

THE STATE OF NEW HAMPSHIRE
before the
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

REPLY BRIEF OF AQUARION WATER COMPANY OF NEW HAMPSHIRE

Aquarion Water Company of New Hampshire (“Aquarion” or the “Company”) submits this reply brief to the New Hampshire Public Utilities Commission (the “Commission”) in response to the Memorandum of Law and Statement of Position (“Memorandum”) of the Towns of Hampton and North Hampton (collectively, the “Towns”). The Company’s reply brief responds to several of the Towns’ legal claims, and the accompanying prefiled rebuttal testimony of Company witnesses John P. Walsh, Debra A. Szabo and Carl McMorran address various factual assertions in the Memorandum and the Towns’ related filings. This reply brief and testimony are submitted in accordance with the Commission’s procedural order issued on November 17, 2021 (the “Order”), which noted several issues to be addressed in this proceeding, including whether “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,” and that “briefing the issues would be helpful to the Commission.” Order, at 2. On December 21, 2021, the Commission modified the briefing schedule in a Procedural Order Re: Joint Motion for Reconsideration to accommodate concurrent briefing to “allow the parties to submit initial briefs and/or testimony on January 31, 2022 and reply briefs and/or testimony on February 14, 2022.” Procedural Order at 1. Aquarion therefore submits both a reply brief and testimony.

I. Introduction

The Towns argue that a “modified rate structure is needed to account for the cost of fire protection benefits provided to Wiggin Way customers,” and that the solution is for the Commission to impose an 18.7 percent “surcharge” on Wiggin Way customers as a condition of the proposed franchise expansion.¹ As explained in this reply brief, the Towns’ position is unsupported by the law and the facts. In essence, the Towns are asking the Commission to authorize an arbitrary and discriminatory rate upon 43 water customers, outside of a rate case, and with no cost basis for their proposal. The Towns claim that the “public good” standard required by RSA 374:22 and 374:26 for a franchise expansion, and 374:30 for acquisition of assets from a public utility, is not satisfied unless these customers are subjected to the surcharge, but they ignore the DES Order, which found that the public good is served by Aquarion connecting these customers to address an imminent threat to public health and safety. As demonstrated in this brief, the Towns’ assertions are either in error, misapplied, or are entirely unsupported or contradicted by fact, and do not trigger an RSA 378:7 rate review, nor create a “subsidy” amongst customers prohibited by RSA 378:10. The proposition of imposing an 18.7 percent surcharge on the Wiggin Way customers as a condition for them to obtain safe and reliable water service is contrary to the Aquarion tariff, Commission ratemaking standards and public policy.

The basis for the Petition is clear: a definitive public good exists, which is to remedy a health hazard to the Wiggin Way customers, and no other customers are impacted by this proposal. Wiggin Way is not only paying for all costs of the permanent water service, it is also generating and will continue to generate incremental revenue to cover Aquarion’s costs to operate and maintain the system. As a result, there are no costs incurred by Aquarion or any existing franchise

¹ Memorandum, at 2, 5.

customers for either the establishment of permanent service to Wiggin Way or the ongoing operation and maintenance of the interconnection providing that service, which means establishing permanent service does not violate RSA 378:10. And finally, Aquarion is not asking for a rate change for the Wiggin Way customers. The Company's petition proposes to continue to apply the current tariff rate for year-round metered water service, which is the only rate the Company is authorized to charge for its year-round customers like those of Wiggin Way. Contrary to the Towns' assertion, this is not a rate change contemplated that would trigger RSA 378:7, and in fact, this is not a rate change at all. The Company's Petition is narrowly drawn: to effectuate permanent service to existing customers in Wiggin Way, the only action requested of the Commission is to approve the limited franchise expansion to the Wiggin Way subdivision, which will fulfill the longstanding mandate of the Commission's sister agency, the Department of Environmental Services ("DES").

II. A Discriminatory Surcharge is Contrary to Aquarion's Tariff and Prohibited by RSA 378:14

The Towns are proposing a "surcharge" for Wiggin Way customers to be imposed on top of Aquarion's year-round, tariffed rate for metered water service, as a condition for Wiggin Way to continue to be served by Aquarion. This proposal is without merit for several reasons. First, it is contrary to Aquarion's tariff and the law that prohibits charging any utility customer a different rate than any other customer in the same rate class of that same utility. RSA 378:14 states:

No public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered. (emphasis added).

As proposed by the Towns, a surcharge in any amount, let alone 18.7 percent, is clearly prohibited by this statute. In addition, the surcharge is entirely arbitrary and has no cost basis.

The Towns' assertion that "supply capacity" will be taken away from the fire protection of Hampton or North Hampton, therefore requiring charges or "adjustments" to the rate charged to Wiggin Way,² is not supported by any facts and plainly erroneous, as the DES has already found the water supply to be adequate to serve both Wiggin Way and the existing Aquarion franchise.³⁴

As discussed in the Company's rebuttal testimony, the municipality requesting public fire service determines the location and number of hydrants it requires within its boundaries. The fact that a single hydrant *within North Hampton* is located within relatively close proximity to Wiggin Way (and has not been used to date to fight a fire), does not change the fact that the Wiggin Way customers receive metered service, consistent with all others in their rate class. The Town has not established that these customers benefit from a subsidy prohibited by RSA 378:10, or that such a subsidy exists.

Aside from the statutory prohibition, the Towns' proposal is also inconsistent with the plain language of the Company's tariff. In their Memorandum, the Towns ignore the salient part of the tariff on pages 8 and 10, claiming the franchise expansion is inconsistent with the tariff, when the opposite is in fact true. The quotes from pages 8 and 10 of the tariff refer to "refundable extension agreements" and "refundable extension deposit agreements" in the event that "anticipated revenues and operating expenses are insufficient to cover all operating expenses and *to support the investment required to extend or install the mains*" (page 8) and cost sharing agreements "where *installation costs* are excessive" (page 10). Not only are the referenced agreements irrelevant as

² Towns initial brief at 3.

³ DES Order No. 17-006 WD at 9.

⁴ While RSA 378:18 allows for special contracts to charge different rates to a subset of customers, Puc rule 603.03(c) states in relevant part that special contracts are only allowed in the case where there is "[s]ervice of a character for which there is no rate of general application." That is clearly not the case here, as the service to Wiggin Way has no special characteristics and the year-round rate of general application that Wiggin Way has been paying since 2019 is the correct rate to apply.

they only refer to main extensions (which the Wiggin Way transaction is not), no such agreements are necessary or appropriate, because the Asset Transfer Agreement (“ATA”) covers *all transaction costs*. As demonstrated in the Company’s discovery responses to North Hampton 1-9 and 1-10, attached to Aquarion’s initial brief, Wiggin Way’s revenue in fact *exceeds* the incremental costs of operating expenses.⁵ The Towns’ surcharge proposal is contrary to law, Aquarion’s tariff, and the facts of this matter.

III. A Public Good Exists Irrespective of the Towns’ Claims to the Contrary

The Towns contend that a public good finding for a franchise expansion, as required by RSA 374:26 and 374:22, respectively, cannot be found unless the Commission were to resolve their “serious concerns” by imposing a surcharge. The proposition that a public good finding should be conditioned upon a surcharge on a small group of customers with unsafe levels of arsenic and an inadequate supply of drinking water flies in the face of RSA 374:26. DES has already found a public good in the remedy of this health and safety hazard⁶ consistent with RSA 485:4, II, which further requires that such a remedy be implemented “regardless of existing municipal or public water system service area boundaries.” The public good requirement of RSA 374:26 should be read and applied consistently with other statutes, and the facts of this matter more than sufficiently support this finding, as DES has already concluded.⁷ As a relevant aside, the Towns’ application of RSA 374:30 is not required here. While Commission approval of the ATA would be supportive of the fact that the transaction between Aquarion and Wiggin Way is consistent with the requirement of RSA 485:4, II (i.e., that no person associated with the order have incurred any

⁵ Aquarion initial brief at 6, and Attachment A.

⁶ DES Order at 8-9

⁷ *Id.*

costs), Commission approval is not required here, as Wiggin Way is not a public utility contemplated under RSA 374:30. Furthermore, the ATA itself proves that all costs will be borne by Wiggin Way and not Aquarion, the Towns, or any customers within the existing franchise.

IV. The Proposed Franchise Expansion is Just and Reasonable

The Towns' arguments for the application of RSA 378:7 and 378:10 are bald assertions unsupported and contradicted by the facts of this matter. The Towns self-servingly assert that this case is "more than a franchise expansion"⁸ but their assertion has no factual or legal basis. The Company's proposal to maintain service to the Wiggin Way customers on the current year-round tariffed rate for metered water service is not a "rate change" contemplated by RSA 378:7. As discussed in the Company's rebuttal testimony, the Wiggin Way customers were initially on a seasonal rate, but then were switched to the year-round rate when they no longer qualified for the seasonal rate, and have been on the year-round rate since 2019. The Company's Petition does not propose a rate change, rather just the continued application of an existing tariff rate that the Commission has previously approved as just and reasonable. Regardless, however, both tariffed rates have been approved by the Commission as just and reasonable. The Towns' claims challenging either rate as applied to Wiggin Way are contradicted by the facts provided in the discovery responses discussed above. There is only one rate to apply here, that of Aquarion's tariffed rate for year-round customers, and this is nothing more than a franchise expansion—one that is just, reasonable and for the public good.

Finally, there is no subsidy at issue, unlawful or otherwise, and therefore no violation of RSA 378:10. As mentioned above, the Towns focus their claim solely on the fact that a single hydrant located within North Hampton is in relatively close proximity to Wiggin Way and might

⁸ Towns initial brief at 5.

be used in a fire emergency. This is no different from any other metered service water customer that resides in proximity to a municipal boundary. As discussed in the Company's rebuttal testimony, the Company's tariff rates for customers, such as those in Wiggin Way, do not authorize charges for public fire protection charges without the existence of hydrants within municipal boundaries.⁹ That the Towns do not like the fire protection charges they do pay does not mean that Wiggin Way is being subsidized, nor does the existence of a fire hydrant near, but not in the Wiggin Way subdivision. The fact that one hydrant could theoretically be used to fight a fire across town boundaries is nothing new, which is why towns—and in fact the towns of Hampton, North Hampton—are part of a mutual aid agreement with the Town of Stratham and others, as provided in the statement of North Hampton Fire Chief Lajoie.¹⁰ However, even in the absence of such an agreement, the facts in this matter and the explicit terms of the Aquarion tariff do not allow for Wiggin Way customers to be charged for fire protection service. Such charge would be discriminatory.

IV. Conclusion

In conclusion, the Commission should soundly reject the Towns' continued attempts to unnecessarily complicate this proceeding with unsupported and irrelevant positions to the detriment of Wiggin Way customers. In their latest filings, the Towns' offer no evidence or legal basis that would support their surcharge proposal, and it only serves to further delay the permanent provision of water service to these customers to provide a safe and adequate water supply and final resolution of the very real health concerns involved. The Company respectfully requests the Commission approve the franchise expansion as expeditiously as possible and put this long

⁹ See Aquarion Tariff, original page 8, and fourth revised page 15.

¹⁰ Comments of North Hampton Fire Chief Jason Lajoie at 1.

overdue matter to rest so that the customers of Wiggin Way may be assured of safe and reliable water service by Aquarion now and into the future.

Respectfully submitted,

Aquarion Water Company of New Hampshire, Inc.

Date: February 14, 2021

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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.

Date: February 14, 2021



Jessica A. Chiavara