

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

AQUARION WATER COMPANY OF NEW HAMPSHIRE

Request for Change in Rates

Docket No. DW 20-184

MOTION FOR REHEARING AND CLARIFICATION OF ORDER NO. 26,659

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07 and RSA 541:3, Aquarion Water Company of New Hampshire, Inc. (“Aquarion” or the “Company”) respectfully requests rehearing and clarification of Order No. 26,659 (July 29, 2022) (the “Order”) issued by the New Hampshire Public Utilities Commission (the “Commission”) in the instant docket.

In this motion, Aquarion seeks rehearing of the following issues: (1) the Commission’s interpretation that the settling parties “intent” was to limit recovery of wages, salaries and benefits to those related only to capital costs arising from the specific non-revenue producing projects, notwithstanding express language and evidence in the Settlement Agreement to the contrary that the recovery of these costs in the step adjustment (the “Step Adjustment”) is to include all 2021 known and measurable wages, salaries and benefits costs;¹ and (2) the Commission’s decision to withhold approval of the methodology of the calculation of the Step Adjustment, even though the methodology was an integral provision of the Settlement Agreement.²

In addition, the Company seeks clarification of the following issues: (1) direction in the ordering clause on page 13 of the Order directing Aquarion to file “*within 30 days of the date of this order*,” documentation of the difference between temporary rates pursuant to Order No. 26,488

¹ Order, at 11.

² *Id.*

and the permanent rates approved herein, and a proposed surcharge for recovering the difference from customers, for review by the NH Department of Energy, who shall in turn file a recommendation with the Commission;”³ and (2) the ordering clause directing Aquarion to “file a request for recovery of rate case expenses with the Commission when such applicable rate case expenses are finalized.”⁴

I. BACKGROUND AND PROCEDURAL HISTORY

On November 18, 2020, Aquarion filed with the Commission a Notice of Intent to File Rate Schedules pursuant to N.H. Code Admin. Rules Puc 1604.05. On December 18, 2020, Aquarion filed its Petition for Temporary and Permanent Rates (“Petition”), including proposed tariffs and rate schedules, testimony, attachments and other information supporting the Petition. Aquarion’s filing was made in accordance with Commission Order No. 26,245, dated May 2, 2019 in Docket Nos. DW 18-161 and DW 18-054 requiring a full rate proceeding to be filed no later than 2020, utilizing the prior year as its test year. On January 29, 2021, the Commission issued Order No. 26,449 suspending Aquarion’s proposed water service tariff for temporary and permanent rate increases for 18 months pending further investigation and scheduling a prehearing conference for March 10, 2021.

The Commission approved a procedural schedule and amendments to the procedural schedule for adjudication of the Company’s permanent rate request that included multiple rounds of discovery, technical sessions, settlement conferences, Department and intervenor testimony, Company rebuttal testimony, and hearings. Aquarion responded to five sets of discovery requests and three sets of technical session discovery requests from Commission Staff;⁵ one set of discovery

³ Order, at 13 (emphasis added).

⁴ *Id.*

⁵ As of July 1, 2021, the Commission Staff was reassigned to the Department of Energy. Counsel for the Department filed a notice of appearance on July 9, 2021.

requests and one set of technical session discovery requests from the OCA; and four sets of discovery requests and one set of technical session discovery requests from the Towns. Pursuant to the procedural schedule, technical sessions were held on April 29, 2021, August 16, 2021, December 6, 2021, and January 12, 2022. The Department, OCA and the Towns each filed testimony on March 2, 2022. In the weeks prior to and following the submission of testimony by the Department, OCA and the Towns, the parties engaged in settlement discussions. Despite each party having distinctly different positions on the issues, all parties to the docket were able to reach a comprehensive Settlement Agreement resolving all issues in the case, which was filed to this docket on June 2, 2022. A hearing on the Settlement Agreement was held on June 22, 2022 and the Commission issued the Order on July 29, 2022.

II. LEGAL STANDARD

Pursuant to RSA 541:3 and 541:4, a party may move for rehearing of a Commission order within 30 days of the order by specifying every ground upon which it is claimed that the order is unlawful or unreasonable. The Commission may grant rehearing or reconsideration where a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal, or by identifying new evidence that could not have been presented in the underlying proceeding. *Id.* at 4-5. Within 30 days of the filing of a motion for rehearing, the Commission must grant, deny, or suspend the order or decision complained of pending further consideration, and the suspension may be upon such terms and conditions as the Commission may prescribe. RSA 365:21.

III. AQUARION'S REQUEST FOR REHEARING

Aquarion first seeks rehearing of the Commission's decision to limit recovery of 2021 known and measurable wages, salaries and benefits based on the Commission's mistaken interpretation that the settling parties "intent" was to include wages, salaries and benefits related only to capital costs arising from the specific non-revenue producing projects in the Step Adjustment. This was not the settling parties' intent and contradicts an explicit term of the Settlement Agreement. In fact, the Order ignores the plain and unambiguous language of the Settlement Agreement. The Order at page 11 states:

[f]urthermore, the scope of "2021 known and measurable wages, salaries, and benefits" to be included in the Step Adjustment shall only relate to capital costs arising from the specific non-revenue producing projects to be recovered within the Step Adjustment. Wages, salaries, and benefits arising from operations outside of the non-revenue producing capital projects included within the Step Adjustment shall not be allowed for recovery within the Step Adjustment. We believe this was the intent of the Settling Parties and thus provide such clarity here.

However, the Settlement Agreement on page 6 states that the Step Adjustment "shall include only allowed non-revenue producing projects closed to plant in 2020 and 2021, which are placed in service, and used and useful, in the amount of \$12,094,580, net of a pending grant and accumulated depreciation, as shown in Appendix 4, *and the 2021 known and measurable wages, salaries, and benefits increase as shown in Appendix 5*" (emphasis added). There is no qualifying language or limitation in the reference to 2021 known and measurable wages, salaries and benefits. Rather the language is unqualified, as the agreement of the settling parties was intended to allow the Company to collect in the Step Adjustment all 2021 known and measurable wages, salaries and benefits, as specified explicitly in the Settlement Agreement.

Appendix 5 to the Settlement Agreement specifically identifies the amount of 2021 known and measurable wages, salaries and benefits to be included in the Step Adjustment. Appendix 5

reflects the Company's actual costs that were agreed to by the settling parties. The Settlement Agreement does not limit recovery to those "only relate[d] to capital costs arising from the specific non-revenue producing projects" as the Order mistakenly concludes was intended by the settling parties.

In summary, the Commission's decision on page 11 to limit recovery of 2021 known and measurable wages, salaries and benefits to only those that "relate to capital costs arising from the specific non-revenue producing projects to be recovered in the Step Adjustment" is based on the mistaken conclusion that the settling parties intended for that to be the case. This decision directly contradicts the explicit language of the Settlement Agreement and Appendix 5. Given this mistaken concept results in an erroneous conclusion, the Commission should reconsider its decision to limit recovery of 2021 known and measurable wages, salaries and benefits to those related to non-revenue capital producing projects, and instead include all 2021 known and measurable wages, salaries and benefits consistent with the Settlement Agreement and actual intent of the settling parties.

Aquarion also seeks rehearing on the Commission's decision to withhold approval of the methodology of the calculation of the Step Adjustment, even though the methodology was an integral provision of the Settlement Agreement. In fact, the methodology of the calculation of the Step Adjustment was a negotiated term of the Settlement Agreement and a component in the balance of consideration deemed acceptable to the settling parties. There is no evidence in the record challenging the calculation methodology of the Step Adjustment as presented in the Settlement Agreement. The Commission asked no questions regarding the calculation methodology at hearing, and it was supported by all parties to the docket, in that all parties are signatories to the Settlement Agreement.

RSA 541-A:35 requires that “[a] final decision or order adverse to a party . . . shall include findings of fact and conclusions of law, separately stated.” If the Commission “has concerns regarding the discontinuity of methodologies related to the calculation and rationales for application of step adjustments across the various regulated utilities” (Order at 11), those concerns are not a basis for rejection of this provision of the Settlement Agreement; and is neither a finding of fact nor conclusion of law that would support rejection of an uncontested term of the Settlement Agreement.

RSA 541-A:31, VIII limits findings of fact to those “based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:33, V.” RSA 541-A:33, V establishes the types of facts that may be officially noticed: “(a) Any fact which could be judicially noticed in the courts of this state; (b) The record of other proceedings before the agency; (c) Generally recognized technical or scientific facts within the agency's specialized knowledge; (d) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association.” Here, there is no evidence in the record, no record of other proceedings, and no generally recognized technical fact within the agency’s specialized knowledge that would support rejection of the calculation methodology for purposes of the Settlement Agreement.

The Settlement Agreement represents the totality of the bargain that the settling parties found to be just, reasonable and in the public interest, and is not a series of discreet individual elements that can be eliminated piecemeal. There is no finding of fact, support in the record, or conclusion of law that supports this change. With no record evidence or noticed fact to support rejecting the Step Adjustment calculation methodology as an integral term of the Settlement

Agreement, the Commission should reconsider its decision to withhold approval of the calculation methodology, consistent with the provisions of RSA 541-A enumerated above.

Additionally, the Commission's stated intention to open a future investigation into step adjustment calculations (the Order of Notice of which was just issued on August 26, 2022) "to further probe the matter, with the ultimate goal of establishing consistent standards for the composition of step adjustments and when, why, and how the Commission considers step adjustments proposed by regulated utilities" (Order at 11) does not justify a decision to withhold approval of the calculation methodology of the Step Adjustment, and is contrary to RSA 541-A:31. Orders decide the case presently before the Commission and decisions are to be based on the record for that case. RSA 541-A:31, VI lists what comprises the record in a contested case:

- (a) Any prehearing order.
- (b) All pleadings, motions, objections, and rulings.
- (c) Evidence received or considered.
- (d) A statement of matters officially noticed.
- (e) Proposed findings and exceptions.
- (f) Any decision, opinion, or report by the officer presiding at the hearing.
- (g) The tape recording or stenographic notes or symbols prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.
- (h) Staff memoranda or data submitted to the presiding officer, except memoranda or data prepared and submitted by agency legal counsel or personal assistants and not inconsistent with RSA 541-A:36.
- (i) Matters placed on the record after an ex parte communication.

The decision to withhold approval of the calculation methodology of the Step Adjustment is not based upon the record in this case, and relies on a only recently-commenced proceeding that should not affect the Company's rights under the Settlement Agreement. Rather, in declining to approve the calculation methodology of the Step Adjustment, the Order is predicated upon a speculative future finding that has not been made, and conclusions from a future adjudication following an investigation only just initiated on August 26, 2022. Such a determination is clearly

contrary to RSA 541-A:31. To the extent the Commission intends to commence a general investigation pertaining to methodologies for calculation of step adjustments, the investigation could not have any bearing on the methodology for calculating the Step Adjustment under the Settlement Agreement, as investigations cannot result in decisions that retroactively affect the rights, duties and privileges of a party; such decisions are to be made in contested cases only after a full adjudication. *See* RSA 541-A:1; RSA 541-A:31, I.

For all of the reasons discussed above, the Commission's decision to withhold approval of the calculation methodology of the Step Adjustment is unreasonable and unlawful and should be reconsidered, and the Step Adjustment calculation methodology should be approved.

IV. AQUARION'S REQUEST FOR CLARIFICATION

Aquarion seeks clarification on the ordering clause on page 13 that requires Aquarion to "file, within 30 days of the date of this order, documentation of the difference between temporary rates pursuant to Order No. 26,488 and the permanent rates approved herein, and a proposed surcharge for recovering the difference from customers, for review by the NH Department of Energy, who shall in turn file a recommendation with the Commission." The timing of this filing is inconsistent with Section 9.4 and Appendix 3 of the Settlement Agreement,⁶ which provides for this filing to be made following approval of the Step Adjustment, so that the Step Adjustment

⁶ Section 9.4 of the Settlement Agreement states: "[t]he difference between the revenues obtained from the rates prescribed in the temporary rate order, Order No. 26,488, and the revenues that would have been obtained under the rates designed to collect the approved revenue determined after review and approval of this Settlement Agreement, if applied during the period that the temporary rate order was in effect from February 1, 2021 to the time of issuance of a Commission Order approving the Step Adjustment, shall be returned to customers over a period of 12 months beginning with service rendered as of November 1, 2022."

Appendix 3 of the Settlement Agreement states: "the Settling Parties agree, subject to Commission approval, that the effective date that the new permanent rates shall go into effect shall be the same date upon which the Commission issues its order approving the Step I adjustment. As such, the time period for the temp-to-perm recoupment shall also be from February 1, 2021 through the date of the Commission's order approving Step I rates."

recovery is implemented in conjunction with the reconciliation of the difference in temporary rates to permanent rates.

The temporary to permanent recoupment will cover the period from the date of temporary rates until the date permanent rates become effective. The Order approved that permanent rates will become effective at the same time the Step Adjustment becomes effective, therefore it is not possible to calculate the total temporary to permanent recoupment until the Step Adjustment is also approved. Nor can Aquarion calculate a surcharge without knowing the total authorized revenue, including the Step Adjustment revenue requirement.

The Commission approved Section 9.4 and Appendix 3 of the Settlement Agreement, but the ordering clause is in conflict with these terms. Therefore, the Company seeks clarification of how to proceed with this calculation. Until such clarification is received, Aquarion is unable to comply with the referenced ordering clause. Any filing would be based on assumptions that would need to be updated to reflect actual billed consumption through the effective date of the Step Adjustment, to determine what the actual recoupment is, and the new authorized revenue to determine the surcharge percentage. If the Company is required to make the filing based on the referenced ordering clause, it would be nothing more than an estimate and not something upon which the DOE could make a recommendation or the Commission could rule.

Second, the Company requests clarification of the second ordering clause on page 13 of the Order, which states that “Aquarion shall file a request for recover of rate case expenses with the Commission when such applicable rate case expenses are finalized.” This seems to conflict with the terms agreed upon in the Settlement Agreement regarding rate case expenses. Per Section 9.1 of the Settlement Agreement, the Company “agrees to submit its calculation of rate case expenses and proposed surcharge within 30 days of the Commission’s order approving this

Settlement Agreement.” (Settlement Agreement at 12). The Company respectfully requests that the record reflect that the parties agreed to a definitive time period for the Company’s filing as within 30 days from a Commission order approving the Settlement Agreement and not when the expenses are “finalized” as this allows for ambiguity as to when rate case expenses can be filed, and allows for the possibility of filing for increased rate case expenses given the potential for a greater time period associated with the rate case expenses with an open-ended deadline. The Company however also notes that it is unable to make its rate case expense filing at this time because it has not received all rate case-related invoices to date. To adhere to the intent of the Settlement Agreement, notwithstanding, Aquarion respectfully proposes that the Company be allowed to make the rate case expense filing once expenses are finalized, as stated in the ordering clause, but that the directive is qualified to only include expenses up through the 30 days after the issuance of the Order. This will allow the Company to make a complete filing, and adhere to the bargain struck with the parties to the Settlement Agreement.

In closing, the Company notes that the Department of Energy supports all relief requested by the Company in this Motion.

WHEREFORE, AQUARION respectfully requests that the Commission:

- A. Grant rehearing of the issues identified in this Motion for the reasons set forth in Section III, above, which are that the Commission allow recovery of all known and measurable wages, salaries and benefits for 2021 without restriction, and approve the methodology for calculating the Step Adjustment;
- B. Provide clarification regarding the issues identified in Section IV, above; and
- C. Grant any such further relief as may be just and reasonable.

Respectfully submitted,

AQUARION WATER COMPANY OF NEW HAMPSHIRE, INC.

Date: August 29, 2022

By: 

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

08/29/2022
Date



Jessica A. Chiavara