

**BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Aquarion Water Company of New Hampshire

Petition for Franchise Expansion, Acquisition of Assets and Application of Existing Rates

Docket No. DW 21 – 093

**TOWN OF HAMPTON AND NORTH HAMPTON’S MEMORANDUM OF LAW
AND STATEMENT OF POSITION**

NOW COME the Towns of Hampton and North Hampton (“North Hampton”), by and through counsel, and offer the following Memorandum of Law and Statement of Position as follows:

I. Background.

On March 1, 2021, concerned that service to the Wiggin Way system would result in a change in rates and an “undue or unreasonable preference or advantage” to Wiggin Way customers contrary to RSA 378:10, the Town of North Hampton requested that the Commission require hold a hearing and review the proposed rates as required by RSA 378:7. On May 10, 2021, the Commission issued an Order of Notice in this proceeding, stating on Page 1 that Aquarion has requested “application of Aquarion’s existing tariffed rates” to the Wiggin Way system. However, Aquarion is currently charging its approved seasonal rates, despite the fact that the Wiggin Way system is not a seasonal system. The Commission’s May 10, 2021 Order of Notice therefore requested that the parties address the following issues:

[A] whether consideration of the future rate impact of a franchise expansion upon a water utility’s current customers is contemplated under RSA 374:22 and RSA 374:26; [B] whether current customers who are not residents of the proposed franchise expansion service area have standing, under RSA 541-A:32, I; [C] whether rate schedules required during full rate proceedings, under N.H. Admin. R., Part Puc 1600, are required to be filed in connection with a franchise

expansion request under RSA 374:22 and RSA 374:26; **[D]** whether application of a different but existing tariff rate, such as changing from seasonal rates charged during an emergency connection to permanent rates, represents a change in rate contemplated by RSA 378:7; and **[E]** whether a franchise expansion request, pursuant to RSA 374:22 and RSA 374:26, and the implementation of existing tariffed rates in connection with the proposed franchise expansion, require detailed examination of possible rate subsidization or preference, under RSA 378:10.
(letters in bold added)

On July 26, 2021, the parties briefed the issue. On September 3, 2021, the Commission granted intervention by the Towns pursuant to RSA 541-A:32, II. In its Order granting intervention, the Commission observed that: “Specifically, the Towns’ participation will aid the Commission in developing a full and adequate record relating to RSA 374:26’s public good requirement, as well as whether the implementation of preexisting tariffed rates in connection with the proposed franchise expansion requires a detailed examination of possible rate subsidization or preference under RSA 378:10.” A schedule for briefing and testimony was subsequently established and amended following a motion for reconsideration by Aquarion. As a result, the Town of North Hampton offers this Memorandum of Law and Statement of Position requesting that the Commission approve the proposed acquisition subject to a condition that the rate charged to customers in the Wiggin Way system be increased by 18.70% or such other amount as may reasonably reflect the costs to provide and maintain fire protection service in the system which, as proposed by Aquarion, would not otherwise be recovered.

II. A Modified Rate Structure is Needed to Account for the Cost of Fire Protection Benefits Provided to Wiggin Way Customers.

Aquarion’s existing rate structure includes several different charges which must be read and understood together. These include public fire protection charges to its host municipalities that Aquarion has proposed in DW 20 – 184 to increase to \$1.3 million dollars per year to

maintain capacity in the system for fire-fighting. However, the proposed franchise expansion for Wiggin Way includes no charges or adjustment for the supply capacity it will take away from public fire protection customers like North Hampton and Hampton. The proposed expansion does not follow the provisions of Aquarion’s own Tariff concerning main extensions or conversion of seasonal connections to permanent ones.¹ As set forth in the attached Testimony of North Hampton Fire Chief Jason Lajoie, Wiggin Water customers receive substantial benefits to the availability of hydrants and the additional capacity in the system. As explained in the Testimony of North Hampton Water Commissioner Timothy Harned, the cost to provide this service is the result of significant charges paid by the Towns of North Hampton and Hampton.

The statutes governing utility franchise expansion, RSA 374:22, RSA 374:26 and RSA 374:30, should be read together in context and as a whole to understand their application to this case. *Appeal of Algonquin Gas Transmission, LLC*, 170 N.H. 763, 770 (2018) (“We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Id. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole.”); *Appeal of Town of Lincoln*, 172 N.H. 244, 248 (2019) (same). It is helpful to consider RSA 374:30 first because it provides that the standard to be applied by the Commission in considering a franchise is whether the proposed expansion is “in the public good”. It states:

¹ See e.g. Tariff, Page 8, Para 40. In cases where “anticipated revenues are insufficient to cover all operating expenses and to support the investment required to extend or install mains” – then a “Refundable Extension Agreement” and a “Refundable Extension Deposit Agreement” which covers the costs to serve those customers; see also Tariff, Page 10, Para 42 (“... Where installation costs are excessive, a cost sharing Agreement with the customers connected to the proposed replacement shall become effective subject to approval of the Public Utilities Commission.”); Page 10, Para 44 (“... At the request of a customer or customer group, the Company will replace an existing customer-owned line (seasonal or underground) providing the customer or customer group pays to the Company the required construction cost, in accordance with the provisions of Section 40g(3)(4)(5)(6)(7).”).

374:30 Other Public Utility Leases, Etc. –

I. Any public utility may transfer or lease its franchise, works, or system, or any part of such franchise, works, or system, exercised or located in this state, or contract for the operation of its works and system located in this state, *when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise* The commission may, by general order, authorize a public utility to transfer to another public utility a part interest in poles and their appurtenances for the purpose of joint use by such public utilities.

In numerous proceedings, the Commission has reviewed the sufficiency of existing rates to serve proposed customers when considering a franchise expansion. For example, in Order No. 26,301, *Hampstead Area Water Company* (October 22, 2019), the Commission considered a franchise expansion in which the utility initially provided service “on an emergency basis” and thereafter sought to expand its franchise and “charge the Company's existing consolidated rate to the proposed area”. In approving the proposed expansion, the Commission found that the utility’s “application of consolidated rates to Tisdale's owner is just and reasonable” (Page 6).

In another case, in Order No. 25,086, *Pennichuck East Utility* (March 29, 2010), the Commission found the public good test was met because the evidence showed that the proposed existing “rates will cover WVC's revenue requirement and Staff agrees.” Page 5. There are numerous other examples wherein the Commission considered the sufficiency of existing rates in approving a franchise expansion. See e.g. Order No. 24,595, *Pennichuck East Utility* (March 3, 2006) (commission reviewed whether existing rates were just and reasonable for new development in Exeter); Order No. 24,299, *Hampstead Area Water Company*, (March 26, 2004) (“This rate allows HAWC to recover the operation and maintenance expenses associated with maintaining this water system until such time as it files for a new rate.”).

This proceeding is more than a franchise expansion. Aquarion is proposing to change from one rate class (seasonal rates) to another (permanent rates). This triggers rate review under RSA 378:7. The change is not the result of a change by the customer such as change from residential use to commercial or industrial use. It is a change in rates initiated by the utility for the same use. Such a change requires review as to whether the new rate is “just and reasonable” (RSA 378:7) or one that results in subsidy (RSA 378:10).

If it were otherwise, an acquiring utility could purchase an existing utility and charge its existing rates without review. The prohibition against unreasonable rates and subsidies apply to all customer rates and customer classes at all times. As set forth in North Hampton’s March 1, 2021 Request for Hearing and in Hampton’s Joint Statement, there are serious questions as to whether the public good standard can be met without taking into account the costs to serve these customers without a subsidy. These changes need to be addressed under the standards provided by RSA 378:7 and RSA 378:10. This does not mean that a full set of rate case schedules is required. The key point is that there must be sufficient information to demonstrate that the rate is just and reasonable and will not result in undue subsidy. RSA 378:7 & 10.

The solution is a simple one. As explained in Mr. Harned’s testimony, the Commission can approve the franchise expansion subject to a condition that Wiggin Way customers pay a surcharge which reasonably reflects Aquarion’s costs for fire protection. Based on its 2019 Annual Report to the Commission and other information included with Mr. Harned’s testimony, a surcharge of approximately 18.70% would appear to be reasonable and avoid an unlawful subsidy in violation of RSA 378:10.

Counsel for the Town of Hampton concurs and joins in this Memorandum.

Respectfully submitted,

TOWN OF NORTH HAMPTON

By its Counsel,

NH WATER LAW



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Dated: January 31, 2022

CERTIFICATE OF SERVICE

I certify that a complete copy of the foregoing is being sent this day to all persons on the Commission's official service list for this proceeding.



Justin C. Richardson, Esq.