

THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Hampstead Area Water Company, Inc.

Request for Step II Adjustment

Docket No. DW 23-020

NEW HAMPSHIRE DEPARTMENT OF ENERGY’S INITIAL BRIEF
IN SUPPORT OF UTILITY RECOVERY OF REASONABLE STEP EXPENSES

The Commission has required the New Hampshire Department of Energy (“DOE” or “the Department”) and all other settling parties to “file written legal briefs with the Commission concerning the legal basis and any precedent for requesting recovery of expenses relating to Step I and Step II adjustments” Order No. 26,902 (November 8, 2023) at 14. This brief, in support of HAWC ‘s recovering appropriate step-related expenses through a surcharge to customers, meets the Commission’s requirement.

I. SUMMARY

DOE supports HAWC’s recovery of appropriate step-related expenses. As explained below in further detail, step adjustments serve the important functions of addressing regulatory lag for small utilities and of supporting gradual rate increases over longer time periods (“gradualism”) for utilities with a relatively small number of customers. Step increases also extend the time between rate-cases, thus conserving administrative time and expenses for the Commission and all parties. DOE also sometimes uses consultants itself when adjudicating permanent rates and step increases. DOE is able to bill utilities for those consultant expenses, however utilities reasonably expect to recover those expenses from ratepayers. *See Attachment*

A, Technical Statement of Jayson P. Laflamme, Director, Water Group, Division of Regulatory Support, DOE (hereinafter “DOE Laflamme Tech Statement”) at 3.

In the opinion of the DOE, NH Administrative Rules Chapter 1900 do not address the recovery of expenses related to step increases. Nonetheless, in DOE’s opinion, appropriate expenses related to step increases are recoverable by small utilities in advance of a future rate case because step increases serve important policy goals. The recovery of a small utilities’ step increase expenses is also consistent with past precedent and past practice.

In addition to a Commission conclusion that HAWC may seek to recover appropriate Step I and Step II Adjustment-related expenses, the relief DOE seeks in this brief includes DOE’s request for an opportunity to conduct discovery on HAWC’s step-related expense, to file a proposed procedural schedule, and to file a DOE report or technical statement reviewing HAWCs step-related expenses no later than February 29, 2024. Finally, DOE requests clarification of certain statements in Order No. 26,902.

I. INTRODUCTION / PROCEDURAL HISTORY

In Docket No. DW 20-117, the Commission approved a Settlement Agreement on permanent rates and a Settlement Agreement on a Step I Adjustment. The Settlement Agreement on permanent rates includes explicit provisions for Step I and Step II adjustments, however it did not explicitly provide for HAWC’s recovery of step-related expenses. *See* Order No. 26,635 at 13 (June 2, 2022; revised July 20, 2022); Settlement Agreement (S/A) on Permanent Rates (filed May 9, 2022) at 3-4, 3 n.3, 6-7, 14. The Settlement Agreement on Permanent Rates does explicitly provide for the recovery of rate case expenses pursuant to NH Admin. R. Puc Chapter 1900. *See* S/A Permanent Rates at 14. The June 2022 S/A on permanent rates also included a stay-out provision, prohibiting the Company from filing a future full permanent rate proceeding

before January 1, 2025, utilizing a 2024 test year. *See id.* at 15, Section N; Order No. 26,635 at 17.¹

The Settlement Agreement on Step I Adjustment, in conjunction with the parties' discussion at hearing does contemplate the potential recovery of HAWC's reasonable step expenses. *See* S/A Step I Adjustment (January 25, 2023) in Dkt. No. 20-117 (Step expenses not explicitly addressed); Transcript of April 14, 2023 Hearing at 28-29, 90-91, 106 107 (HAWC proposes to address Step I and Step II expenses in Step II settlement discussions; DOE acknowledges discussion). The Commission approved the S/A on Step I Adjustment. *See* Order No. 26,809 at 5 in Dkt. No. DW 20-117 (approving S/A on Step I Adjustment and deferring expenses for Step I and Step II presented together) *subsequent history* Orders No. 26,846 (June 14, 2023) and Order No. 26,874 (August 16, 2023); and Procedural Order Re: Request for Clarification (August 18, 2023) (not relevant to rate case expenses).

The S/A on Step II Adjustment explicitly contemplates the recovery of reasonable Step II expenses. *See* S/A Step II Adjustment (August 17, 2023) at 9-10 in Dkt. No. 23-020 (recovery sought pursuant to RSA Chapter 1900, through surcharge to customers); Revised S/A Step II Adjustment (September 8, 2023) (same- revised to add parties). The Commission also approved

¹ In the *Settlement on Permanent Rates*, the settling parties agreed that the ". . . maximum combined effect of the Permanent Rate Revenue Requirement [increase] (\$298,319), Step I (not to exceed \$258,450) and Step II (not to exceed \$220,023) would be a total maximum revenue requirement increase of \$776,792 . . ." *Settlement on Permanent Rates* at 8. The permanent rate revenue requirement increase, as stated, implicitly excluded permanent rate case expenses. For example, the approved revenue requirement for permanent rates was \$2,540,482 and the later approved permanent rate case expenses were \$322,775. Had the identified permanent rate revenue requirement increase been intended to include permanent rate case expenses, it would have had to have been higher (\$2,540,482 + \$322,775 = \$2,863,257). Moreover, until all permanent rate case expenses were finalized, submitted, and reviewed, it would have been impossible both to file final expenses and to prospectively include the expenses in the permanent rate revenue requirement increase identified in the *Settlement on Permanent Rates*. Similarly, the not-to-exceed step adjustment revenue requirement increases, as stated, implicitly excluded step-related expenses. In addition, the Order on the Step I Settlement and the Step II Settlement Agreement explicitly contemplated the payment of (appropriate) step-related expenses. *See* DOE Laflamme Tech Statement at 4; Revised Step II Settlement Agreement (September 8, 2023) at 9, Section "g Rate Case Expenses Incurred in Step I and Step II" (S/A revised to add additional parties); Order No. 26,902 on November 8, 2023 (approving DOE review of HAWC's step-related expenses and subsequent Commission review).

the S/A on Step II Adjustment, and asked the settling parties to file briefs on the legal authority for HAWC's recovery of step-related expenses. *See* Order No. 26,902 (November 8, 2023) at 13-14.

As a settling party in all three S/As under consideration here, DOE considers itself obligated to urge the Commission to uphold the agreements and terms reached therein, including but not limited to HAWC's ability to recovery reasonable and appropriate expenses related to Step I and Step II.

II. DOE'S ANALYSIS

A. Expenses related to step increases do not fall within the ambit of NH Code Admin Rules Chapter 1900

New Hampshire Code of Administrative Rules Chapter 1900, *Rate Case Expenses*, is uniquely focused on expenses directly related to what are commonly described as “permanent rates” in contrast to “temporary rates.” *Compare* RSA 378:27 “Temporary Rates” with RSA 378:28 “Permanent Rates” (“permanent rates” is a term of art within utility practice); *see In Re Guardianship of C.R.* 174 N.H. 804,807 (January 2022) (summarizing standard rules of statutory construction). The same rules of statutory construction that apply to statutes are applicable to the interpretation of administrative rules. Although statutory construction requires that language be construed “consistent with its plain and ordinary meaning,” *see id.*, where, as here, the field of utility regulation includes as terms of art “temporary rates” and “permanent rates” the more specific meaning appropriate to the context and specialized field is the appropriate meaning to apply. *See id.* (all parts of a statute are construed together to effectuate the overall purpose and avoid an absurd or unjust result; statutes are not construed in isolation; they are construed in harmony with the overall statutory scheme). *See Appeal of Public Service Company of New Hampshire*, 125 N.H. 46, 52 (1984) (In matters of statutory interpretation, the NH Supreme

Court will “follow common and approved usage except where it is apparent that a technical term is used in a technical sense”). Thus, Puc Chapter 1900’s reference to “permanent rates” does not mean “any rate that has been approved as other than temporary.” The reference to “permanent rates” means “rates established in the permanent rate case stage of the docket.” Step increases and any related expenses fall wholly outside the ambit of Puc Chapter 1900.

This conclusion is supported by other definitions in Chapter 1900. Chapter 1900 defines “rate case expenses” as “...those non-recurring expenses incurred by a utility in the preparing or presentation of **a full rate case proceeding** before the commission, **necessary** for the conduct of the rate case.” Puc 1903.05 (Emphasis added). “Full rate case” is defined as “a proceeding in which a revenue requirement is established for a utility and rates are set to meet that revenue requirement pursuant to Puc 1604.” Chapter 1900 also defines “final order” as “an order of the commission . . . rendering **its final determination on permanent rates.**” (Emphasis added). Taken together, Chapter 1900 is intended to address what is, and what is not recoverable for expenses associated with adjudicating permanent (not temporary) rates.

Based upon the above, by definition, a step increase is distinct from the determination of permanent rates; a step increase addresses recovery of capital costs incurred after the utility’s test year. *See* DOE Laflamme Tech Statement at 3. Accordingly, as stated above, expenses associated with step increases do not fall within the ambit of Puc Chapter 1900.

- B. Nonetheless, because of the important objectives step increases achieve, appropriate expenses related to small utilities step increases may be recovered if deemed just and reasonable

In the opinion of DOE, notwithstanding that step expenses are not addressed by Puc Chapter 1900, step adjustments are valuable tools for regulating small water utilities and therefore appropriate step-related expenses are (and have already been) reasonable for recovery.

See DOE Laflamme Tech Statement at 3-4 The recovery of step-related expenses is fully consistent with RSA 378:28 “Permanent Rates” which states in relevant part:

Nothing contained in this section shall preclude the commission from receiving and considering any evidence which may be pertinent and material to the determination of a just and reasonable rate base and a just and reasonable rate of return thereon.

Permanent rate case proceedings are not intended to preclude the adjustment or rate base requirements through step adjustments and/or the recovery of reasonable step-expenses.

Step adjustments are valuable tools for managing small water utilities. Step adjustments mitigate regulatory lag for small water utilities such as HAWC for plant investments that occur within 12-24 months after the approved test year. See DOE Laflamme Tech Statement at 2-3. Step increases also support rate gradualism for utility customers by avoiding a steep accumulation of capital investments to be added to rate base all-at-once in sequential permanent rate proceedings over what is—by definition—a small number of customers. See *id* at 2-4.

The step adjustments (and expenses) may, themselves, also organically extend the timeframe between general rate proceedings because capital improvements in the period immediately following the rate case have been included in rates.

C. The recovery of step-expenses in Step Adjustment proceedings is especially important for small water utilities

Small water utilities have several unique characteristics as compared to large utilities that make the recovery of step-related expenses especially important with regard to utility regulation. First, small water utilities are less likely to have full time professionals, including engineers, attorneys, and accountants on staff. Accordingly, small utilities are significantly more likely to hire consultants specifically in order to work on step adjustments and are unlikely to have been able to include those consultant costs in standard staff time included in rate base. This is the case

for HAWC, where, for example, HAWC’s legal requirements for both the permanent rate case and the step adjustments were provided by contract attorneys through an agreement with a HAWC affiliate. *See* DOE LaFlamme Tech Statement at 2-4. Thus, proportionately, small water utilities are likely to have large expenses solely related to rate case and step adjustment proceedings.

Second, smaller utilities are likely to find it challenging to carry any appropriate step-expenses on their books until the next rate case. Further, the complexity of the issues a small utility may need to resolve in a step adjustment is not wholly within its control. In addition, the DOE itself may need to hire consultants to address step-related topics. DOE would bill the utility for those costs, and the small utility would anticipate fairly prompt recovery, consistent with past practice (see below). *See* LaFlamme Tech Statement at 3; RSA 365:37, :38. A prohibition on the prompt recovery of step-expenses for small utilities could have a chilling impact on the role of skilled consultants working with small utilities and potentially on capital investments that support safe and reliable service.

D. Past practice supports review and recovery of expenses related to step increases

The Commission has a past practice of approving step-related expenses for small water utilities. For example, the Commission has done so in the following small water dockets:

Docket No. DW 08-065, Hampstead Area Water Company, Inc., Commission Order No. 25,077 (February 25, 2010) at 5 (also approving step adjustments to rates describing “step adjustment expenses” generically as “rate case expenses”).

Docket No. DW 08-070, Lakes Region Water Company, Inc., Commission Order No. 24,925 (December 30, 2008) at 9 and 15 (also approving step adjustment and describing “step adjustment expenses” generically as “rate case expenses”) and Order No. 24,954 (March 27, 2009) at 4 (also approving step adjustment and describing “step adjustment expenses” generically as “rate case expenses”).

Docket No. DW 08-070, Lakes Region Water Company, Inc., Commission Order No. 25,197 (February 18, 2011) at 4 (approving step increase) and Order No. 25,226 (May 27, 2011) at 3 (approving recovery of expenses related to the February 18, 2011 step increase and referring to “step adjustment related expenses” generically as “rate case expenses”).

Docket No. 13-213, West Swanzey Water Company, Commission Order No. 25,606 (December 19, 2013) at 5 (also approving step adjustment and describing associated step adjustment expenses generically as “rate case expenses”).

Docket No. DW 17-118, Hampstead Area Water Company, Inc., Commission Order No. 26,248 (May 6, 2019) at 3 (describing step adjustment-expenses generically as “rate case expenses”).

The Orders cited in the Commission’s Order are distinguishable for policy reasons because they were issued in dockets dealing with large gas and electric utilities, which have more inhouse staff (whose expenses are included in rate base) and for whom step-expenses are more easily carried until a future rate case. *See* Order No. 26,902 (November 8, 2023) (revised on December 5 for reasons not relevant here) at 9 (citing orders that approve step adjustment for Liberty Utilities Granite State Electric and for Public Service Company of New Hampshire and that are silent with regard to step-related expenses).

The DOE generally supports excluding step-related expenses from recovery for larger utilities for a number of policy reasons not relevant here. *See, e.g.*, Docket DG 20-105 Liberty Utilities (EnergyNorth Natural Gas Corp. d/b/a Liberty; DOE Letter (January 13, 2022) (DOE does not support recovery for depreciation study incurred outside the test year).

III. IF THE COMMISSION ACCEPTS DOE’S LEGAL ANALYSIS, DOE REQUESTS AN OPPORTUNITY FOR DISCOVERY AND TO SUBMIT ITS ANALYSIS OF HAWC’S REQUEST FOR RECOVERY OF STEP EXPENSES NO LATER THAN FEBRUARY 29, 2024.

If the Commission accepts DOE’s legal analysis--that expenses related to step increases may be recovered by a small utility if deemed just and reasonable, --DOE requests an

opportunity to file at least two sets of data requests with HAWC and the opportunity to schedule at least one technical session. Although step-related expenses may seem straightforward, DOE needs an opportunity to review what has been filed, verify that all necessary documentation is in the record, time for the Company to provide related investigation and updated responses, and time to write its own report. *See, e.g.,* Dkt. No. DW 22-032 *Pennichuck Water Works, Inc. Request for Change in Rates*, DOE Letter Dated September 19, 2023 (requesting additional time to investigate rate case expenses); *Procedural Order Re; Request to Extend Deadline for DOE Analysis* (Oct.2, 2023) in Dkt No. DW 22-032 (granting extended deadline). DOE estimates that it can file a final report on or before February 29, 2023. DOE further proposes that in its order on the arguments briefed herein, the Commission establish a date for the settling parties to file a proposed procedural schedule for discovery, if consistent with the Commission’s final legal conclusions.

IV. DOE SEEKS CLARIFICATION OF ORDER 26,902

Order 26,902 is not yet a final order on the merits, and accordingly DOE seeks clarification as follows. The Order states that “*Step adjustments are generally limited in scope and permit recovery for investments similar to those that have been reviewed in the underlying rates case that established the step adjustment provision.* Order at 9 (Emphasis added; citation to large utility dockets omitted).” In the opinion of the DOE, it is appropriate for small utilities to seek a step adjustment for any capital investment that is non-revenue producing (or, if revenue producing to have that revenue taken into account in setting the related revenue requirement) and made to improve safe and reliable service. No greater similarity is required. In light of the analysis presented in this brief, the DOE asks the Commission to clarify this statement in Order No. 26,902.

Order 26,902 states, “...*HAWC has the burden to show that the step adjustment presented in this proceeding incorporate only investments that were placed in service and were used and useful in the applicable test year.*” Order at 9 (Emphasis added). In the opinion of the DOE, a step adjustment may account for investments that were used and useful during the test year, yet may also incorporate investments outside the test year, as here. Here, HAWC’s test year was 2019; Step I investments were used and useful in 2020, and Step II investments were used and useful in 2021. *See* Order No. 26,902 at 10 (approving Step II Adjustment for “assets put into service in 2021”); precedent cited in Section II (d) above. In light of the analysis presented in this brief, the DOE asks the Commission to clarify this statement in Order No. 26,902.

Order No. 26,902 states, “*it is not customary for the Commission to approve rate case expenses for step proceedings.*” Order No. 26,902 at 13. In light of the small water utilities orders listed in Section II (d) above, the DOE asks the Commission to clarify this statement in Order No. 26,902.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, the Department of Energy respectfully recommends that the Public Utilities Commission:

- A. FIND that HAWC’s step-related expenses do not fall within the ambit of NH Code Admin Rules Chapter 1900;
- B. FIND that appropriate step increases, including step increases at issue here, can: (i) mitigate regulatory lag, (ii) support rate gradualism; (iii) extend the time between rate cases, thus conserving administrative time and expense;
- C. FIND that, consistent with past practice, and because of the important policy objectives step increases may achieve, expenses due to HAWC’s Step I and Step II Adjustments such as, or similar to, expenses identified in Puc 1906.01 (b)(2)-(b)(6), that are also necessary, and achieved in an efficient and cost-effective manner, are appropriate for recovery, as forcing a small water utility such as HAWC to carry the expenses until the next rate case or absorb them would create a disproportionate hardship, as compared to large utilities;

- D. FIND that HAWC expenses due to Step I and Step II Adjustments, such as, or similar to, expenses identified in Puc 1906.07 (a)-.07(f) or that the Commission finds unreasonable are not eligible for recovery;
- E. FIND that for small utilities, including small water utilities with minimal professional staff and (by definition) a small customer base, such as HAWC, expenses due to step adjustments may be just and reasonable, and included in agreed upon terms for step settlement agreements even if expenses were not explicitly identified in an approved settlement on permanent rates, consistent with past practice;
- F. If the Commission accepts the DOE's legal analysis, DIRECT that the parties shall submit a proposed procedural schedule for discovery related to specific step expenses for which recovery is sought (expenses due to be filed by HAWC today) and DIRECT that DOE shall file its analysis and recommendation as to whether request is just and reasonable on or before February 29, 2023;
- G. CLARIFY Order No. 26,902 as described above in Section V; and
- H. GRANT such other and further relief as is reasonable and just.

Respectfully Submitted,

New Hampshire Department of Energy
By its Attorney,

/s/ Mary E. Schwarzer

Mary E. Schwarzer, Esq. #11878
21 South Fruit Street, Suite 10
Concord, NH 03301
(603) 271-3670
Mary.E.Schwarzer@energy.nh.gov

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CERTIFICATE OF SERVICE

I hereby provide that a copy of this pleading was provided by electronic mail to the individuals included in the Commission's service list in this docket on this date, December 7, 2023.

/s/ Mary E. Schwarzer

Mary E. Schwarzer