we issued on January 5, 2024, motions to compel are due within three days of service of written objections, and answers to motions to compel are due within three days of service of motions to compel. PAWC served their formal objections to Interrogatories OCA Set 27 on January 16, 2024. Therefore, the OCA's Motion to

Compel #3 was timely filed on January 19, 2024, and PAWC's answer was timely filed on January 22, 2024.

For the reasons stated below, the OCA's Motion to Compel #3 is granted.

DISCUSSION

Section 5.321(c) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa.Code § 5.321(c), specifically provides that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Discovery is permitted regardless of whether the information sought "relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant." *Id.* Information may be discoverable, even if it would be inadmissible at a hearing. "It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Consistently, the Commission has allowed participants wide latitude in discovery matters. *Pa. P.U.C. v. The Peoples Natural Gas Company*, 62 Pa. PUC 56 (August 26, 1986); and *Pa. P.U.C. v. Equitable Gas Company*, 61 Pa. PUC 468 (May 16, 1986).

The Commission's regulations place limitations on the scope of discovery. Discovery that would cause unreasonable burden or expense or require an unreasonable investigation by a party is not permitted. 52 Pa.Code § 5.361(a)(2), (4). "The law is [] clear that the Commission has the right to limit discovery that would place an unreasonable burden upon a participant in litigation." *Application of Newtown Artesian Water Company and Indian Rock Water Company*, Docket No. A-212070, 1990 Pa. PUC LEXIS 83 (June 20, 1990) *citing City of Pittsburgh v. Pa. PUC*, 526 A.2d 1243, 1249-50 (Pa. Cmwlth. 1987).

Question 14 subpart b. of OCA Interrogatories Set 27 directed to PAWC requests the following information: [BEGIN CONFIDENTIAL]



[END CONFIDENTIAL]

The OCA avers that PAWC's objections to Question 14 subpart b. of OCA Interrogatories Set 27 fails for three reasons. First, the designation of the requested information as confidential and proprietary does not preclude it from discovery. Second, the OCA maintains that it can state, with a reasonable degree of certainty, that the requested information is reasonably related to the ratemaking claims made by PAWC in this base rate case and reasonably calculated to lead to the discovery of admissible evidence as to the OCA's ratemaking claims.

Specifically, the OCA claims that its interrogatory seeks [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] all of which ultimately result in system costs borne by consumers. The OCA notes that PAWC included in its base rate filings claims related to water and wastewater systems in the fully projected future test year (FPFTY) that it has yet to acquire, and the OCA avers that an answer to this interrogatory will inform the OCA of the effects of these acquisitions on PAWC, including on PAWC's revenue requirement claims. Third, the OCA states that PAWC's argument that the requested material is not relevant lacks merit because the OCA is entitled to obtain discovery relevant to the subject matter of the proceeding and relating to the OCA's potential ratemaking adjustment claims in this proceeding. The OCA notes that PAWC witness Everette points to several proposed system acquisitions as justification that the Commission grant a rate of return reflecting PAWC's superior management performance.

PAWC's Answer to the Motion to Compel agrees that the claimed revenue requirement for the FPFTY includes water and wastewater systems to be acquired. However, PAWC asserts that none of the topics sought by the OCA's interrogatory relate to the examination of PAWC's existing and proposed base rate in this proceeding within the statutory period specified by 66 Pa.C.S. § 1308(d). PAWC alleges that the OCA seeks to convert this proceeding from a base rate case into a wholly inappropriate vehicle for relitigating issues related to Section 1329 acquisitions previously approved by the Commission. PAWC emphasizes that the material sought by the OCA is internal, confidential and competitively sensitive. PAWC notes that in a previous base rate proceeding an Administrative Law Judge dismissed the OCA's motion to compel unless the information sought by the OCA was redacted as to contemplated future acquisitions/business opportunities, labor negotiations, and litigation/settlement discussion. *Pa. P.U.C. v. Pennsylvania-American Water Co.*, Docket No. R-2011-2232243 et al. (Order on Motion to Compel entered July 21, 2011) pp. 21-22 ("2011 ALJ Order"). Therefore, PAWC asserts, there is clear precedent specific to PAWC that the information sought by the OCA here is not discoverable.

We agree with the OCA that the information requested by OCA Interrogatories Set 27 Question 14 subpart b. is relevant or reasonably calculated to lead to the discovery of admissible evidence. Both the OCA and PAWC agree that water and wastewater system acquisitions are included in PAWC's claimed revenue requirement for the FPFTY in this proceeding. However, PAWC emphasizes that the information sought by the OCA related to completed acquisitions was not used for any purpose in developing the Company's claims in this rate case. Despite these objections, we find that the information sought by the OCA regarding acquisitions is permissible under the broad discovery standards detailed above. The OCA seeks documentation related to PAWC's acquisition practices, and PAWC has included acquisitions in its FPFTY revenue requirement. Additionally, as the OCA emphasizes, discovery is not limited to how PAWC developed its claims but extends to the OCA's potential ratemaking adjustment claims in this proceeding. 52 Pa. Code § 5.321(c). Although we agree with PAWC that this is not the appropriate proceeding to relitigate Section 1329 acquisitions, at this point, the OCA is only seeking discovery, and we have no reason to believe they are seeking to inappropriately relitigate Section 1329 acquisitions.

We also find that PAWC citing to acquisitions as support for a rate of return based on superior management performance provides an additional, more specific reason that the OCA's interrogatory is permissible. It is plausible that the information sought by the OCA may or may not support this claim of superior management performance. PAWC admits that it has requested the Commission adopt a rate of return in recognition of its claimed superior management performance but denies that this gives the OCA free reign to request any and all information related to PAWC's acquisitions. PAWC similarly cites to the 2011 ALJ Order as support for its objection. We find that the 2011 ALJ Order is distinguishable from the OCA's request here. The ALJs' decision in 2011 appears to primarily deny the OCA's request because it was a "fishing expedition", i.e., overly broad, by asking for board meeting minutes without specifically referencing what was sought. In this instance, the OCA's request is related to a specific subject, acquisitions, and as referenced above PAWC has included FPFTY acquisitions as part of its base rate filings in support of its claimed revenue requirement.

THEREFORE,

IT IS ORDERED:

- 1. That the Office of Consumer Advocate's Motion to Dismiss Objections and Compel Answers to OCA Interrogatories Set 27 Question 14 subpart b. is granted.
- 2. That Pennsylvania-American Water Company is directed to answer the Office of Consumer Advocate's Interrogatories Set 27 Question 14 subpart b. by no later than January 30, 2024.

Date: January 29, 2024

Christopher P. Pell
Deputy Chief Administrative Law Judge

/s/
John M. Coogan
Administrative Law Judge

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