STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Hampstead Area Water Company, Lakes Region Water Company and Abenaki Water Company

Joint Petition for Declaratory Ruling or Rulemaking
Regarding the Return on Equity for Small Water Systems

Docket No. DW 18-026

Motion to Dismiss

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and moves for dismissal of the petition that gave rise to this proceeding. In support of this motion the OCA states as follows:

On February 27, 2018, three of the state's water utilities – Hampstead Area Water Company (HAWC), Lakes Region Water Company (Lakes Region) and Abenaki Water Company (Abenaki) (collectively, Petitioners) filed a joint petition with the New Hampshire Public Utilities Commission seeking approval of a "small size premium" that would automatically increase, for "small satellite water systems" serving fewer than 3,300 customers, the return on equity (ROE) allowed to shareholders for purposes of determining the rates of those utilities. The petition seeks to achieve this result via one of two avenues: a declaratory ruling or the adoption of a new rule.

The Office of the Consumer Advocate (OCA), on behalf of the state's residential utility customers, hereby moves for dismissal of the Petition. The Petitioners are seeking here to induce

the Commission to indulge in something the PUC has long disfavored – single-issue ratemaking – via a misapplication of the standards governing declaratory orders and the promulgation of rules. For the reasons explained below, the Commission cannot allow such a proceeding to move forward.

I. The Petitioners Have Not Met the Standard for Declaratory Orders

As directed by the Legislature via the Administrative Procedure Act, *see* RSA 541-A:16, I ("each agency shall . . . [a]dopt rules relating to filing petitions for declaratory rulings and their prompt disposition"), the Commission has established a process by which persons may seek a declaratory ruling "on any matter within the jurisdiction of the commission." N.H. Code Admin. Rules Puc 207.01(a). The rule requires the Commission to dismiss any such petition that, *inter alia*, "[f]ails to set forth factual allegations that are definite and concrete" or "[i]nvolves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case." *Id*. at (c).

These standards codify the requirements the New Hampshire Supreme Court has established for declaratory judgments in civil proceedings, via its decision in *Delude v. Town of Amherst*, 137 N.H. 361 (1993) and other cases cited therein. As the Court explained, a declaratory ruling is inappropriate unless the party seeking such a determination has "demonstrated a present legal or equitable right" and a claim that is "definite and concrete;" such a claim "cannot be based on a set of hypothetical facts." *Id*. at 363 (citations omitted).

The petition at issue runs squarely up against the rule against addressing hypothetical situations and/or specifying how the Commission would decide a future case. The allegations in the petition are certainly definite and concrete; indeed they are voluminous. There is prefiled

testimony describing in some detail the present situation confronted by each of the petitioning utilities. There is an extensive disquisition from economic analyst Pauline Ahern of the sort one typically finds in a rate case in support of a utility's request for an ROE specific to that utility. But in this instance Ahearn and her clients are explicitly seeking not a determination that any of these individual utilities is entitled to a particular ROE based on the facts and circumstances applicable to that company but, rather, a "generic/formula ROE methodology." Petition at ¶ 15; Testimony of Paula M. Ahearn at 2, lines 20-21. This is precisely the sort of hypothetical ruling that is a prohibited abuse of the declaratory ruling mechanism.

The Commission must bear in mind that the Petition does *not* ask for a declaratory ruling to the effect that a generic process for determining an allowed ROE for small utilities is appropriate given the cost of full-blown testimony from a witness expert in ROE. Rather, the Petitioners are requesting a specific formula – a variation of one adopted in Florida, but with certain utility-favorable adjustments advocated by Ms. Ahearn. Embedded in that formula are lavish upward adjustments based on the claim that small companies are significantly more risky propositions from the perspective of utility shareholders than larger utilities providing precisely the same services to customers. Assuming, purely for the sake of argument, that such a claim could have factual and legal support, it is entirely a hypothetical assertion when made in isolation – i.e., absent a thorough inquiry into all of the facts and circumstances of a particular utility provided by a full rate case.

The Petition seems to conflate two things deliberately – the case for adopting a formula-based ROE determination process applicable to small water companies – and the outcome of such a formula-based determination. The Petitioners seek to lock in the latter by having the

Commission issue a declaratory order to the effect that size matters – and in an amount specific to the three individual petitioners.

Ms. Ahearn (at page 72, line 3 of her testimony), Mr. St. Cyr (at page 3, line 17 of his testimony on behalf of HAWC), and Mr. Morse (at page 2 line 20 of his testimony on behalf of HAWC), all claim the Commission has adopted a 9.6 percent ROE adopt which they should be allowed to add their small-size premium – but in reality there has been no such determation as a general proposition – so the ultimate results sought at the conclusion of Ms. Ahearn's testimony are nothing if not hypothetical. To endorse her recommendations here would be a travesty of the declaratory order process. The Petitioners are certainly entitled to advance the positions taken by Ms. Ahearn in her testimony but the appropriate place is a rate case – particularly as to the two petitioners with rate case proceedings currently active before the Commission.

II. The Commission Lacks Authority to Adopt an ROE Size Premium via Rulemaking

"Because effective rules have the force of law, rulemaking is lawmaking. Yet lawmaking is a legislative function. Therefore, rulemaking authority exists for [an] agency only if the legislature has delegated its lawmaking power by enacting a law granting [the] agency the authority to adopt rules." New Hampshire Drafting and Procedure Manual for Administrative Rules (2016 ed.) at Ch. 3, § 1.1.

RSA 365:8 sets forth the Commission's authority to promulgate rules. The authority to resolve rate cases, or components of rate cases, through rulemaking is not among the 14 distinct categories of rules the agency is authorized to promulgate. Of the 14 types of rules the Commission is authorized to adopt, the only one that could possibly apply to this situation is

"[s]tandards and procedures for streamlined review or other alternative processes to enhance the efficiency of the commission and respond to the needs of the utility's ratepayers and shareholders." RSA 365:8, II.

N.H. Code Admin. Rules Part Puc 610 is an example of a Commission rule providing for streamlined review. It allows *very* small water companies (those with fewer than 600 customers, per Rule Puc 602.15) to simplify the rate case process, presumably because the costs associated with a conventional rate case exceed the benefits for enterprises with so few customers. But there is a difference between streamlining a process – e.g., by providing an established pathway to determining an appropriate ROE, *see* N.H. Code Admin. Rules Puc 610.03 (requiring Commission to determine a "generic return on equity" for small water companies, via the discounted cash flow method annually), subject to the right of the OCA or any other interested party to challenge any outcome as violative of the statutory "just and reasonable" requirement, *see* N.H.Code Admin. Rules Puc 610.07 – and simply fixing an size-based ROE adder on a permanent basis via rule.

In *Appeal of Concord Natural Gas Corp*., 121 N.H. 685 (1981), three natural gas utilities challenged the Commission's promulgation of rules precluding them from including certain advertising expenses in rates. The New Hampshire Supreme Court found agency authority for such rulemaking in the Commission's statutory mandate pursuant to RSA 374 to establish a system of accounts and records to be used by utilities. *Id*. at 689-90. But the Court stressed that the Commission may only promulgate rules "[w]hen the legislature so authorizes." *Id*. at 690 (citation omitted). In the instant case, the petitioners have cited no grant of rulemaking authority from the Legislature; instead, they merely ask (as an alternative to a declaratory ruling) for the Commission to amend the Puc 600 rules. Petition at ¶ 20.

III. The Cited Massachusetts, Connecticut and Florida Precedents are Inapposite with Respect to New Hampshire Law

Ms. Ahearn's testimony discusses at length the ROE formulae adopted by the Commission's counterparts in Massachusetts, Connecticut and Florida. The Massachusetts regulators acted pursuant to specific rulemaking authority. *See* Massachusetts General Laws Ch. 165, § 1B. Connecticut's decision involved the adoption of a settlement agreement in a generic docket. *See* Attachment PMA-7 to the Ahearn Testimony. In Florida, the regulators acted pursuant to specific statutory authority to adopt an ROE formula that could be used by any water company in lieu of submitting an ROE witness. *See* Fla. Stat. § 367.081(4)(f). Leaving aside the merits of these determinations, it suffices to say here that none of the processes employed in those jurisdictions support a conclusion that as a matter of New Hampshire Law the Commission may adopt, via the declaratory order process or by rule, an ROE premium for small water companies.

IV. This is Single-Issue Ratemaking Run Riot

The Commission has a longstanding policy against single-issue ratemaking. *See, e.g., PNE Energy Supply*, Order No. 25,603 in Docket No. DE 12-295 (2013) at 14 ("the Commission does not favor single issue ratemaking"); *Energy Efficiency Rate Mechanisms*, Order No. 24,934 in Docket No. DE 07-064 (2009) at 22 ("it would be appropriate to propose revenue decoupling in the context of a rate case in order to avoid single-issue ratemaking"); *Statewide Low-Income Electric Assistance Program*, Order No. 23,980 in Docket No. DE 02-034, 2002 N.H. PUC Lexis 65 at 59 ("single-issue ratemaking" is "a practice we have traditionally eschewed"). As the Commission stated in 2001, "[s]ingle-issue rate cases are frowned upon in utility ratemaking because the objective of ratemaking is not to ensure recovery dollar for dollar of every

expenditure made by a utility, but rather to ensure that the company has a reasonable opportunity to earn a reasonable overall return on investments dedicated to public utility functions. . . . Single-issue rate cases . . . focus on the change in a single expense (or revenue) item since the last rate case, ignoring completely what changes may have taken place in the other factors of net income." *Connecticut Valley Electric Co*., Order No. 23,887 in Docket No. 01-224, 86 NH PUC 947, 950-51 (2001). Even an ROE expert whose testimony on behalf of utilities is familiar to the Commission from other cases agrees! *See* Testimony of Robert R. Hevert, filed on behalf of Unitil Energy Systems, Inc., Energy North Natural Gas, Inc. and Granite State Electric Company in Docket No. 07-072 (August 29, 2008) at of at 14, lines 2-8 (arguing against considering "a single element of a utility's financing/ratemaking structure in isolation" because it "amounts to unbalanced, single issue ratemaking, a practice which is frowned upon in utility ratemaking because it ignores completely what changes may have taken place in the other factors of net income and expenses") (citations omitted).[1]

Whether considered as a potential declaratory order or as the result of a rulemaking process, what the Petitioners are seeking here is precisely the sort of single-issue ratemaking the Commission has historically condemned. The statutory imperatives are to serve as "the arbiter between the interests of the customer and the interests of the regulated utilities" pursuant to RSA 363:17-a and thereby to approve only those rates that are "just and reasonable" pursuant to RSA 378. These objectives are utterly thwarted, in a manner that violates these statutes as well as the

[1] Mr. Hevert's testimony in Docket No. DE 07-072 is available at http://www.puc.nh.gov/Regulatory/CASEFILE/2007/07-072/TESTIMONY/07-072%202008-08-29%20HEVERT%20TESTIMONY.PDF. One notable example of the PUC departing from the "no single issue ratemaking" paradigm occurred in 2005, when the Commission considered in isolation the question of what ROE should apply to generation facilities owned by Public Service Company of New Hampshire (PSNH). But this is the exception that proves the rule because (1) the parties to a recently concluded PSNH rate case had agreed to discrete consideration of the ROE applicable to the company's generation assets and (2) the unique circumstances of PSNH – a restructured, formerly vertically integrated electric utility that had been forced by statute to delay the divestiture of its generation portfolio – warranted a discrete inquiry into what ROE would apply to these investments. *See generally Public Service Company of N.H.*, Order No. 24,552 in Docket No. DE 04-177 (2005).

due process rights of ratepayers, when a key component of just and reasonable rates is fixed via a rule or binding declaratory judgment. RSA 378:7 requires the Commission to hold a hearing before determining what rates are just and reasonable with respect to a particular utility; the existence of a predetermined ROE would transgress this hearing requirement by effectively putting a key component of just and reasonable rates out of reach.

Dismissal of the petition does not leave these utilities without recourse. Abenaki can present the Ahearn testimony in support of its requested rate increase in DW 17-165 (assuming a suitable revision to the currently approved procedural schedule in that docket) and HAWC can likewise file it in Docket No. DW 17-118 (which is currently being held in abeyance in light of the pendency of the instant proceeding). Whichever of those cases is resolved first would presumably yield a precedent upon which all three companies (and the OCA) could rely with respect to whether the Commission is willing to find that water utilities are entitled to an ROE premium based on their small size. If the real problem these companies confront is that they are too big to take advantage of the streamlined rate-setting process outlined in Part Puc 610 of the Commission's rules, but too small to make it cost effective to present ROE testimony in an actual rate case, appropriate revisions to the procedures and thresholds in Part Puc 610 may merit consideration. But in no circumstances is it appropriate to allow a variable in the cost-of-service ratemaking equation to metastasize into a constant.

V. Conclusion

New Hampshire law, and long-established practice and precedent concerning cost-of-service ratemaking, does not allow the PUC to use either the declaratory order process or the rulemaking process to impose on ratepayers a Return on Equity premium based in arbitrary fashion on a utility meeting a small-size threshold.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Dismiss without prejudice the Petition of Hampstead Area Water Company, Lakes Region Water Company and Abenaki Water Company, and

B. Grant any other such relief as it deems appropriate.

Sincerely,

D. Maurice Kreis
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April 11, 2018

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis