

STATE OF NEW HAMPSHIRE

SUPREME COURT

Appeal of the Lakes Region Water Co., Inc.

RSA 541 (Rule 10)

A. Parties and Counsel

1. Party Seeking Review

Counsel

Lakes Region Water Co., Inc.

Upton & Hatfield, LLP

159 Middle Street

Portsmouth, NH 03801

(603) 436-7046

jrichardson@uptonhatfield.com

2. All other Parties

N.H. Public Utilities Commission

Counsel

John Clifford, Esq.

21 S. Fruit St., Suite 10

Concord, N.H. 03301-2429

Robert Mykytiuk

PO BOX 842

MOULTONBORO NH 03254

rmykytiuk@yahoo.com

Counsel

N/A

B. Orders Appealed From and Motion for Rehearing.

1. Order No. 26,037, *Order Denying Motion for Rehearing*, July 5, 2017.

2. *Motion for Rehearing and Suspension of Order No. 26,014*, June 5, 2017.

3. Order No. 26,014, *Order on Hearing on Merits*, May 5, 2014.

C. Questions Presented for Review.

1. The Public Utilities Commission (“Commission”) erred by allowing a customer to receive water service for a second dwelling for free when RSA 378:1 provides that utility service is to be “rendered in accordance with the rules adopted by the commission” and the Commission’s Rule Puc 606.04 (j) prohibits “tandem services” which connect separate dwellings using a single service line.
2. The Commission erred by failing to explain and apply Rule Puc 606.04 (j) to the circumstances of this case when Lakes Region Water Co., Inc. (“Company”) requested that the Commission apply the Rule as written; and
3. The Commission erred by failing to consider evidence and argument as to a new issue determined in its order, *i.e.* that the Company could not amend its Tariff in the future to require a separate service line as contemplated by Rule 606.04 (j), when RSA 541:3 permits a motion for rehearing as to any issue “covered or included in the order.”

D. Provisions of the Constitution, Statutes, Ordinances, Rules or Regulations Involved in the Appeal.

1. RSA 378:1.
2. Rule Puc 606.04.
3. RSA 541:1-7.

E. Other Documents Involved in the Appeal.

The Company’s exhibits are contained in the administrative record, to be provided as specified by Rule 10.

F. Statement of the Case.

On or about November 4, 2014, Robert Mykytiuk, a utility customer of Lakes Region Water Co., Inc., constructed an additional dwelling on his property for his personal use, allowing him to rent his existing residence near Lake Winnepesaukee as a vacation rental. The new dwelling is connected “in tandem” with the existing residence, using a single service line running from one dwelling to the next. The rules of the Commission prohibit water utilities from allowing tandem services. Rule Puc 606.04.

On April 26, 2016, after discovering the new dwelling, the Company notified the customer that he had constructed an additional dwelling or place of consumption and was required to apply for a second service. On June 30, 2016, after the customer refused to submit an application for the new service, the Company assessed a second customer charge. On October 4, 2016, after the Commission staff agreed that the Company had properly assessed the second charge, the customer filed a complaint with the Commission.

Before the Commission, the Company argued that the Commission’s rules, specifically Rule Puc 606.04, prohibit both branched and tandem services and that RSA 378:1 requires that the rates for water service be charged in accordance with the Commission’s rules. The Commission staff “agreed that there should be a separate service line, there should be a separate meter. It is a second dwelling unit.” Transcript, Pages 176-177.

On May 5, 2017, the Commission determined in Order No. 26,014 that the customer met his burden of proof because the Company’s Tariff does not authorize a second charge to be assessed. The Commission ordered the Company to refund the second base charge assessed by the Company. The Company has refunded the customer in full. In addition, the Commission ordered that the Company could revise its Tariff to provide for a second customer charge but it could not revise its Tariff to require a second service line for the new dwelling. The Commission did not apply or explain its Rules which prohibit tandem services.

On June 5, 2017, the Company moved for rehearing which the Commission denied on July 5, 2017. This appeal followed.

G. Jurisdictional Basis for the Appeal.

RSA 365:21; RSA 541:6.

H. Statement of the reasons why a substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.

This appeal provides an important opportunity to clarify administrative agency law under RSA 541. Specifically, when a Commission fails to address a party's argument in its final order on the merits, it must do so when specified in a timely motion for rehearing under RSA 541:4.

This appeal involves a straightforward application of RSA 378:1 which provides that utility rates govern service "in accordance with the rules adopted by the commission". The Commission's Rule Puc 606.04 prohibits "tandem services" in which two or more dwellings are connected in tandem using a single service line. This issue was raised below on the merits and on rehearing. However, the Commission failed to apply its Rules to address the issue in its May 5, 2017 *Order on Hearing on Merits* and again in its July 5, 2017 *Order Denying Motion for Rehearing*. Lakes Region requests an appeal to clarify that, when an agency fails to address an issue raised on the merits, it must do so when specified in a motion for rehearing under RSA 541:4.

I. Preservation of Issues.

Counsel for the Company certifies that every issue raised in this Appeal has been presented to the Commission and has been properly presented for appellate review by a contemporaneous objection or where appropriate, by a properly filed pleading.

Respectfully submitted,

Lakes Region Water Co., Inc.,

By its Counsel,

UPTON & HATFIELD, LLP

Date: August 2, 2017



Justin C. Richardson, Esq.

NHBA #12148

159 Middle Street

Portsmouth, New Hampshire 03801

jrichardson@uptonhatfield.com

(603) 436-7046

CERTIFICATE OF SERVICE

I certify that two copies of the within Appeal have been mailed this day to the customer Robert Mykytiuk, to John Clifford, Esq., counsel to Staff of the Commission and to Debra Howland, Executive Director of the Commission.



Justin C. Richardson, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 16-834

COMPLAINT OF ROBERT MYKYTIUK AGAINST
LAKES REGION WATER COMPANY, INC.

ORDER ON HEARING ON MERITS

ORDER NO. 26,014

May 5, 2017

APPEARANCES: Robert Mykytiuk, *pro se*; Upton & Hatfield, LLP, by Justin C. Richardson, Esq., for Lakes Region Water Company, Inc.; and Staff of the Public Utilities Commission by John S. Clifford, Esq.

The Commission orders Lakes Region Water Company, Inc., to refund certain base charges it has collected from its customer, Robert Mykytiuk, and prohibits the company from imposing such charges unless and until they are included in the company's tariff.

I. PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

On October 4, 2016, Robert Mykytiuk filed a complaint with the Commission against Lakes Region Water Company, Inc. (Lakes Region or the Company), alleging that Lakes Region cannot require him to pay an additional quarterly base charge¹ of \$135.26 under the terms of its tariff. The additional base charge relates to a second structure on Mr. Mykytiuk's property located at 17 Mayflower Lane in the Town of Moultonborough.

In March 2016, the Company learned that Mr. Mykytiuk had completed construction of an additional structure on his property. During construction, Mr. Mykytiuk tapped into the service connection to his primary residence to supply water to the new structure. Shortly

¹ The parties have used the term "base charge" interchangeably with the "Minimum charge per customer per quarter," which is the phrase used in the Company's tariff. *See* NHPUC No. 6 – Water, 7th Rev. Page 10, Nov. 28, 2016.

thereafter, Lakes Region sent a letter to Mr. Mykytiuk requesting an inspection of the water service connection along with an application for service relating to the new structure.

On May 9, 2016, Lakes Region sent a supervisor to the Mykytiuk residence to inspect the new service connection. Lakes Region concluded that the new structure required a separate service connection, but chose not to install a separate connection at that time. Instead, Lakes Region started to bill Mr. Mykytiuk an additional base charge of \$135.26 per quarter. The additional charge first appeared on Mr. Mykytiuk's June 2016 water bill and has continued to appear on subsequent bills to date. Mr. Mykytiuk took exception to Lakes Region's interpretation of the terms of its tariff and, in his complaint, submitted that the new structure is an accessory dwelling unit and that he is not required to have separately metered water service.

By letter dated October 11, 2016, the Commission notified Lakes Region and Mr. Mykytiuk that it would treat the matter as a formal complaint. On November 10, 2016, the Commission issued a letter setting a hearing for December 14 and directing the parties to file witness lists, summaries of testimony, and exhibits by November 30. Both parties made timely filings. On December 5, 2016, Lakes Region filed a Motion to Deny Complaint and Exclude Irrelevant Evidence. As a result of that filing, the Commission canceled the December 14 hearing so it could properly address the issues raised in Lakes Region's motion. Mr. Mykytiuk filed an objection to the motion on December 14. The Commission issued an order on January 31, 2017, limiting certain testimony of both parties. A final hearing on the merits was held before the Commission on March 20, 2017. Mr. Mykytiuk's complaint and all other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at

<http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-834.html>

II. POSITIONS OF THE PARTIES

A. Robert Mykytiuk

Mr. Mykytiuk stated that Lakes Region is prohibited from charging him a separate base charge for his additional structure because such a charge is not included in the tariff on file with the Commission. Tr. at 10. If authority existed in the tariff for a second base charge, Mr. Mykytiuk would pay it. Tr. at 112.

Mr. Mykytiuk offered the testimony of Karel Crawford, a State Representative who represents District 4 which covers the area of Moultonborough where Mr. Mykytiuk lives. Ms. Crawford testified that she searched the tariff to determine if Lakes Region could charge a second base charge for the second building. She could not find where that was permitted under Lakes Region's tariff. Tr. at 19. When she contacted Amanda Noonan, the Director of Consumer Services and External Affairs at the Commission, Ms. Noonan indicated she could not find where a second base charge is permitted in Lakes Region's tariff. Tr. at 19. Ms. Crawford agreed that Mr. Mykytiuk has installed a "tandem" service line on his property to provide water service to the second structure, Tr. at 23, but she thinks that there should be clarification in the rules or in Lakes Region's tariff to be clear when a customer will be charged a second base fee. Tr. at 27.

Mr. Mykytiuk next called Kevin Quinlin to testify. Mr. Quinlin is the president of the Balmoral Improvement Association and a member of the Moultonborough Planning Board. Tr. at 36. Mr. Quinlin stated that he had several conversations with Lakes Region's president, Thomas Mason, concerning the issues Mr. Mykytiuk was having with Lakes Region and the second base charge. Tr. at 37. Mr. Quinlin reviewed the regulations and tariff and could not find any basis for the fee through his own research. *Id.* Mr. Quinlin stated that the Moultonborough

Planning Board was aware of the issue and that the sense of the board was that the rule should be “one lot, one fee.” Tr. at 41.

Mr. Mykytiuk also presented testimony on his own behalf at the hearing. The thrust of Mr. Mykytiuk’s complaint is that Lakes Region is not permitted to charge him a separate base charge and/or install a separate meter under the terms of the Company’s tariff. He offered several exhibits. Exhibit 2 contained pictures showing where the service line comes into the first structure on his property. The photo shows another water line connected to the service line and going to the second structure, and a shutoff valve for that water line after the meter. He does not believe that this is a tandem service. Tr. at 66-67. He also offered a picture of a house owned by another Lakes Region customer, which has one service pipe serving two structures on the customer’s property. Tr. at 68. According to Mr. Mykytiuk, that customer is not paying two base charges. Mr. Mykytiuk claims there are others who pay two base charges, but there is nothing in the tariff requiring them to have separate meters. Tr. at 68-69. Mr. Mykytiuk agreed that the other customers who have single water meters may have installations that predate the Commission’s adoption of its rules. Tr. at 92-93. He claims there is ambiguity in N.H. Code of Admin. Rules Puc 606.04(j), which does not allow for tandem service. Tr. at 95. Mr. Mykytiuk stated that he was threatened with disconnection if he did not allow Lakes Region to inspect the service connection. He complied with the request. Tr. at 74-78.

On cross examination, Mr. Mykytiuk acknowledged that what he actually rents out is his primary residence, and he sometimes stays on the second floor of the new second structure. The main house is rented through a vacation rental by owner program. Tr. at 107-108. He acknowledged that he would have to pay the second base charge if it were in fact in Lakes Region’s tariff. Tr. at 112.

B. Lakes Region

Leah Valladares of Lakes Region testified that Mr. Mason informed Mr. Mykytiuk as early as March 2015 – when construction had started – of the need to install a second service line. Tr. at 120-121. On April 26, 2016, Ms. Valladares sent a letter to Mr. Mykytiuk enclosing an application for service and requesting the service inspection. Tr. at 121. Lakes Region wanted to inspect the line because there was a potential bypass hazard and health hazard. Tr. at 122. Ms. Valladares explained that it was the Company's standard practice to install a separate meter and charge a second base charge on properties with two separate structures. She discussed an exception to the practice, the McGuire property, and said there are plans to set it up with two accounts. Tr. at 130. Ms. Valladares testified that there are two properties in Balmoral that have two structures on them with two separate meters and accounts. Tr. at 127-18. She also mentioned that there was another property in Wentworth Cove that has two dwellings on the property and it is set up with two accounts and two meters. Tr. at 131. Upon viewing Mr. Mykytiuk's second dwelling, Ms. Valladares confirmed that it is approximately 1,575 square feet, is not connected to the main residence and has – to the best of her knowledge – one sink, two baths, two water closets, two lavatories, a shower, a dishwasher and a washing machine. Tr. t 132-34.

Ms. Valladares stated that Lakes Region decided not to disconnect Mr. Mykytiuk in April 2016 after being satisfied that there were no health concerns and that Mr. Mykytiuk had not bypassed recording water usage on the meter. Moreover, Lakes Region did not want to cause an undue hardship on Mr. Mykytiuk. Tr. at 135. Mr. Mykytiuk is current on his billing of the two base charges. Tr. at 136.

Ms. Valladares was asked to describe the connections that were contained in Exhibit 5, which portrayed the water service connections at Mr. Mykytiuk's residence. She explained that a branch connection is one in which the service line branches and goes to multiple dwellings. A branch connection is made prior to the meter. Tr. at 143. She considered a tandem connection to be one which went to a second place of consumption after the meter. Tr. at 145. She viewed Mr. Mykytiuk's arrangement as a tandem connection. She testified that Puc 606.04(h), prohibits any type of branch or tree connection. Tr. at 144. She opined that there would be more costs for supplying the demand to a separate structure. Tr. at 146. Ms. Valladares recommended that a second service line be installed and a meter be installed at the second place of consumption, because, in her view, the current configuration does not comply with the Commission's rules. Tr. at 149.

Ms. Valladares concluded that, financially, the current situation is not fair. Mr. Mykytiuk built a separate dwelling and it should have two service lines, and he should be charged as two customers because he has created "an increased draw on the system." Tr. at 150. Ms. Valladares acknowledged that Lakes Region's tariff refers to a "minimum charge per customer per quarter" which she and the Company typically call the "base charge," but that such minimum charge does not refer to any charges that are levied per unit. Tr. at 168-69. The "metered rate" is the charge for usage and it is measured in hundreds of cubic feet. Tr. at 169. Ms. Valladares admitted that Lakes Region's tariff needs to be revised; that there is no specific working definition about what tandem service is; and that Lakes Region commonly refers to terms like customers, place of consumption, structures and premises, as being individuals as a general rule. Tr. at 171-172.

C. Staff

Mark Naylor, the Director of the Commission's Gas and Water Division, was asked by the Commission to testify. Mr. Naylor confirmed that he sent an email to Mr. Mykytiuk on April 12, 2016, stating that he did not disagree with Lakes Region charging him two base charges for the two structures on his property. He considered it to be a compromise instead of digging up the service connection and installing another service line and a meter. He said it is not correct to assert that adding a second dwelling unit to an existing service does not create cost. It creates demand that must be satisfied by the utility. The utility is required to meet demand every minute of every day, and must be set up to handle peak demand on its system whenever it occurs. He said when you add additional customers, it adds to peak demand. Mr. Naylor read from the American Water Works Association M1 Manual and stated that demand costs are associated with providing facilities to meet the peak rates of use or demands placed on the system by the customers. Tr. at 174-177.

Mr. Naylor agreed with the suggestion that "customer" and "dwelling unit" should be treated synonymously. Tr. at 178. He testified that he considers a tandem service line to be a single service line that serves two end-users or two or potentially more customers. Tr. at 180. A branched service would be before the meter, but he thought that tandem or branched is a distinction without a difference. Tr. at 180-181. To Mr. Naylor, it does not matter in which structure Mr. Mykytiuk actually resides. Whichever one he uses and whichever one he rents, according to Mr. Naylor, "It's a separate place of consumption." Tr. at 184. In this case, it is the second unit that creates additional demand on the system. *Id.* To rectify the situation, Mr. Naylor suggested that what is needed is a clear definition of what a customer is and what a place of consumption is, and a clear definition of how service is formally requested. Tr. at 186.

He thinks a tariff change is in order to make it clearer. Tr. at 187. Mr. Naylor also considered what the effect would be if Mr. Mykytiuk sold the property with two dwelling units on it and they were both then occupied full time. Mr. Naylor said it “furthers the point” that ideally there should be two meters and two service lines because demand may be too much for the meter. Tr. at 190-191.

III. COMMISSION ANALYSIS

The Commission has broad authority to hold hearings on complaints against utilities both by statute, RSA 365:1 *et seq.*, and pursuant to its rules. N.H. Code of Admin. Rules Puc 204. The Commission is charged with setting rates that are just and reasonable. RSA 378:7. Every public utility shall keep on file “schedules showing the rates, fares, charges and prices for any service rendered.” RSA 378:1.

In this case, we find that Lakes Region’s tariff does not specifically address the situation presented here, where Mr. Mykytiuk has built a second dwelling on his property. The tariff refers to “customer(s)” throughout, but there is nothing in the tariff about when a second meter or separate service must be installed, or what is or is not a tandem service as prohibited by our rules under Puc 606.04(j). Our own rules define customer as any person supplied with water by a utility. Puc 602.05. They define service connection as the point of connection between the customer’s service pipe and the utility’s service line. Puc 602.12. What Mr. Mykytiuk has done is to add a new line to his second structure after the metering point in the main residence.

While the tariff does not address the present situation, additional consumption does not come without cost to Lakes Region. If both units are fully occupied, it is incumbent upon Lakes Region under our rules to be able to satisfy peak demand to both structures at the same time.

According to Mr. Naylor, this situation has the potential to create additional demand on Lakes Region's system.

Mr. Mykytiuk points to the new Accessory Dwelling Unit (ADU) law which goes into effect on June 1, 2017, which provides that "separate systems shall not be required for the principal and accessory dwelling units." RSA 674:72 V. That law is not yet in effect and we take no position on whether Mr. Mykytiuk's second structure would qualify as an ADU under the new law, or what the new law may mean in the context of this, or any other case, where an ADU is added to a home after the date the new law takes effect.

Under the terms of its present tariff, there is no basis for Lakes Region to require Mr. Mykytiuk to pay a second base charge every month for his newly constructed unit. We acknowledge that this new unit may create additional demand on Lakes Region's system and expect Lakes Region will propose revisions to its tariff to address similar situations.

Mr. Mykytiuk has met his burden of proof by a preponderance of evidence pursuant to Puc 203.25 in showing that Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff. Until such time as Lakes Region's tariff is amended, the Company shall not impose a second base charge on Mr. Mykytiuk, and Lakes Region is directed to refund to Mr. Mykytiuk the second base charges it has collected from him to date. The Company is not precluded from making additional inspections in the future. In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so long as he undertakes no further renovations to the structures on his property.

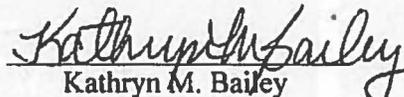
Based upon the foregoing, it is hereby

ORDERED, that pursuant to RSA 365:29, Lakes Region shall refund the fees charged to Mr. Mykytiuk for the second base charge, with interest, and it is

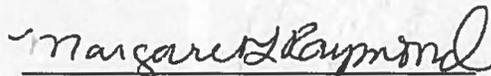
FURTHER ORDERED that Lakes Region shall not impose a second base charge on the property at 17 Mayflower Lane in the Town of Moultonborough, or on any similar configuration, until such time as Lakes Region receives approval to impose a second charge under the terms of a properly filed tariff amendment.

By order of the Public Utilities Commission of New Hampshire this fifth day of May, 2017.


Martin P. Honigberg
Chairman


Kathryn M. Bailey
Commissioner

Attested by:


Margaret L. Raymond
Assistant Secretary

SERVICE LIST - EMAIL ADDRESSES- DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov
amanda.noonan@puc.nh.gov
jayson.laflamme@puc.nh.gov
john.clifford@puc.nh.gov
jrichardson@upton-hatfield.com
leah@Lakesregionwater.com
lrwater@lakesregionwater.com
mark.naylor@puc.nh.gov
ocalitigation@oca.nh.gov
rmykytiuk@yahoo.com
robyn.descoteau@puc.nh.gov
rorie.patterson@puc.nh.gov
smallon@uptonhatfield.com
steve.frink@puc.nh.gov

Docket #: 16-834-1 Printed: May 05, 2017

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Lakes Region Water Company, Inc.

Docket No. DW 16-834

Motion for Rehearing and Suspension of Order No. 26,014

NOW COMES Lakes Region Water Co., Inc., (the "Company" or "Lakes Region") moves for rehearing of Order No. 26,014 as follows:

I. REHEARING REQUEST

Lakes Region Water Co., Inc., agrees that its Tariff does not define when a customer who develops his property to allow two separate uses, a residential use and a vacation rental, becomes two customers. The Commission's directive to revise its Tariff to address this issue is a good one. However, in Order No. 26,014, the Commission did not address the central issue in this case: that Lakes Region's Tariff governs water utility service that it is "rendered in accordance with the rules adopted by the commission" (RSA 378:1) and the Commission's rules specifically prohibit both branched and tandem services. Puc 606.04 (h) & (j).¹ As a result, Lakes Region requests that the Commission grant rehearing or reconsideration of Order No. 26,014 pursuant to RSA 541 and suspend Order No. 26,014 pursuant to RSA 365:21, due to the following errors of law:

¹ See e.g., Lakes Region's November 30, 2016 *Witness Summary and Exhibit List*, Page 2; Lakes Region's December 5, 2016 *Motion to Dismiss*, Para. 5 ("The Commission's Laws, Rules and Tariff Control. The Commission has adopted specific rules which control the outcome of this proceeding: For example, Puc 606.04 (h) requires that all water utilities "shall require that the customer shall not install any tree or branch connection in the service pipe." Puc 606.04 (j) requires that all water utilities "shall require" that "[n]o tandem services shall be permitted."").

1. The Commission Misapprehended the Customer's Burden of Proof.

Order No. 26,014 mistakenly determined that the customer's burden of proof was to prove that "Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff".² However, the customer's burden of proof was to demonstrate that the rate charged by Lakes Region was "unjust and unreasonable" or otherwise in violation of the law. *See e.g. RSA 378:7; RSA 365:29.*

RSA 378:1 provides that all utility service is to be "rendered in accordance with the rules adopted by the commission pursuant to RSA 541-A". The Commission's rules governing water service specifically prohibit tandem services. *See e.g. Puc 606.04 (j)* ("[n]o tandem services shall be permitted."). Order No. 26,014 misapprehended the law and the customer's burden proof to be merely to show that Lakes Region had no specific tariff provision authorizing it to charge for a second service. However, water utility service under RSA 378:1 means water service that is "rendered in accordance with the rules adopted by the commission" and the commission's Rule Puc 606.04 (j) clearly prohibits tandem services.

Order No. 26,014 appears to require that Lakes Region's Tariff define each or every circumstance in which a separate customer charge may be required. Lakes Region's Tariff is not intended to do this. In fact, the Tariff does not even state that separate apartments on the same property but owned by a single owner, such as exist in Tamworth and other locations, are required to pay separate customer charges. This is because Lakes Region's Tariff *assumes* and the Commission's rules *require* that separate and distinct uses or buildings have separate service lines (and meters) "except in unusual situations such as service to an apartment or to a condominium". Rule Puc 606.04 (g).

² Order No. 26,014, Page 9.

However, the law does not require Lakes Region to define each and every circumstance when a separate service may be required. Rather, it is the customer's burden to demonstrate that Lakes Region's rates or charges are unjust or unreasonable, or otherwise in violation of the law. The fact that Lakes Region's Tariff may have been unclear does not mean that a customer is entitled to a second service free of charge while others pay full price. Rather, the law requires that the customer prove that Lakes Region applied its rates in a manner that is unjust or unreasonable or in violation of the law.

In this case, the customer submitted no evidence to show that Lakes Region's charges were in fact unjust or unreasonable or otherwise in violation of the law. He merely sought to prove that Lakes Region's Tariff did not specifically address his particular use and, in his view, he was therefore entitled to pay only a single charge. However, as Order No. 26,014 recognizes, he has two separate uses: a residential use and seasonal vacation rental. There are two separate structures that are connected by a tandem service connection, which is prohibited by Rule Puc 606.04 (j). As staff testified and Order No. 26,014 recognizes, the second use as a vacation rental increases the demand on Lakes Region's system and the cost to provide water service. RSA 378:1 directs Lakes Region to provide service "in accordance with the rules adopted by the commission" which prohibit tandem services. Lakes Region is therefore required to charge each separate apartment or use as a separate customer.

While the customer demonstrated that Lakes Region's Tariff did not specifically address tandem services, he did not meet his burden to prove that Lakes Region charged rates that are unjust or unreasonable or in violation of the law. It was not Lakes Region's burden to prove or establish absolute or mathematical certainty in the definitions its

Tariff when the Commission's rules specifically prohibit tandem services. As a result, Lakes Region requests that the Commission reconsider or rehear Order No. 26,014 in light of the customer's burden to prove that the rates charged by Lakes Region to this customer are unjust or unreasonable or otherwise unlawful.

2. The Commission Erred By Ordering Reparation without Notice.

Lakes Region moves for rehearing or reconsideration of Order No. 26,014 because the Commission ordered reparation of customer bills paid for service that had been already rendered when RSA 365:29 requires issuance of a "notice of hearing or the filing of the petition for reparation." In this case, the customer did not request (and the Commission did not notice) any reparation at any time prior to the hearing.

The record in this case is not in dispute. The customer filed a complaint after Staff agreed that Lakes Region had correctly applied a second base charge for the customer's two separate uses of his property as both a residence and vacation rental. In his complaint dated October 3, 2016, he did not request a refund but instead requested: "A RESOLUTE FINDING TO END THE CONTINUOUS THREATS OF WATER SHUTOFF FOR NONPAYMENT FROM LAKES REGION WATER." (emphasis in original). Lakes Region did not threaten the customer. However, the key point is that he did not request and Lakes Region had no reason to believe that the customer requested a refund.

On November 10, 2016, the Commission directed Lakes Region and the customer to submit statements of the law and relief requested. In his December 16, 2016 response, the customer did not cite the reparation statute or request a refund. Instead, he cited extensively to the ADU law which *as of June 1, 2017*, prohibits municipal officials

from requiring separate utility systems for ADUs. However, the customer does not have an ADU and Lakes Region reasonably understood this proceeding to concern only whether its decision to charge a second base charge, supported by staff, was unjust or unreasonable.

At no time did the Commission notice the potential for a refund to be ordered. The customer did not request a refund until the conclusion his closing statement. *Transcript*, Page 206 or 209. This occurred after the issues and evidence were presented and after Lakes Region's opportunity to present arguments.

Had the customer requested (or the Commission issued notice of) a refund, Lakes Region would have immediately filed a revised Tariff to require that a second base charge be paid. In fact, Lakes Region had already begun to consider updating the terms and conditions contained in its Tariff prior to this proceeding. However, because of the complaint filed by this customer (and in light of the fact that he did not request a refund), Lakes Region determined that the best course of action would be to wait for the Commission's determinations and interpretation of its rules in this proceeding before filing updates to its Tariff.

New Hampshire law and RSA 365:29 are clear that a "notice of hearing or the filing of the petition for reparation" are required before a refund can be ordered. In this case, the customer did not file a petition for reparation or similar request. Had notice of a refund been issued by the Commission, Lakes Region would have promptly amended its Tariff to include a requirement that each separate apartment, building or other use pay a separate customer charge. In addition, Lakes Region would have presented detailed evidence as to its actual costs to provide service this customer's actual consumption

during peak demand periods in order to demonstrate that the rates charged for service to his premises were not unjust or unreasonable. However, in this case there was no customer request for a refund and the Commission did not issue notice of one. As a result, it was unnecessary to delve into the facts or the law concerning whether this customer is entitled to a refund as the legal prerequisites for a refund under RSA 365:29 had not been met. As a result, Lakes Region requests that the Commission suspend and grant rehearing or reconsideration of Order No. 26,014 to the extent it directs Lakes Region to refund customer charges for service rendered, contrary to RSA 365:29.

3. The Commission erred by ordering that Lakes Region could not revise its Tariff to require a separate meter or a service line.

On the last page of Order No. 26,014, the Commission determined that Lakes Region could amend its Tariff in the future to require a second customer charge. The Order states that: "Until such time as Lakes Region's tariff is amended, the Company shall not impose a second base charge on Mr. Mykytiuk". Page 9. However, in the last sentence, the Commission ordered that: "In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so long as he undertakes no further renovations to the structures on his property." *Id.*

Lakes Region does not believe it is appropriate to make any determinations as to how a future tariff might be applied at this time in this proceeding. The practical operational issues (below) have not been presented and the Commission's rules clearly prohibit tandem services. To the extent that the Commission is concerned as to how Lakes Region may apply a future tariff, the Commission could leave this docket open or open a new docket.

In making its ruling, Order No. 26,014 overlooks significant operational and regulatory reasons for the Commission rules and DES requirements that each separate customer or use have its own meter and service line, even if it is not immediately required for reasons of public health, as Lakes Region field staff determined. For example:

- First, for operational reasons, a separate turn off should always be required when a building may be unoccupied during winter months. Pipes freezes due to loss of heating, water leaks in internal plumbing and other issues can result in water loss and property damage.³ As presently configured, both buildings could be rented separately or occupied while the owner is away. Service cannot be shut-off without turning off water supply to both buildings. If a freeze, leak or other problem arose in one building while its was unoccupied or its owner away, the first or second building might be un-accessible. It is important that Lakes Region be able to turn off each building separately, especially when they may be separately occupied, accessed or owned by different persons at any time.
- Second, as separate service line and meter are required because the present configuration prevents the utility from disconnecting one customer service without disconnecting both. This is an additional reason why the Commission's rules contemplate separate meters and curb stops being installed in the case of apartments. Puc 606.04 (g) ("Curb stops shall be placed at the customer's property line except in unusual situations such as

³ For this and other reasons, insurance policies typically (and prudent practice always) require that whenever a building is unoccupied for more long periods, the water line into a building be turned off.

service to an apartment or to a condominium.”). The owner of the property could offer either unit for long term rental at any time.

- Third, meter service is required by the Commission’s rules and DES water conservation rules. Having one meter serve two units leaves Lakes Region unable to allocate costs in a rental environment where, for example, a leakage occurs in internal plumbing. Having a meter in a separate building that Lakes Region may be unable to access if the owner is away makes it more difficult and costly for Lakes Region to provide service. Lakes Region is not allowed to refuse service. RSA 374:1. It can only require that the service connections comply with the terms of its tariff and the rules adopted by the Commission.

These are just a few of many reasons why the Commission’s rules prohibit tandem services, 606.04 (j)(2); require individual shut offs, 606.04 (j)(1); and require that the “size, design, material and installation of the service pipe shall conform to such requirements of the utility”, 606.04 (d). By allowing a service configuration that does not comply with the Commission’s rules, Order No. 26,014 may increase Lakes Region’s cost to provide service and impair its ability to serve customers.

Lakes Region did not present evidence concerning all of the reasons that separate service lines and meters are required because the issue before the Commission in this proceeding was whether Lakes Region’s requirement of a second base charge was unjust or unreasonable in light of the Commission’s rule Rule Puc 606.04 (j) which specifically prohibit tandem services. What a future tariff could be permitted to require in the future was not an issue notice or to be considered in this proceeding which only concerned what

the legal requirements that applied to service. As a result, Lakes Region requests that the Commission grant rehearing or reconsideration of the last sentence of Order No. 26,014 and make no determination as to how a future tariff may or may not apply until such time as its existing Tariff is amended.

II. STANDARD FOR REHEARING

As the New Hampshire Supreme Court explained in *Dumais v. State Personnel Comm'n*, 118 N.H. 309 (1978), “[t]he purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in this original decision, and thus invites reconsideration upon the record upon which that decision rested.” *Id.* at 311 (citing *Lambert v. State*, 115 N.H. 516 (1975) (quotations omitted)). Rehearing is also appropriate where new evidence becomes available which could not have been presented at the hearing. *Appeal of Gas Serv., Inc.*, 121 N.H. 797, 801 (1981); *Dumais*, 118 N.H. at 312.

III. CONCLUSION

For the reasons stated herein, Lakes Region respectfully requests that the Commission grant rehearing or reconsideration of Order No. 26,014 pursuant to RSA 541, suspend Order No. 26,014 pending consideration of this motion pursuant to RSA 365:21, and grant such other relief as justice may require.

Respectfully submitted,

**LAKES REGION WATER
COMPANY, INC.**

By its Counsel,

UPTON & HATFIELD, LLP



Justin C. Richardson

NHBA #12148

159 Middle Street

Portsmouth, NH 03801

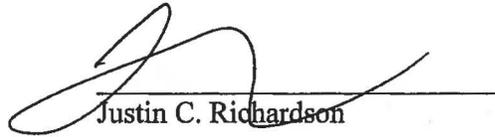
(603) 436-7046

jrichardson@upton-hatfield.com

Dated: June 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to all parties on the official service list for this proceeding.



Justin C. Richardson

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION
DW 16-834**

**COMPLAINT OF ROBERT MYKYTIUK AGAINST
LAKES REGION WATER CO., INC.**

ORDER DENYING MOTION FOR REHEARING

ORDER NO. 26,037

July 5, 2017

For the reasons set forth below, the Commission denies the motion for rehearing on Order No. 26,014 dated May 24, 2017 (Order), regarding a complaint filed by Robert Mykytiuk against Lakes Region Water Co., Inc.

I. PROCEDURAL BACKGROUND

On October 4, 2016, Robert Mykytiuk filed a complaint with the Commission against Lakes Region Water Co., Inc. (Lakes Region or the Company), alleging that Lakes Region cannot require him to pay an additional quarterly base charge¹ of \$135.26 under the terms of its tariff. The additional base charge relates to a second structure on Mr. Mykytiuk's property located at 17 Mayflower Lane in the Town of Moultonborough.

The Commission issued an order on May 24, 2017, following a hearing on the merits, granting the relief requested by Mr. Mykytiuk. The Commission found that Lakes Region was not authorized to charge him a second base charge under the terms of its tariff, and ordered Lakes Region to refund the sums that Mr. Mykytiuk had paid for the second base charge. Lakes Region's motion argues that the Commission: (i) erred on the burden of proof; (ii) erred by

¹ The parties have interchangeably used the term "base charge" to describe what is the "Minimum charge per customer per quarter" as described in the Company's tariff. See NHPUC No. 6 – Water, 7th Rev. Page 10, Nov. 28, 2016.

ordering reparation without notice; and (iii) erred by stating that the company could not require a separate meter or service line for Mr. Mykytiuk in the future.

For a complete procedural history of this matter and all docket filings, other than any for which confidential treatment has been requested of or granted by the Commission, go to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-834.html>

II COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for "good reason" when the moving party demonstrates that the decision is "unlawful or unreasonable." RSA 541:3, RSA 541:4; *see Rural Telephone Company*, Order No. 25,291 at 9 (November 21, 2011). Good reason exists if there are matters that the Commission "overlooked or mistakenly conceived in the original decision," *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (April 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (November 12, 2010). Although Lakes Region raised the same arguments in its motion for rehearing as it did at hearing, for clarity we will discuss each of the issues raised in the motion.

A. Burden of Proof

The Order states that the customer's burden was to prove that "Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff." *Order* at 9. Lakes Region claims that it is the customer's burden of proof to demonstrate that the rate is unjust or unreasonable or otherwise in violation of law, citing RSA 378:7 and RSA 365:29.

Mr. Mykytiuk must meet his burden of proof by a preponderance of the evidence under N.H. Code Admin. Rule Puc 203.25. A preponderance of evidence means "such evidence as

when weighed with that opposed to it has more convincing force, and from which it results that a greater probability is in favor of the party upon whom the burden rests.” *Appeal of Rockingham Cnty. Sheriff’s Dept.*, 144 N.H. 194, 197 (1999) (citation omitted). The burden of proof for administrative adjudications generally is a fair preponderance of the evidence. *See In re Preisendorfer*, 143 N.H. 50, 55 (1998) (citing *In re Polk License Revocation*, 90 N.J. 550, 449 A.2d 7, 12-16 (N.J. 1982)). Mr. Mykytiuk met his burden.

“Whenever the commission shall be of opinion ... that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law ... the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force.” RSA 378:7. Under RSA 365:1 a person can make a complaint over any “thing” or “act” claimed to have been done or omitted by a utility. In this case, the thing or act complained of was the imposition of the second base charge. *See* RSA 378:1 (utility must have a published tariff “showing the rates, fares, charges and prices for any service rendered”). The authorization for such a charge was not in Lakes Region’s tariff and Mr. Mykytiuk proved that omission by a preponderance of the evidence. “[W]e are obliged to give effect to the plain language used in the tariff.” *Appeal of Verizon New England*, 158 N.H. at 700. Because a second base charge is not in Lakes Region’s tariff, the imposition of one on Mr. Mykytiuk is “in violation of [a] provision of law” under RSA 378:7.

B. Ordering Reparations Without Notice

Lakes Region’s motion states that a notice of hearing is required under RSA 365:29 before reparations may be awarded. A plain reading of the statute does not require that a formal notice of reparation be made prior to Commission determination.

On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation,

that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

RSA 365:29.

A request for a hearing is sufficient to serve as a request for reparation under RSA 365:29. *Stebbins Commercial Properties*, Order No. 25,364 (May 14, 2012). The New Hampshire Supreme Court has noted that the “Commission has authority to act upon its own motion or upon complaint in behalf of the public in any situation where service or rates may be directly affected by its order.” The Commission must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power. “One such power is to award restitution if one has been unjustly enriched at the expense of another.” *Granite State Transmission v. State*, 105 N.H. 454, 456 (1964); *see Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539 (1980).

In this case, the Commission was presented with a utility imposing a charge that was not authorized by a tariff and we found that charge to be unauthorized and unjust. Under established precedent, the Commission has authority to order the refund of an overcharge and the statute does not require the Commission to announce, in advance, that it is considering that remedy. Mr. Mykytiuk requested a refund of all fixed charges as part of his closing argument. March 20, 2017, Hearing Transcript (Tr). at 206. The Commission acted on that request, but it could have done so regardless of whether Mr. Mykytiuk asked for such relief.

C. Separate Meter or Service Line

Lakes Region objects to the final sentence in the order that reads, “In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so

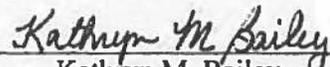
long as he undertakes no further renovations to the structures on his property.” *Order* at. 9.

Lakes Region offers no legal authority on the issue of whether the Commission can order Lakes Region to refrain from requiring a separate meter or service line against Mr. Mykytiuk, As the arbiter between the interests of the ratepayers and the interests of utilities, RSA 363:17-a, the Commission may determine disputes between utilities and their customers. In this case, we have resolved a dispute between Mr. Mykytiuk and Lakes Region. Based on the facts of this case, we have found that such a restriction on future treatment of Mr. Mykytiuk is a just and reasonable result and within our role under RSA 363:17-a.

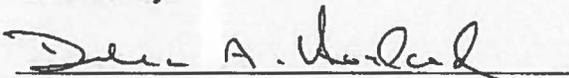
In sum, we find that Lakes Region did not present new evidence that was otherwise unavailable until now and did not identify specific matters that we overlooked or mistakenly conceived in issuing our prior order. Accordingly, we deny Lakes Region’s motion for rehearing.

By order of the Public Utilities Commission of New Hampshire this fifth day of July,
2017.


Martin P. Honigberg
Chairman


Kathryn M. Bailey
Commissioner

Attested by:


Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov
amanda.noonan@puc.nh.gov
jayson.laflamme@puc.nh.gov
john.clifford@puc.nh.gov
jrichardson@upton-hatfield.com
leah@Lakesregionwater.com
lrwater@lakesregionwater.com
mark.naylor@puc.nh.gov
ocalitigation@oca.nh.gov
rmykytiuk@yahoo.com
robyn.descoteau@puc.nh.gov
rorie.patterson@puc.nh.gov
smallon@uptonhatfield.com
steve.frink@puc.nh.gov

Docket #: 16-834-1 Printed: July 05, 2017

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.