

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
Lakes Region Water Company, Inc.
Docket No. DW 18-056
Motion for Rehearing of Order No. 26,340

NOW COMES Lakes Region Water Co., Inc., (“Lakes Region”) and moves for rehearing of Order No. 26,340 as follows:

I. BACKGROUND

Order No. 26,340 directed Lakes Region “to record annual and cumulative regulatory liabilities to track tax savings realized from recent corporate tax rate decreases” and “to record a regulatory liability equivalent to its calculated excess deferred income tax reserve.” Lakes Region does not object and has implemented this directive which will be reflected in its Annual Report.¹ Lakes Region will also, as directed by Order No. 26,340 and as it proposed in this proceeding on August 9, 2019, file a general rate case utilizing a 2019 test year on or before December 31, 2020.

Lakes Region acknowledges that Order No. 26,340 states that the Commission “is not presently invoking its ratemaking authority pursuant to RSA 378, by directing Lakes Region to modify its existing rates or refund customers” and that “[a]bsent a change to Lakes Region’s rates, arguments based on single-issue and retroactive ratemaking are simply not ripe for the Commission’s consideration, and we rule as such.” However, Lakes Region is compelled to move for rehearing or, more correctly, a first hearing,

¹ Lakes Region requested a 30-day extension to file its Annual Report specifically for this purpose.

because the Commission's Order to record a regulatory liability to its customers retroactively to January 1, 2018 represents a substantial taking of Lakes Region's property rights and interests in just and reasonable rates based on its investment in plant dedicated to serving the public. To do as the Commission has directed, i.e. carry a regulatory liability, both on-going and retroactive to January 1, 2018, to be refunded to customers at some future date, without any finding that Lakes Region's underlying rates are reasonable or not, unlawfully holds Lakes Region entire business hostage. It is imperative that Order No. 26,340 be vacated or clarified to make clear that Lakes Region's rates are not subject to adjustment except as provided by RSA 378:7, i.e. after notice and a hearing and only to the extent that its rates are determined to be unjust and unreasonable. A retroactive adjustment, when Lakes Region has not charged rates that are unjust or unreasonable, is unlawful.

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. LAKES REGION'S RATES WERE LAWFULLY APPROVED, JUST AND REASONABLE.

Lakes Region's rates were lawfully approved in Docket No. DW 15 – 2009 based on a detailed and comprehensive examination of all of its costs to provide service to the public. Order No. 25,969 approved Lakes Region's permanent rates on November 28, 2016. Order No. 26,142 approved a step adjustment on June 8, 2028. These orders found that Lakes Region's rates were just and reasonable. By law, these rates cannot be changed except after statutory notice and a hearing in cases where rates are unjust and unreasonable.

RSA 378:7 provides that the Commission may adjust rates only "after a hearing had upon its own motion or upon complaint, that the rates ... are unjust or unreasonable". Once issued, the orders approving Lakes Region's rates may only be altered "after notice and hearing". RSA 365:28. However, there is no reason to believe that Lakes Region's lawfully approved rates are unjust or unreasonable. In its August 9, 2019 response to Staff's recommendation, Lakes Region provided the yearly calculations of its actual rates of return based on its investment in plant and its actual tax and other expenses submitted with its Annual Reports to the Commission. These calculations showed that Lakes Region's rates have been just and reasonable at all times.

The changes to the tax rates in 2018 coincided with major investments in new plant and changes in expenses which offset the tax reductions. The result is that taxes, while one factor impacting rates changed as of January 1, 2018, it was offset by others such as inflation in expenses and plant additions. There is no evidence to suggest that Lakes Region's rates exceeded just and reasonable levels.

Whatever changes may be needed to adjust Lakes Region's rates in the future is certainly a matter to be considered in a future proceeding under RSA 378:7. However, the Commission cannot, simply by stroke of the pen, take away Lakes Region's statutory and constitutional right to charge rates that are just and reasonable. It does not matter that the actual refund amount may be ordered at some uncertain time in some uncertain amount. The uncertainty and fear of what the Commission may or may not order as a refund to customers impacts the Company and investors of debt and equity.

IV. AN ADJUSTMENT TO RATES FOR A FUTURE REFUND TO CUSTOMERS CANNOT BE ORDERED WITHOUT A HEARING.

It is a fundamental principle that utility rates, once lawfully approved, create property rights and interests that are protected by law. Whatever power the Commission may or may not have over utility accounting is beside the point. Rates cannot be adjusted except by following the statutory process. The Commission has directed that Lakes Region maintain a regulatory liability on its books, retroactive to January 1, 2018, without affording Lakes Region a hearing and opportunity to demonstrate that its rates were at all times just and reasonable. RSA 378:7 is clear rates cannot be adjusted by the Commission without a hearing and a finding based on the evidence that existing rates were unjust or unreasonable:

378:7 Fixing of Rates by Commission. – Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or 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, or that the maximum rates, fares or charges chargeable by any such public utility are insufficient, the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be

charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. [...] (emphasis added).

By ordering Lakes Region to record a regulatory liability to customers, retroactive to January 1, 2018, the Commission has imposed a substantial but uncertain liability without affording it a hearing to show that its rates were at all relevant times just and reasonable and do not require any reduction or refund. Lakes Region is entitled to a hearing before a liability, particularly a retrospective one, may be imposed.

V. THE COMMISSION CANNOT MODIFY OR REVOKE THE ORDERS APPROVING ITS RATES WITHOUT A HEARING.

Lakes Region's rates were lawfully approved in Docket No. DW 15 – 2009 based on a detailed and comprehensive examination of all of its costs to provide service to the public. That comprehensive examination of Lakes Region's rates resulted in a Settlement Agreement dated October 6, 2016 which provided in part that:

IV. CONDITIONS

This Settlement Agreement is expressly conditioned upon the Commission's approval of all its provisions, without change or condition. If such approval is not granted, the Settlement Agreement shall be deemed to be null and void and without effect, and shall not be admissible as evidence or used against any party. The Commission's acceptance of this Settlement Agreement does not constitute continuing approval of, or precedent regarding, any particular principle or issue in this proceeding, but such acceptance does constitute a determination that the revenue requirement and rates recommended by the Settlement Agreement are just and reasonable. (emphasis added).

On November 28, 2016, the Commission issued Order No. 25,969 which approved the terms of the Settlement Agreement and found Lakes Region's rates to be just and reasonable. In approving the Settlement Agreement, the Commission explained:

The proposed overall revenue requirement is the product of a "meeting of the minds" of the Settling Parties regarding a number of complex issues. The areas of agreement include an appropriate and equitable capital structure, the cost components reflected in the determination of an overall cost of capital, and an appropriate valuation for the Company's rate base. The permanent increase is equal to the previously approved temporary rate increase of 9.94 percent and is proposed to be effective on a service-rendered basis as of September 14, 2015, in accordance with Commission Order No. 25,862. In addition, the initial step adjustment is proposed to be effective on a service rendered basis as of the date of this order. In order to reconcile the revenue difference between temporary and permanent rates, the Settling Parties propose that a surcharge be implemented to collect an amount equal to the difference in revenues the Company would have collected had the agreed upon level of permanent rates been in effect for service rendered after September 14, 2015. The Settling Parties also propose that the revenues generated from the initial step adjustment not be included in the reconciliation of temporary and permanent rates. Further, Lakes Region is to submit its surcharge proposal to the Commission by no later than 30 days from the date of this order and the surcharge shall be subject to the review and recommendations of the Commission Staff, and the OCA. The Commission has previously approved negotiated settlements which include step adjustments. *See, e.g. West Swanzey Water Company, Inc.*, Order No. 25,606 (December 19, 2013). The Commission finds the proposed revenue requirements, rates, and effective dates reasonable and approves them. (emphasis added).

The Commission cannot unilaterally modify its rate approval order and determination that Lakes Region's approved rates are just and reasonable without a hearing.

RSA 365:28 provides that alternations of approved orders can only be made "after notice and hearing" and states:

365:28 Altering Orders. – At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it. This hearing shall not be required when any prior order made by the commission was

made under a provision of law that did not require a hearing and a hearing was, in fact, not held.

Order No. 26,340 unlawfully and unreasonably modified Lakes Region's approved rates by imposing a substantial regulatory liability without a hearing as required by RSA 365:28 and RSA 378:7.

VI. ORDER NO. 26,340 ERRED IN FINDING THAT LAKES REGION FAILED TO MOVE FOR REHEARING.

Order No. 26,340 unreasonably and unlawfully determined that Lakes Region failed to move for reconsideration of the Commission's initial Order No. opening an investigatory proceeding in Docket No. IR 18 – 001. The Commission stated:

First, Lakes Region waived any objection to the accounting requirements mandated by the Commission in Order 26,096. As that Order was issued in a separate docket, [IR] 18-001, on January 3, 2018, the Company had an opportunity to file a motion for reconsideration within thirty days, or by February 4, 2018. *See Unitil Energy Systems, Inc.*, Order No. 25,915 at 5-6 (June 28, 2016) (motions for reconsideration governed by RSA 541:3, which requires the filing of motion for reconsideration within 30 days of decision); N.H. Admin. R., Puc 203.33. The Company filed its request a full 18 months later on August 9, 2019, which is approximately 520 days beyond the 30-day period to file a motion to reconsider. Accordingly, we rule that Lakes Region waived any objection to the requirements set forth in Order 26,096.

The Commission erred fundamentally in its application of the law on this point. The Supreme Court has made clear, as the Commission itself has done in prior cases,² that RSA 541 does not require motions for rehearing be submitted to each and every order

² *See e.g. City of Nashua*, Order No. 24, 948 (2009) (“Pennichuck claims that Nashua waived this argument by failing to move for rehearing of Order No. 24,425, which was issued on January 21, 2005, in which we excluded these two entities. We find Nashua’s motion for rehearing on this issue timely. The scope of the taking was raised early in the proceeding and determined in Order No. 24,425.”).

issued. In *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. 267 (2013), the Court stated:

“... we first consider the petitioners' contention that several of FairPoint's arguments are untimely and should be dismissed because FairPoint did not move for rehearing within thirty days of each of the PUC orders giving rise to these arguments.

Based upon our review of RSA chapter 541, we reject the petitioners' argument. [...] We find nothing in the statutory scheme that supports the petitioners' contention that FairPoint was required to move for rehearing of every PUC order that gave rise to the arguments it has raised on appeal. The record demonstrates that FairPoint timely moved for reconsideration of the orders at issue.”

RSA 541:3 does not require that a motion for rehearing successively be filed during the course of a proceeding. *Cf. Appeal of Courville*, 139 N.H. 119, (1994) (“final decision that began the statutory appeal period.”). Rather, to preserve an issue for appeal it must be “raised during the course of the hearing”. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990). Once a commission renders its final decision, rehearing may then be sought concerning “any matter determined in the action or proceeding, or covered or included in the order”. RSA 541:3. Lakes Region complied with this requirement. Its objections to Staff’s proposal were raised during the course of the proceeding and brought to the Commission’s attention on August 9, 2019, promptly in response to Staff’s recommendation submitted on July 29, 2019.

The Commission erred in its determination that Order No. 26,096 was a final order subject to rehearing and appeal. It was not so. Order No. 26,096 was issued on January 3, 2018 as a general investigation concerning changes to the tax code that were made: “At the end of December 2017, [when] the United States Congress voted and the President signed into law major federal tax law changes¹ (“2017 Tax Act”) effective for

tax year 2018.” Order No. 26,096, Page 1. These changes were not known or understood at the time. No determinations were made in the proceeding, except to require that all public utilities submit proposals for review and approval in a different proceeding. Its docket number, IR 18-001, is that used for an investigative proceeding or rulemaking.

The Commission did not commence a contested case proceeding under RSA 541-A. There were no parties to the order. No appearances were filed. No hearings were held. No evidence was considered. There were no subsequent orders issued in the proceeding. It was a preliminary procedural order directing all utilities to file proposals to be reviewed and approved in some other proceeding. Lakes Region complied with RSA 541 by presenting its case in this proceeding and by submission of this motion pursuant to RSA 541:3

VII. CONCLUSION

Lakes Region respectfully requests that the Commission grant rehearing of Order No. 26,340 and such other relief as justice may require.

Respectfully submitted,

**LAKES REGION WATER
COMPANY, INC.**

By its Counsel,

NH WATER LAW



Dated: April 27, 2020

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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.

A handwritten signature in black ink, appearing to read "Justin C. Richardson", written in a cursive style.

Justin C. Richardson

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