

BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

*Hampstead Area Water Company
Lakes Region Water Co., Inc.
Abenaki Water Co., Inc.*

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

Docket No. DW 18 – 026

OBJECTION TO MOTION TO DISMISS

Lakes Region Water Co., Inc. (“Lakes Region”), by and through Upton & Hatfield, LLP, objects to the Office of Consumer Advocate’s Motion to Dismiss as follows:

I. The Commission has broad authority to investigate matters and adopt rules as required to promote the public interest.

1. The Commission’s authority to investigate matters concerning public utilities is extremely broad. RSA 374:3 states that the “public utilities commission shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the provisions of this title.” In the *Appeal of Verizon New Eng., Inc.*, 153 N.H. 50, 64 – 65 (2005), the New Hampshire Supreme Court explained that the Commission has broad statutory powers and powers that are inherent: “the PUC has broad statutory powers” and that it “is legislatively empowered to be the arbiter between the interests of the customer and the interests of the regulated utilities. *See* RSA 363:17-a (1995) [...] [It] must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power.”

2. In *Appeal of Concord Nat. Gas Corp.*, 121 N.H. 685, 689 (1981), the Supreme Court similarly explained that this Commission’s “rulemaking authority may be implied from the express grant of authority in RSA 374:3” which gives it general supervisory powers over the utilities it regulates.

3. The Commission has express authority to adopt rules providing “[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. This express grant of statutory authority clearly authorizes the Commission to consider whether the Commission should change its rules or consider alternatives to traditional cost of equity ratemaking. In fact, when the Legislature enacted RSA 365:8, II, it explained that it was “[e]xpand[ing] the rulemaking authority of the public utilities commission, *including giving the commission rulemaking authority relating to all utilities law under title 34.*” Law of 1994, Chapter 193 (Attachment #1) (emphasis added).

4. The OCA’s suggestion that the Commission cannot investigate the manner in which it regulates small water companies or amend the existing generic formula for a return on equity in Rule PUC 602.07 & 610.03, or, consider alternative forms of regulation as expressly authorized by RSA 374:3-a and Chapter 193:2 of the Laws of 1994, is entirely mistaken.

5. The problem to be addressed in this proceeding is an extremely important one. Understandably, the Consumer Advocate is seeking to protect residential customers by any means necessary. However, the law requires that rates of return on equity be sufficient to compensate investors for the risks imposed on them by their duty to provide service.¹ The

¹ *Appeal of Pub. Serv. Co.*, 130 N.H. 748, 751 (1988) (Souter, J) (“The objectives of setting a reasonable rate of return on a utility’s rate base, *see* RSA 378:27, :28, include compensating the company’s investors for the risks they assume when they lend to the company and buy its stock. [...] The constitutional

NHDES (Attachment #2),² NARUC (Attachment #3),³ and this Commission⁴ have all recognized that small water systems present significant increased risks to investors. Lakes Region agrees that how best to consider this issue is a legitimate question. However, the Consumer Advocate's Motion seeks to close the doors of justice on those most in need of a legal remedy. Lakes Region submits that failing to address the problems harms residential customers by denying owners access to capital required to maintain and improve service to customers, as NARUC itself has concluded.⁵

II. The Commission has the authority to issue a declaratory ruling.

6. RSA 541-A:16, I (d) requires that all agencies adopt rules allowing for “declaratory rulings and their prompt disposition”. By statute, declaratory rulings are defined as

consequence of this type of risk allocation is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them.”).

² See Attachment #2, *New Hampshire Water Resources Primer* (2008) (“Even large community water systems find the Safe Drinking Water Act regulations difficult and costly to meet, so it is no surprise that it is much more difficult for small water systems. Figure 8-7 depicts the many challenges that small water systems may encounter as they provide safe drinking water. New Hampshire has a large proportion of small systems which are widely distributed and often impossible to interconnect. Per customer costs may be dramatically different than those associated with large systems.”) (emphasis added).

³ See e.g. *NARUC Resolutions, Attachment #3*, Page 1 (finding that “small water company viability issues continue to be a challenge for regulators” and that “traditional cost-of-service regulatory model as applied to small water systems may result in regulatory costs that are disproportionately high on a per-customer basis”) (emphasis added).

⁴ See e.g. *Order No. 23,334 in DW 99-133 (Consolidated Water)* (1999) (The Commission “is aware of the particular challenges that confront small water utilities in New Hampshire”. Until 2012, the Commission’s web site formerly stated that the “requirements of the Safe Drinking Water Act (SDWA) and the need for replacement of aging infrastructure have made it increasingly difficult for small water utilities to acquire the capital needed to invest in their systems.”); *Order No. 24,196 in DW 02-156 (Lakes Region Water Co., Inc.)* (2003) (The Commission “acknowledging the challenges faced by small water utilities in attracting and acquiring capital...”); *Order No. 23,008 in DF 96-210 (Tilton Northfield Aqueduct)* (1998) (The “small water utilities indicated that no bank would lend a small water utility funds without a guarantee that those funds could be recovered from ratepayers”).

⁵ See Attachment #3, Page 3 (“[r]atemaking that has worked reasonably well in the past for water and wastewater utilities no longer addresses the challenges of today and tomorrow. Revenue, driven by declining use per customer, is flat to decreasing while the nature of investment (rate base) has shifted largely from plant needed to serve new customers to non-revenue producing infrastructure replacement”; “[d]eficient returns present a clear challenge to the ability of the water and wastewater industry to attract the capital necessary to address future infrastructure investment requirements necessary to provide safe and reliable service”) (emphasis added).

“an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency.” RSA 541-A:1, V.

7. The Petitioners seek a declaratory ruling as to the “specific applicability” of the statutory requirements in RSA 378:27 to set rates based on “a just and reasonable rate of return” on rate base. This is an appropriate subject for a declaratory ruling because neither the statute nor the Commission’s rules provide much guidance for the owners of small water systems who, as the Commission is aware, cannot afford to spend a hundred of thousand dollars or more on a cost of equity expert in an individual rate case,⁶ with no certainty as to the likely result.

8. The Consumer Advocate’s argument that the Commission’s procedural Rule Puc 207.01 precludes a declaratory ruling is confusing and incorrect. The Petition presents evidence that is: “definite and concrete”; not “hypothetical”; and implicates the rights of the Petitioners to rates that are just and reasonable, as required by Rule Puc 207.01.

9. Procedural rules are intended to fill in the details but, as the New Hampshire Supreme Court has repeatedly explained, “administrative rules may not add to, detract from, or modify the statute which they are intended to implement.” *Appeal of Anderson*, 147 N.H. 181, 183 (2001); *Appeal of Cover*, 168 N.H. 614, 621 (2016). The Petitioners have a statutory right to petition for a declaratory ruling as to the “specific applicability” of RSA 378:27 to the very small water systems they operate. The Commission’s procedural rules do not and cannot take this statutory right to be heard away.

10. Of course, this is not to say that the Petitioners are entitled to a particular ruling or outcome. The Commission has considerable discretion to weigh the evidence, hear opposing views and determine how best to proceed. It could reject evidence or deny a petition. However,

⁶ This is particularly true because small water companies and their customers are at risk for the costs of experts retained by the Company and the Consumer Advocate. See *RSA 363:28, III*.

the law does not prohibit the Petitioners from presenting their petition as the Consumer Advocate suggests.

III. The Petitioners have not requested single issue ratemaking.

11. The Consumer Advocate claims that this proceeding represents a request for “single issue” ratemaking. Again, the Consumer Advocate is mistaken. Both Abenaki and Hampstead have pending rate cases in which all rate making issues are being reviewed. Rates will be set in those proceedings based on consideration of all of the issues. This proceeding simply seeks to address an issue common to all small water system cases in an administratively efficient manner.

12. The Administrative Procedures Act allows the Commission to commence an adjudicative proceeding “at any time with respect to a matter within the agency's jurisdiction”. RSA 541-A:31, II. Inherent in that authority is the power to break out an issue for consideration in this proceeding. There is no reason to believe that the Consumer Advocate will not have a full and complete opportunity to present evidence and argument in this proceeding and in the two pending rate cases. As a result, there is no single issue ratemaking.

13. Lastly, Lakes Region has not requested any change to its rates. It desires clarity, if not a rule, on how an appropriate cost of equity for small water companies should be determined. There is no reason to believe that a declaratory ruling or an appropriate amendment to the Commission’s rules would result in single issue rate making or preclude the Commission from considering evidence in a future rate case.

WHEREFORE Lakes Region respectfully requests that the Commission deny the Consumer Advocate’s Motion to Dismiss and grant such other relief as justice may require.

Respectfully submitted,

Lakes Region Water Co., Inc.

By Its Counsel,

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Date: April 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded via Electronic Mail to all persons on the Commission's official service list in Docket No. DW 18 – 026.


Justin C. Richardson