

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION
DW 16-834**

**COMPLAINT OF ROBERT MYKYTIUK AGAINST
LAKES REGION WATER CO., INC.**

ORDER DENYING MOTION FOR REHEARING

ORDER NO. 26,037

July 5, 2017

For the reasons set forth below, the Commission denies the motion for rehearing on Order No. 26,014 dated May 24, 2017 (Order), regarding a complaint filed by Robert Mykytiuk against Lakes Region Water Co., Inc.

I. PROCEDURAL BACKGROUND

On October 4, 2016, Robert Mykytiuk filed a complaint with the Commission against Lakes Region Water Co., Inc. (Lakes Region or the Company), alleging that Lakes Region cannot require him to pay an additional quarterly base charge¹ of \$135.26 under the terms of its tariff. The additional base charge relates to a second structure on Mr. Mykytiuk's property located at 17 Mayflower Lane in the Town of Moultonborough.

The Commission issued an order on May 24, 2017, following a hearing on the merits, granting the relief requested by Mr. Mykytiuk. The Commission found that Lakes Region was not authorized to charge him a second base charge under the terms of its tariff, and ordered Lakes Region to refund the sums that Mr. Mykytiuk had paid for the second base charge. Lakes Region's motion argues that the Commission: (i) erred on the burden of proof; (ii) erred by

¹ The parties have interchangeably used the term "base charge" to describe what is the "Minimum charge per customer per quarter" as described in the Company's tariff. See NHPUC No. 6 – Water, 7th Rev. Page 10, Nov. 28, 2016.

ordering reparation without notice; and (iii) erred by stating that the company could not require a separate meter or service line for Mr. Mykytiuk in the future.

For a complete procedural history of this matter and all docket filings, other than any for which confidential treatment has been requested of or granted by the Commission, go to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-834.html>

II COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for “good reason” when the moving party demonstrates that the decision is “unlawful or unreasonable.” RSA 541:3, RSA 541:4; *see Rural Telephone Company*, Order No. 25,291 at 9 (November 21, 2011). Good reason exists if there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (April 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (November 12, 2010). Although Lakes Region raised the same arguments in its motion for rehearing as it did at hearing, for clarity we will discuss each of the issues raised in the motion.

A. Burden of Proof

The Order states that the customer's burden was to prove that “Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff.” *Order* at 9. Lakes Region claims that it is the customer's burden of proof to demonstrate that the rate is unjust or unreasonable or otherwise in violation of law, citing RSA 378:7 and RSA 365:29.

Mr. Mykytiuk must meet his burden of proof by a preponderance of the evidence under N.H. Code Admin. Rule Puc 203.25. A preponderance of evidence means “such evidence as

when weighed with that opposed to it has more convincing force, and from which it results that a greater probability is in favor of the party upon whom the burden rests.” *Appeal of Rockingham Cnty. Sheriff’s Dept.*, 144 N.H. 194, 197 (1999) (citation omitted). The burden of proof for administrative adjudications generally is a fair preponderance of the evidence. *See In re Preisendorfer*, 143 N.H. 50, 55 (1998) (citing *In re Polk License Revocation*, 90 N.J. 550, 449 A.2d 7, 12-16 (N.J. 1982)). Mr. Mykytiuk met his burden.

“Whenever the commission shall be of opinion ... that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law ... the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force.” RSA 378:7. Under RSA 365:1 a person can make a complaint over any “thing” or “act” claimed to have been done or omitted by a utility. In this case, the thing or act complained of was the imposition of the second base charge. *See* RSA 378:1 (utility must have a published tariff “showing the rates, fares, charges and prices for any service rendered”). The authorization for such a charge was not in Lakes Region’s tariff and Mr. Mykytiuk proved that omission by a preponderance of the evidence. “[W]e are obliged to give effect to the plain language used in the tariff.” *Appeal of Verizon New England*, 158 N.H. at 700. Because a second base charge is not in Lakes Region’s tariff, the imposition of one on Mr. Mykytiuk is “in violation of [a] provision of law” under RSA 378:7.

B. Ordering Reparations Without Notice

Lakes Region’s motion states that a notice of hearing is required under RSA 365:29 before reparations may be awarded. A plain reading of the statute does not require that a formal notice of reparation be made prior to Commission determination.

On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation,

that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

RSA 365:29.

A request for a hearing is sufficient to serve as a request for reparation under RSA 365:29. *Stebbins Commercial Properties*, Order No. 25,364 (May 14, 2012). The New Hampshire Supreme Court has noted that the “Commission has authority to act upon its own motion or upon complaint in behalf of the public in any situation where service or rates may be directly affected by its order.” The Commission must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power. “One such power is to award restitution if one has been unjustly enriched at the expense of another.” *Granite State Transmission v. State*, 105 N.H. 454, 456 (1964); *see Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539 (1980).

In this case, the Commission was presented with a utility imposing a charge that was not authorized by a tariff and we found that charge to be unauthorized and unjust. Under established precedent, the Commission has authority to order the refund of an overcharge and the statute does not require the Commission to announce, in advance, that it is considering that remedy. Mr. Mykytiuk requested a refund of all fixed charges as part of his closing argument. March 20, 2017, Hearing Transcript (Tr). at 206. The Commission acted on that request, but it could have done so regardless of whether Mr. Mykytiuk asked for such relief.

C. Separate Meter or Service Line

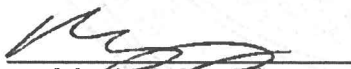
Lakes Region objects to the final sentence in the order that reads, “In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so

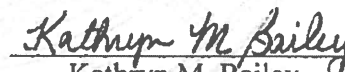
long as he undertakes no further renovations to the structures on his property.” *Order* at. 9.

Lakes Region offers no legal authority on the issue of whether the Commission can order Lakes Region to refrain from requiring a separate meter or service line against Mr. Mykytiuk. As the arbiter between the interests of the ratepayers and the interests of utilities, RSA 363:17-a, the Commission may determine disputes between utilities and their customers. In this case, we have resolved a dispute between Mr. Mykytiuk and Lakes Region. Based on the facts of this case, we have found that such a restriction on future treatment of Mr. Mykytiuk is a just and reasonable result and within our role under RSA 363:17-a.


In sum, we find that Lakes Region did not present new evidence that was otherwise unavailable until now and did not identify specific matters that we overlooked or mistakenly conceived in issuing our prior order. Accordingly, we deny Lakes Region’s motion for rehearing.

By order of the Public Utilities Commission of New Hampshire this fifth day of July, 2017.


Martin P. Honigberg
Chairman


Kathryn M. Bailey
Commissioner

Attested by:


Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
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CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.