STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

Lakes Region Water Company, Inc.

Docket No. 20 – 187
&
Docket No. 22 – 068

MOTION FOR REHEARING OF ORDER NO. 26,905 AND PROCEDURAL ORDER RE: APPROVAL OF SETTLEMENT ON THE ISSUE OF RATE CASE EXPENSES

Lakes Region Water Co., Inc., ("Lakes Region") moves for rehearing or reconsideration of Order No. 26,905 in Docket No. 20 – 187 and the Commission's November 21, 2023 *Procedural Order Re: Approval of Settlement on the Issue of Rate Case Expenses* issued in Docket No. 22 – 068 as follows:

I. MOTION FOR REHEARING.

In Order No 26,905, the Commission approved a temporary to permanent rate recoupment, including approval of a customer credit in the amount of $44,865.11 recommended pursuant to the terms of an October 26, 2023 *Settlement Agreement of Parties Regarding Temporary-to-Permanent Rate Revenue Reconciliation and Rate Case Expenses* ("October 26, 2023 *Settlement Agreement*").[1] However, in Order No. 26,905, the Commission departed from the terms of the *Agreement* by approving the recovery of only $75,166.35 in rate case expenses and excluding *sub silentio* $19,245.01 in rate case expenses related to the Step Adjustment.

[1] When clear from the context of this Motion, both the October 26, 2023 *Settlement Agreement* and the April 28, 20222 *Settlement Agreement for Permanent Rates* may be referred to as the "*Agreement*".

Lakes Region moves for rehearing of Order No. 26,905 and the Commission's Procedural Order Re: Approval of Settlement on the Issue of Rate Case Expenses in Docket No. 22 – 068 because in both Orders the Commission overlooked that both the customer credit of $44,865.11 and the recovery of $19,245.01 in rate case expenses related to the step adjustment resulted from the April 28, 2022 *Settlement Agreement for Permanent Rates* approved by Order No. 26,633 (May 27, 2022) which resolved all aspects of Lakes Region petition for a permanent rate increase. As part of the approved *Settlement Agreement for Permanent Rates*, Lakes Region agreed to remove $815,287 in 2020 and 2021 net plant additions (despite legal precedent allowing such adjustments)[2] which resulted in the $44,865.11 recoupment credit to customers. In exchange, the *Settlement Agreement for Permanent Rates* expressly provided for the 2020 and 2021 plant additions to be included in a Step Adjustment concurrently with the permanent rates

[2] *See e.g. Appeal of PSNH*, 130 NH 748, 758 (1988) ("For many years, commissions have adjusted test-year data for 'known changes,' i.e., a change that actually took place during or after the test period…." C. Phillips, Jr., *The Regulation of Public Utilities* 182 (1985) … *Thus, the test year data are modified to conform to actual experience, for the sake of furnishing the most accurate possible prediction of the utility's fortunes in the period following the rate order*.") (emphasis added); LUCC v. Granite State Electric, 119 N.H. 359, 363 (1979) ("The testimony shows that Granite State, characteristic of all electric utility companies in the past several years, has experienced an unprecedented increase in operating expenses due to the monumental rise in the cost of energy. *We have recognized increased operating expenses as a hallmark of attrition*.") (emphasis added); *New England Tel v. State*, 113 NH 92, 99 – 100 (1973) ("This court appreciates that lengthy investigative hearings and the use of a past test year to make computations necessarily resulted in a regulatory lag between the tariff filing by the company on August 6, 1971, and the ultimate commission orders thereon on August 24 and September 20, 1972. This lag can further accentuate the effects of attrition. We are also aware that there is need of a cut-off date for the receipt of information to enable the commission to make a decision. However, in a case such as this where the company maintains that the return fixed by the commission will lead to an unconstitutional confiscation of its property, the commission must receive and consider recent information which might substantially affect that issue. *We therefore remand to the commission for consideration and determination the sole issue of whether attrition is a significant factor which has been or must be considered by the commission in arriving at a proper return for the company*.") (multiple citations omitted) (emphasis added).

approved in this proceeding and expressly provided for the recovery of rate case expenses related to the Step Adjustment.

The Commission erred by overlooking that both the customer credit of $44,865.11 and the recovery of $19,245.01 in rate case expenses related to the step adjustment were required by the October 26, 2023 *Settlement Agreement* which provided:

> "This Agreement is expressly conditioned upon the Commission's acceptance of all its provisions, without change or condition. If the Commission does not accept this Agreement in its entirety, without change or condition, or if the Commission makes any findings that go beyond the scope of this Agreement, and the Settling Parties are unable to agree with said changes, conditions, or findings, this Agreement shall be deemed withdrawn and shall not constitute any part of the record in this proceeding and shall not be used for any other purpose."

Lakes Region moves for rehearing and provides notice pursuant to the October 26, 2023 *Settlement Agreement* that, in the event that the Commission does not approve the full recovery of $19,245.01 in rate case expenses related to the step adjustment, the entirety of the October 26, 2023 *Settlement Agreement* "shall be deemed withdrawn and shall not constitute any part of the record in this proceeding and shall not be used for any purpose." This means that the customer credit recommended by the October 26, 2023 *Settlement Agreement* is also withdrawn and should be vacated and refunded.

In the event the Commission's rejection of the recovery of rate case required by both *Settlement Agreements* stands, Lakes Region requests that the Commission schedule a hearing in both Docket No. 20 – 187 and Docket No. 22 – 068 for further proceedings to hear evidence required for a full and fair adjudication of recoupment and rate case expense recovery, including the following:

(a) Rate recoupment as a result of the Commission's rejection of recovery of the step-related rate case expenses recommended by the October 26, 2023 *Settlement Agreement*;

(b) Modification of the April 28, 2023 *Settlement Agreement for Permanent Rates* to include recovery for the costs 2020 and 2021 plant additions which were in service at the time its permanent rates were approved due to the Commission's rejection of recovery of the step-related rate case expenses as required by the *Agreement*; and

(c) Recovery of additional rate cases expenses due to the on-going nature of these proceedings required by the Commission's rejection of the Settlement Agreements in both proceedings.

Lastly, Lakes Region requests that the Commission accept this *Motion* as its comprehensive response to the Commission's November 21, 2023 *Procedural Order Re: Approval of Settlement on the Issue of Rate Case Expenses*. Lakes Region invites the Commission to reverse its collision course with established law and precedent and approve recovery of all of Lakes Region's reasonable rate case expenses, including the $19,245.01 related to the Step Increase and authorize Lakes Region to file a surcharge of $10.52 per customer as recommended by the October 26, 2022 *Settlement Agreement*. Whatever concerns the Commission may have regarding the use of Step Adjustments as a mechanism for adjustment of permanent rates belong in a rulemaking proceeding or in an investigatory docket such as the Commission opened in IR 22 – 048, not in this proceeding which concerns the constitutionally and statutory mandated rights to just and reasonable rates.

II. STANDARD FOR REHEARING

As the New Hampshire Supreme Court explained in *Dumais v. State Personnel Comm'n*, 118 N.H. 309, 311 (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." *citing* *Lambert v. State*, 115 N.H. 516 (1975) (quotations omitted). This Motion seeks rehearing of Order No. 26,905 and the Commission's November 21, 2023 *Procedural Order Re: Approval of Settlement on the Issue of Rate Case Expenses* because the Commission overlooked that the Step Adjustment and rate case expense recovery were expressly authorized by Order No. 26,633 and were critical components of the comprehensive *Settlement Agreement for Permanent Rates* resolving Lakes Region's full rate case. Lakes Region's recovery of reasonable non-recurring rate case expenses was mandated by Order No. 26,633, and the April 28, 2023 *Settlement Agreement for Permanent Rates* consistent with established precedent and the Commission's Rules.

III. ARGUMENT.

A. Recovery of All Rate Case Expenses is Expressly Required by the April 28, 2023 Settlement Agreement for Permanent Rates.

The October 26, 2023 *Settlement Agreement* follows and results from a comprehensive *Settlement Agreement for Permanent Rates* dated April 28, 2023 in which all aspects of Lakes Region's petition for permanent rates were carefully and comprehensively reviewed, evaluated in multiple rounds of data requests and technical sessions, negotiated and approved by Order No. 26,633 (May 27, 2023). As part of the *Settlement Agreement for Permanent Rates*, Lakes Region agreed to remove $815,287 in 2020 and 2021 net plant additions from its test year revenue requirement even though those plant additions were prudent, used and useful, and serving customers.[3] As noted herein, Lakes Region was entitled to include some if not all of these additions as part of

[3] *See Settlement for Permanent Rates dated April 4,2023, Attachment B, Schedule 1.*

its test year revenue requirement under established legal precedent,[4] but did not do so in order to reach a settlement that benefited all interested parties. For its customers, Lakes Region concession reduced its permanent rate revenue requirement to a level below its temporary rates set by the Commission. This meant that: (1) Lakes Region lost the rate benefits of the $815,287 in net plant additions during the period that temporary rates were in effect; and (2) Lakes Region incurred a liability to provide a $44,865.11 rate recoupment credit to its customers reflected in the October 26, 2023 *Settlement Agreement*. The Step Adjustment also benefitted the Department of Energy and customers because it allowed the Department additional time to complete its audit review of those costs beyond the 12-month period provided by RSA 378:6. This further delayed Lakes Region's recovery of the revenue for plant improvements that were prudent, used, and useful and already serving customers at the time of the April 28, 2022 *Settlement Agreement*.[5] *The Step Adjustment was a major permanent rate concession by the Company, not something proposed for its own benefit*.

For Lakes Region, the *Settlement Agreement for Permanent Rates* benefitted the company because it expressly allowed Lakes Region a Step Adjustment of its permanent rate revenue requirement for its net 2020 and 2021 plant additions, a limited adjustment

[4] *See e.g. Footnote 2, including Appeal of PSNH*, 130 NH 748, 758 (1988) ("For many years, commissions have adjusted test-year data for 'known changes,' i.e., a change that actually took place during or after the test period…."); *LUCC v. Granite State Electric*, 119 N.H. 359, 363 (1979) ("We have recognized increased operating expenses as a hallmark of attrition."); *New England Tel v. State*, 113 NH 92, 99 – 100 (1973) ("… in a case such as this where the company maintains that the return fixed by the commission will lead to an unconstitutional confiscation of its property, the commission must receive and consider recent information which might substantially affect that issue. *We therefore remand to the commission for consideration and determination the sole issue of whether attrition is a significant factor which has been or must be considered by the commission in arriving at a proper return for the company*.") (multiple citations omitted) (emphasis added).

[5] Only paving costs representing a very small portion of the Step Adjustment were not in service.

for employee health care costs, and recovery of *all* of its reasonable rate case expenses related to *both* the test year permanent rates and the Step Adjustment. For example, Section III (A)(ii), Paragraph 9 provided as follows:

> **ii. Proposed Timeline**
>
> The Settling Parties agree and provide the following sequential timeline for both the Settling Parties and Commission to address the remainder of this proceeding.
>
> […]
>
> "7. Commission Order #2 – Approves Step I, which terminates the temporary rate period and allows Company to charge new increase in rates per Step I.
>
> 8. Company files tariffs within 15 days after Commission Order #2.
>
> 9. Company files temporary to permanent rate recoupment within 30 days of Commission Order #2, including rate case expenses related to the Step I Adjustment.
>
> 10. DOE conducts review and possible discovery of temporary to permanent rate recoupment and rate case expenses, followed by a report, which includes review of rate case expenses, to the Commission.
>
> 11. Commission Order #3 – Approves temporary to permanent rate recoupment and rate case expenses.
>
> (emphasis added).

These and other provisions were comprehensively evaluated, negotiated, and agreed upon by Lakes Region and Department of Energy. The Step Adjustment and recovery of the rate case expenses is an essential part of the resolution of Lakes Region's full rate case. None of the terms were accidental or left open to interpretation. The Agreement provided for Lakes Region's temporary rates remained in effect until the Step Adjustment was approved. The permanent rates and the Step Adjustment took effect on the same date. It

allowed Lakes Region to then recover all of its reasonable rate case expenses, including those related to the Step Adjustment, as part of "this proceeding."[6]

On May 27, 2022, the Commission approved all of the terms of the *Settlement Agreement for Permanent Rates* by Order No. 26,633 following notice and a hearing as required by RSA 378:7. Order No. 26,633, as amended on July 12, 2022, recognized that the *Settlement Agreement* provided for framework for review and approval of "all permanent rate revenue requirement issues in three proposed stages" as follows:

> (1) acceptance of the terms of the Settlement on permanent rates;
>
> (2) review a petition to be filed at a later date, for an initial adjustment in the Company's permanent rate revenue requirement based on:
>
> (a) capital plant additions completed and placed in service in 2020 and 2021;
>
> (b) post-2019 annual wage expense increases that have been deferred pending review in the current proceeding; and
>
> (c) completion of paving work associated with post-test year 2019 plant additions, to be completed in the second quarter of 2022 with paving costs not to exceed $36,150; and
>
> (3) review in a subsequent petition the recoupment of the difference between temporary and permanent rates and **the recovery of combined rate case expenses**.[7]

The Commission approved the entirety of the *Settlement Agreement for Permanent Rates* which expressly provided for recovery of "combined rate case expenses" for all three phases, including those related to the Step Adjustment. This reference to "combined rate case expenses" in Order No. 26,633 is clear that recovery of rate case expenses related to

[6] Settlement Agreement for Permanent Rates, Section III (A)(ii), Paragraph 9.
[7] Order No. 26,2633 (Page 4) (as revised July 12, 2022) (emphasis added).

the Step Adjustment was a mandatory provision of *Agreement* and the Order itself that was not left open to accidental interpretation, ambiguity or modification.

B. The Commission Cannot Change the Terms of the Settlement Agreement for Permanent Rates.

By law, the Commission cannot undo or modify its approval or the terms of the *Settlement Agreement for Permanent Rates* over a year and a half after its approval, except upon notice and a hearing. RSA 365:28 provides:

> **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. 26,905 erred by overlooking the provisions of the *Settlement Agreement for Permanent Rates* approved by Order No. 26,633 which expressly required recovery of $19,245.01 in reasonable rate case expenses recommended by the October 26, 2023 Settlement Agreement.

The Commission *cannot* modify the terms of the April 28, 2022 *Settlement Agreement for Permanent Rates* without first providing notice and a hearing as required by RSA 365:58. The Commission ***should not*** do so at this time as path laid out by the April 28, 2022 *Settlement Agreement for Permanent Rates* carefully and appropriately balanced the interests of Lakes Region, its customers, and the Department of Energy. The $19,245.01 in rate case expenses related to the Step Agreement are part of a comprehensive settlement framework which produced the $44,865.11 recoupment credit to customers. One cannot exist without the other. The best course of action is to follow the careful plan laid out by both *Settlement Agreements* and approve recovery of the

$19,245.01 in rate case expenses related to the Step Adjustment without further delay or expense.

C. Expenses for Step Adjustments Resulting from a Settlement Agreement for Permanent Rates are Part of a Full Rate Case under the 1900 Rules.

The Step Adjustment authorized by the *Permanent Rate Settlement Agreement* is clearly and unmistakably part of a "full rate case" under the Commission's Puc 1900 Rules. For example, Page 4 of the *Agreement* provided that:

> "The proposed Step I, however, will result in an increase from **the permanent rate revenue requirement**, which will result in an increase in rates for all the Company's customers as shown in Attachments B and C. The Settling Parties recognize that the proposed permanent rate revenue requirement and Step I, if both rates are implemented separately, could result in possible customer confusion stemming from a decrease in rates for a period of months followed by an increase in rates, in the event Step I is approved. **As such, the Settling Parties agree and recommend that, instead of implementing the rates on different effective dates, the effective date for both the permanent rate revenue requirement and the Step I rate increase should be realized on the same date**. This will aid in maintaining rate stabilization and avoid customer confusion."

This understanding is consistent with prior Commission orders treating step adjustments as post-test year adjustments to permanent rates authorized as part a of full rate case. *See e.g., Liberty Utilities, Order Following Hearing on 2019 Step Adjustment*, Order No. 26,377, Page 11 (June 30, 2020);[8] *Hampstead Area Water Company, Order Approving Return on Equity and Change in Rates*, Order No. 26,195, Pages 1 – 2 (November 28,

[8] Explaining that: "While Liberty argued that Staff's scope of inquiry regarding prudence in this step adjustment phase was limited, Liberty acknowledged that the Commission could review both the selection and execution of the projects for prudency. The Commission must find investments prudent, used, and useful under RSA 378:28 before including a return on those investments in permanent rates. Without such inquiry, the Commission could not make the required finding."

2018).[9] *Pennichuck East Utility, Order Approving Permanent Rates*, Order No. 26,179 (October 4, 2018).[10]

The Step Adjustment approved under the *Settlement Agreement for Permanent Rates* could not occur except as part of Lakes Region's full rate case. When the Commission opened Docket No. 22 – 068, it did not require or issue new orders of notice to customers under RSA 378:3. It did not order suspension of rates under RSA 378:6. It did not provide new opportunities for petitions to intervene under RSA 541-A:31 by interested parties who could assert new rights or claims not raised in the proceeding. It did not waive or require waiver of the schedules required to determine a test year revenue requirement in a full rate case. The Commission did not need to do these things because the Step Adjustment was an essential component of the full rate case in Docket No. 20 – 187 in which the test year revenue requirement was approved and adjusted under the terms of the *Settlement Agreement for Permanent Rates*.

By rule, Lakes Region is entitled to recovery of all of its just and reasonable costs. Under Puc Rule 1903.05, rate case expenses are defined as "those non-recurring expenses incurred by a utility in the preparation or presentation of a full rate case proceeding before the commission, necessary for the conduct of the rate case." The reference to "non-recurring expenses" refers to the fact that rate case expenses frequently include expenses for outside legal and financial consultants that are not typically incurred outside of a full rate case. The phrase "full rate case" is in turn defined by Rule Puc 1903.03 as "a proceeding in which a revenue requirement is established for a utility and rates are set

[9] Explaining that: "Both the rate increase and the step adjustment were based on a revenue requirement …".
[10] Explaining that: "PEU's requests for an increase in permanent rates and a step increase are based on the Settling Parties' proposed new ratemaking methodology."

to meet that revenue requirement pursuant to Puc 1604." All of these requirements were met in this case. The Step Adjustment was of the April 28, 2023 Settlement Agreement which resulted in a revenue requirement and a step adjustment that became effective on the same date. The Agreement approved by the Commission in Order No. 26,633 then required that the (reasonable) "combined rate case expenses" for both the permanent rate revenue requirement and the Step Adjustment be recovered after review by the Department's audit staff. Under established precedent, discussed below, the Commission is required by law to provide for recovery of these reasonable expense as long as they are non-recurring, prudently and reasonably incurred expenses that are not otherwise recovered as a test year expenses. The Commission's Puc 1900 Rules do not provide the Commission with any discretion to categorically disallow expenses simply because they relate to a particular phase of a full rate case unless those expenses are imprudent, unreasonable or otherwise recovered in rates. Neither the Puc Part 1906 Rules nor the Puc Part 1907 Rules give the Commission the authority to categorically reject reasonable rate case expenses incurred as part of a full rate case unless they are "matters handled by service providers that are typically performed by utility management and staff of the utility";[11] "typically included in a utility's test-year revenue requirement";[12] "related to responding to commission audit inquiries" (which are also typically included in test-year expenses);[13] or for other reasons articulated in Rule 1907.01.[14] There is nothing in the 1900 rules which even remotely gives the Commission the discretion or authority to disallow recovery of rate case expenses related to a Step

[11] Puc 1907.01 (a).
[12] Puc 1907.01 (b).
[13] Puc 1907.01 (c).
[14] See Puc 1907.01 (d) – (g).

Adjustment mandated as part of a full rate case settlement agreement. To interpret the rules as excluding step adjustments expressly mandated as by a Settlement Agreement and Commission order resolving a full rate case "snatch[es] ambiguity from the jaws of clarity"[15] contrary to the express provisions and intent of the rules as written.

D. Recovery of Rate Case Expenses for a Step Increase Pursuant to a Permanent Rate Settlement Agreement is Required by Law and Precedent.

In its November 21, 2023, Procedural Order in Docket No. 22 – 068, the Commission requested that the "Settling Parties" in that proceeding, i.e. Lakes Region and the Department of Energy,[16] brief the issue of whether rate case expenses related to step adjustments to permanent rates are recoverable. The Commission's November 21, 2023 *Procedural Order* stated: "… it is not customary for the Commission to approve rate case expenses for step proceedings. The Commission requests that within thirty days of issuance of this order the settling parties file written legal briefs concerning the legal basis and any precedent for requesting recovery of expenses relating to the step adjustment proceeding." The Commission did not disclose any custom, practice or precedent for disallowing rate case expenses for a step adjustment expressly allowed by a Settlement Agreement for Permanent Rates approved by the Commission. The Commission is required by law to disclose the basis for its decisions.[17] The

[15] *Appeal of AlphaDirections, Inc.*, 152 N.H. 477, 483 (2005).
[16] Lakes Region and the Department of Energy repeatedly invited the Intervenors in Docket No. 20 – 187, the Lake Ossipee Village homeowners ("LOV Homeowners") to participate in Docket No. 22 – 068 as it implemented the Step Adjustment Phase of the Settlement Agreement approved in Docket No. 20 – 187. However, the LOV Homeowners did not participate or state a position in Docket No. 22 – 068.
[17] *New Eng. Tel. & Tel. Co. v. State*, 95 N.H. 353, 359 (1949) ("By a parity of reasoning, before this court can deem "findings of the commission upon all questions of fact properly before it… to be prima facie lawful and reasonable" (R. L., c. 414, s. 13), the findings must be disclosed."); *Legislative Util. Consumers' Council v. Public Serv. Co.*, 119 N.H. 332, 355 (1979) ("The "end

Commission's failure to disclose the basis for denial is itself grounds for rehearing and appeal.

Lakes Region disagrees with the Commission's conclusion that recovery is not required simply because it involves a Step Adjustment phase of a full rate case proceeding. In Lakes Region's experience, an allowance for rate case expenses is required in every case consistent with New Hampshire law and long-established practice both in New Hampshire and, it is believed, in other jurisdictions. *See e.g. Driscoll et al v. Edison Light & Power*, 307 U.S. 104, 120 – 121 (1939) ("Even where the rates in effect are excessive, on a proceeding by a commission to determine reasonableness, we are of the view that the utility should be allowed its fair and proper expenses for presenting its side to the commission."); *West Ohio Gas Co., v. Ohio Public Utilities Commission*, 294 U.S. 63, 73 (1935) (rate case expenses "must be included among the costs of operation in the computation of a fair return."); *New England Telephone & Telegraph v. State*, 95 N.H. 353, 367 (1949) ("In the estimates of operating expenses for 1948, neither the State's witnesses nor the Commission made allowance for the expenses of the rate case. This was clearly error."); *State v. Hampton Water Works Company*, 91 N.H. 278, 298 ("With reference to the company's own rate-case expense, the Commission assigns various reasons for denying its amortization. Among the reasons, excessive costs, some allocation to other matters, ability to pay and payment of all or a large part out of operating expense, and difficulty in determining a reasonable allowance,

result" test is inconsistent with our previous statement that the commission is not relieved "from the duty to disclose the 'method employed' to reach the prescribed rates, so that the validity of its conclusions may be tested upon judicial review.""").

are given. These reasons are insufficient for the denial. Difficulty in performing the duty to determine what is just and reasonable is no relief from the duty.").

These cases and others stand for the proposition that the Commission cannot deny recovery for an expense in the absence of evidence that the expense is excessive, imprudent or otherwise unreasonable. The Commission's 1900 rules address this requirement by providing for recovery of all reasonable non-recurring rate case expenses as a surcharge. For example, Rule Puc 1907.01 recognizes this by disallowing expenses that are typically recovered by other means such as "matters handled by service providers that are typically performed by utility management and staff";[18] "Expenses typically included in a utility's test-year revenue requirement"[19] including audit expenses;[20] or other expenses that are unrelated to serving the public such as "Expenses for first class airfare, gifts, or alcohol";[21] "lobbying expenses"[22] or "other similar expenses that are not related or material to the preparation or presentation of a full rate case".[23] The implication of the Commission rule and established legal precedent is that if the Commission category disallows recovery of reasonable step-related rate case expenses, then it must otherwise provide for their amortization and recovery in rates as an on-going expense of serving the public. Under the Commission's own rules, it has no discretion to deny their recovery, especially when mandated by the express terms of Order No. 26,633 approving permanent rates pursuant to the express terms of the April 28, 2023 *Settlement Agreement for Permanent Rates*.

[18] Puc 1907.01 (a).
[19] Puc 1907.01 (b).
[20] Puc 1907.01 (c).
[21] Puc 1907.01 (d).
[22] Puc 1907.01 (e).
[23] Puc 1907.01 (g).

Under the principles set forth in *Hope Natural Gas* and its progeny, the existence or non-existence of Commission precedent "used to set rates is irrelevant. Instead, it is the result reached that is important". *Appeal of Richards*, 134 N.H. 148, 164 (1991). In this case, this means that whether the Commission has allowed or not allowed recovery of rate case expenses related to a step increase in other cases is largely irrelevant. What matters is did the Commission provide for reasonably provide for recovery "just and reasonable" rate case expense as required by RSA 378:7. To categorically disallow recovery of a legitimate, necessary and prudently incurred cost to provide service to the public is confiscatory and prohibited by law and by long established precedent.

It is important to note that there are significant limitations to the value of "Commission precedent". While the Commission has the power to adopt rules to implement its governing statutes, it does not possess the power to make law through case-by-case adjudication. *See e.g. Appeal of Local Gov't Ctr.*, 165 N.H. 790, 809 (2014) *citing In re Jack O'Lantern, Inc.*, 118 N.H. 445, 448 (1978)[24] and *Appeal of Monsieur Henri Wines*, 128 N.H. 191, 194 (1986).[25] What this means is that if the Commission wishes to alter the regulatory landscape by disallowing the recovery of just and reasonable rate case expenses, it must do so by exercising rulemaking authority delegated by the Legislature. It cannot create law or policy by denying recovery of reasonable expenses in one case, then applying it as law in the next.

This is particularly true of cases resolved by Settlement Agreement which in Lakes Region's experience have universally included provisions stating that they do not

[24] "An agency may not add to, change, or modify the statute by regulation or through case-by-case adjudication."
[25] Legislature may not delegate to an agency, "the power to make the law".

establish precedent. For example, the October 26, 2023 *Settlement Agreement* included a condition stating that: "The Settling Parties agree that the Commission's acceptance of this Agreement does not constitute continuing approval of, or precedent for, any particular issue in this proceeding other than those specified herein." Section IV, B, Page 12. Similarly, the February 28, 2022 *Settlement Agreement for Permanent Rates* included an identical provision on Page 17 stating that: "The Settling Parties agree that the Commission's acceptance of the Settlement Agreement does not constitute continuing approval of, or precedent for, any particular issue in this proceeding other than those specified herein." This identical language or similar language has been contained in every settlement agreement approved by the Commission for as long as memory can recall. The use of this language in nearly every case means that Commission precedent used in one case, by its own terms, has little or no value when applying statutes or rules to this one. Under *Hope* and *Appeal of Richards, supra,* it is the result in this case, not the methodology used in prior cases that matters.

The Commission is best informed by the statutes as interpreted by the Courts which have the constitutional power to interpret the law, or by the Commission's own rules when permitted to "fill in the details" of a governing statute. *See e.g. Appeal of Cook*, 170 N.H. 746, 750 (2018);[26] *Appeal of Mays*, 161 N.H. 470, 475 (2011).[27] What

[26] "While the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws, this authority is designed only to permit the [agency] to fill in the details to effectuate the purpose of the statute." (quotations omitted).
[27] "The authority of the Board to adopt rules "is designed only to permit the [B]oard to fill in the details to effectuate the purpose of the statute." *Appeal of Anderson*, 147 N.H. at 183 (quotation omitted). To determine whether rules fill in details and do not impermissibly add to the statutory requirements, we look to the plain language of the statute considered as a whole. *See Suburban Realty, Inc. v. Albin*, 131 N.H. 689, 692 (1989). In order for the Board to adopt rules relating to the experience requirements of RSA 309-B:5, IX, the legislature must have left room in the requirement for the Board to "fill in the details.""

was done in one prior rate case or another has doubtful precedential value in most cases due to the varying nature of business and regulatory challenges facing each utility and the needs of its customers, based on the testimony and evidence presented in each case. In cases where a settlement agreement is reached such as in this rate case, the standard or traditional test-year approaches for one issue may be modified due to a compromise on another. For example, as the Commission is aware, many larger utilities do not use outside consultants in the Step Adjustment phase of a full rate case because they have sufficient in-house accounting, legal or financial expertise which is ordinarily included in the test year rate case expense. As such, whether or not the Commission allowed Eversource or Aquarion or any other larger utility to recover step-related rate case expenses does not mean it should be allowed in this case in which Lakes Region's customer base is limited to 1829 customers. Even if it were legally permissible, extreme caution should be used before drawing any conclusions from Commission decisions in other cases.

Subject to the foregoing, Lakes Region provides the following citations or examples which illustrate that the practice before the Commission has typically allowed for recovery of rate expenses in cases where step adjustments are sought as part of the implementation of a permanent rate settlement agreement:

- **In Docket No. 20 – 184, Aquarion Water Company**, the Commission approved recovery of rate case expenses which included step related rate case expenses noting that: "Aquarion filed its rate case expense request within 30 days of the Commission's order approving the step adjustment." *Order No. 26,818*, Page 3 (May 12, 2023). The total rate case expenses included charges related to the

review and approval of the Company's Step Adjustment during the period from August 1, 2022 to the Commission's approval on January 19, 2023 in Order No. 26,671.[28]

- **In Docket No. 17 – 118, Hampstead Area Water Company**, the Commission approved a permanent rate settlement agreement in which the Company "… agreed to file a request for current rate case expense recovery no later than thirty days from the order on permanent rates and the first step adjustment issue date. HAWC also agreed to file a recovery request for its remaining rate case expenses no later than thirty days from the issue date of an order on the second step adjustment." Order No. 26,165, Pages 6 – 7 (July 31, 2018).
- **In Docket No. 08 – 065, Hampstead Area Water Company,** Order No. 25,077, the Commission allowed recovery of rate case expenses for a step increase as a legitimate expenses. The Commission cited to *Lakes Region Water Company, Inc., Order No. 24,708*, 91 N.H. PUC 586, 587 (2006).
- **In Docket No. 08 – 009, Energy North Natural Gas, Inc.**, Order No. 25,064, the Commission directed its staff to "to review the level of rate case expenses in New Hampshire on an industry-by-industry basis over the past decade" and submit a report back to the Commission. On June 30, 2010, the Commission Staff filed its report entitled Staff Report on Rate Case Expenses. A copy of the Staff Report is attached because it included a summary of rate cases including several cases wherein the Commission approved recovery of rate case expenses for step increases, including:

[28] See Aquarion's documentation in support of its request for approval of rate case expenses at Bates Pages 256, 257 (PDF Pages 246, 247) available at this LINK.

- **Lakes Region Water, Docket No. 08 – 070**, *Petition for Financing and Step Increase to Rates, Order Authorizing Recovery of Rate Case Expenses*, Order No. 24,925 (March 29, 2009). The Commission approved recovery of $17,827.64 from customers through a surcharge of $11.06 per customers related to the step increase to rates.
- **Hampstead Area Water Company, Docket No. 08 – 088**, *Petition for Authority to Borrow Long Term Debt, to Construct Water System Interconnection, Approval to Extend Franchise Area and for Step Rate Increase*. According to the Staff Report, Order No. 24,937 (February 6, 2009) "approved a settlement that allowed HAWC to seek recovery of as rate case expenses certain expenses relating to the step adjustment but HAWC did not file any rate case expenses."
- **Pennichuck Water Works, Docket No. 06 – 073**, *Petition for Temporary and Permanent Rates*. Order No. 24,771, *Order Approving Recovery Surcharges and Subsequent Step Adjustment*, referenced in the Staff Report, shows that the "Commission authorized recovery of $198,770.71 in rate case expenses" related to both permanent rates and step increases authorized by a prior Order No. 24,751.
- **Hanover Water Works, Docket Nos. 04 – 117 & 06 – 099**, *Financing and Rate Case Proceedings*. The Staff Report states that the Commission's *Order Authorizing Recovery of Rate Case Expenses and Temporary Rate Recoupment*, Order No 24,954 (March 27, 2009) approved recovery of "expenses related to HWW's financing and step adjustment".

These examples illustrate a general trend to allow reasonable, non-recurring rate case expenses related to step adjustments when authorized as part of a settlement agreement resolving a full rate case. This is not to say that rate case expenses cannot be recovered by other means, such as by their inclusion or amortization as a test year operating expense. For example, Lakes Region is aware that Aquarion and other utilities have water-investment-and-conservation adjustments, cost-of-gas or cost-of-fuel or other adjustments, which are recurring adjustments the cost of which may be included as a test year expense and thereby disallowed by rates. However, what the Commission cannot do is completely and categorically exclude prudently incurred costs solely because they relate to a step adjustment without providing another mechanism for their recovery.

IV. CONCLUSION

Based on the foregoing and other good reasons, Lakes Region respectfully requests that the Commission:

A. Grant rehearing of Order No. 26,905 in Docket No. 20 – 187 and the Commission's November 21, 2023 *Procedural Order Re: Approval of Settlement on the Issue of Rate Case Expenses* issued in Docket No. 22 – 068; and

B. Authorize and Allow Lakes Region to Recover $19,245.01 in rate case expenses related to the step adjustment were required by the October 26, 2023 *Settlement Agreement*; or, in the alternative:

C. Schedule a hearing in both Docket No. 20 – 187 and Docket No. 22 – 068 for further proceedings to hear evidence as to the following and other matters which now must be determined for a full and fair adjudication of recoupment and rate case expense recovery:

(a) Rate recoupment as a result of the Commission's rejection of recovery of the step-related rate case expenses recommended by the October 26, 2023 *Settlement Agreement*;

(b) Modification of the April 28, 2023 *Settlement Agreement for Permanent Rates* to include recovery for the costs 2020 and 2021 plant additions which were in service at the time its permanent rates were approved due to the Commission's rejection of recovery of the step-related rate case expenses as required by the *Agreement*; and

(c) Recovery of additional rate cases expenses due to the on-going nature of these proceedings required by the Commission's rejection of the Settlement Agreements in both proceedings.

Respectfully submitted,

LAKES REGION WATER CO., INC.

By its Counsel,

NH WATER LAW

Dated: December 21, 2023

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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.

Justin C. Richardson