

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DW 19-065

TOWN OF HAMPTON

**Complaint by Town of Hampton Against Aquarion Water Company**

**HAMPTON'S MOTION FOR REHEARING PURSUANT TO N.H. RSA 541:3**

NOW COMES the Town of Hampton in the above-entitled matter and moves for rehearing pursuant to N.H. RSA 541:3 of the Commission's Order No. 26,263 dated June 24, 2019 on the basis that the Commission's Order was erroneous in fact and/or in law, and in support of said Motion says as follows:

**A. Based on the undisputed facts and upon the law, the Commission should not have dismissed Count I in Hampton's Complaint Pursuant to N.H. RSA 365:1 and RSA 365:29 as to Aquarion's Overearnings**

1. There is no dispute that in DW 12-085, the last general rate case involving Aquarion Water Company of New Hampshire, Inc., cited in Paragraph 1 of the Hampton Complaint herein, the Commission after two days of contested hearing, issued Order No. 25,539, in which the Commission analyzed the opposing expert opinions as to the major contested issue—cost of equity, and then adopted Hampton's expert's (David Parcell) opinion of the DCF high-point of a 9.6% cost of equity for Aquarion. Order No. 25,539 at page 19. Aquarion had sought a 10.25% return on equity. Order No. 25,539 at page 3.
2. The Commission clearly stated in said Order No. 25,539 at page 16 that it was "bound to set a rate of return that falls within a zone of reasonableness, neither so low as to result in confiscation of company property, nor so high as to result in extortionate charges to customers," citing Appeal of Conservation Law Foundation, 127 N.H. 606, 635 (1986). Thus, the Commission was implicitly indicating that had it ruled in favor of allowing a higher rate of return on equity that this would have been extortionate to customers.
3. The Commission's Order No. 25,539 at page 21 and its revenue requirement calculations on pages 22 and 23 of said Order clearly indicate that the determined cost of equity was the driver in determining the Company's revenue requirement which represented a 15.20% increase over Aquarion's pro forma test year water revenues and upon which it issued its revised tariff on July 12, 2013.

4. Count I of Hampton's Complaint clearly states that the Commission's ordered rate of return of 9.6% in Order No. 25,539, and its overall rate of return of 7.49% as derived therefrom have been violated by Aquarion achieved return on equity and cited as evidence in support:
  - a) the return on equity figures reported in the Company's own annual reports for the years 2016 [13.11%] and 2017 [10.29%] Complaint herein, paragraphs 4 and 6; and
  - b) the PUC Staff audit dated November 16, 2018 performed in the context of Aquarion's 2019 WICA surcharge petition in DW 18-161, in which Staff for the first time analyzed the rate of return, cost of capital, and return on equity achieved by Aquarion in the years since Commission Order 25,539 was issued and concluded that "The Company appears to have been overearning based on the Rate of Return calculations below, since 2013." The audit figures show that in no year since 2013 had the achieved return on equity been less than 11.13% [in 2015] and had been as high as 17.35% [in 2013]. See Complaint herein paragraphs 8 and 9.
5. Not until Aquarion's filing of its Annual Report for the year ending December 31, 2016 dated March 29, 2017 did Aquarion even begin to calculate and report on its rate of return on equity actually achieved, and it was not until its Annual Report for the year ending December 31, 2018 that was filed on March 29, 2019 and again reported an exceedance of the allowed rate of return on equity, did the Company offer any explanation for this exceedance.
6. Based upon the Company's own figures presented in DW12-085 that each percentage point of return on equity was worth \$154,000. It is the case that the overearnings found by the PUC Staff audit compute to close to \$3 million since 2013 and over \$1 million since 2016 alone. See attached computation sheet.
7. RSA 365:1 clearly afford a person a cause of action via a complaint such as Hampton's here to complain to the Commission in writing of "any thing or act claimed to have been done...in violation of any order of the commission."
8. Furthermore, RSA 365:29 authorizes the Commission, in response to a complaint covering any charge demanded and collected by a public utility that is found to be illegal or unjustly discriminatory, to order due reparation of same to the persons who have paid it.
9. The rates of return achieved by Aquarion would most likely have been deemed to be "extortionate charges to customers" in the words of the Commission's Order No. 25,539 at page 19.
10. In light of the above, the Commission's finding on page 5 of its June 24, 2019 Order No. 26,263 that the Town has not demonstrated a violation of...a Commission order" is blatantly erroneous.

11. In light of the fact that the percentage rate of return of 9.6% found by the Commission in its June 28, 2013 Order No. 25,539 was the critical driver in determining the revenue requirement and the resulting percentage rate increase to customers of 15.20%, as demonstrated on pages 22 and 23 of that order, it is unreasonable and unlawful for the Commission now to dismiss Hampton's Complaint, as it does on page 5 of the June 24, 2019 Order, on the basis of characterizing that critical component as being "only an input into the Commission's calculation of the rates the Commission set for the Company." The rates driven by that critical component is what determine the charges included in the tariff. The achievement of extortionate rates of return through those tariff charges does not excuse the violation of the Commission's Order in 25,539.
12. Based upon the millions of dollars in excessive earning that Aquarion has achieved in violation of the Commission's clearly determined rate of return on equity in Order No. 25,539 at pages 19-23, the Commission's reliance upon its holding in PNE Energy Supply, LLC D/B/A Power New England, Order No. 25,603 at 14 (December 13, 2013) to avoid this issue at this time is unreasonable and unconscionable. The Commission claims based on that case that "examining the individual issue of ROE outside the context of setting appropriate rates leads to single-issue ratemaking, which the Commission 'does not favor.'" This is an unreasonable assertion, where the Town of Hampton's complaint is seeking enforcement of a critical rate determined by the Commission itself after a contested hearing, not the setting of a new rate.
13. The Commission's citation of its December 13, 2013 Order No. 25,603 in PNE Energy Supply, LLC D/B/A Power New England is inapposite for the following reasons: First, that case dealt with a "Selection Charge" that PSNH was allegedly charging to competitive electricity power suppliers, not with the exceedance of a rate of return on equity set by the Commission following a contested hearing. Second, on the very page of this Order No. 25,603 cited by the Commission to as supporting the dismissal of Count I of Hampton's Complaint, the Commission state as follows: "although the Commission does not favor single issue ratemaking, we asserted in this proceeding that the single issue ratemaking prohibition does not serve to cut off Commission inquiry into the reasonableness of any rate at any time' and that the Commission has the authority to examine a rate without requiring an adjustment." Third, the Commission itself in this Order on page 16 cited the availability of the reparations remedy afforded by RSA 365:29, the very provision cited by Hampton in Count I in this case, if the Commission were to find after hearing and investigation that an illegal rate had been collected. The dismissal of Hampton's Complaint illegally and unreasonably cuts off access to such a hearing and investigation, with no explanation for the overearning being required of Aquarion.
14. What the Town of Hampton is seeking through Count I of its Complaint is not ratemaking, but rather enforcement of the rate of return on equity ordered by the Commission in the Commission's Order No. 25,539.

15. The Commission's reliance on its "preferred mechanism to address the issue of overearning...by a utility" in "a full rate proceeding" affords no remedy at all for the fact of the Company's having collected millions of dollars of "overearning...since 2013" in the words of the PUC Staff Audit issued on November 16, 2018: the next rate case slated to be filed in 2020 will be based upon 2019 as a test year and will set rates going forward, without redressing past violations of the Company's overearnings through rebates or reparations.
16. The logical consequence of the Commission's approach embodied in its dismissal is that there is no remedy for past violations of its Order No. 25,539 at page 19, only adjustment of rates going forward in a subsequent general rate. This approach thus unreasonably and unlawfully cuts off the remedies available under RSA 365:1 and RSA 365:29 as sought to be invoked here by the Town of Hampton. See, Granite State Gas Transmission, Inc. v. State, 105 N.H. 454, 456 (1964) (noting 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," and citing RSA 365:29 as giving "the Commission authority to prevent unreasonable prejudice or disadvantage to customers").
17. The well-established, applicable standard of review for dismissal of a complaint was thus not followed by the Commission in its dismissal of Count I here: namely, that (as with a Court, the Commission must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 104 (2002)(quoting Hobin v. Coldwell Banker Residential Affiliates, 144 N.H. 626, 628 (2000)). In making this determination, the Commission, like a Court, must "assume the truth of all facts alleged by the plaintiff and construe all reasonable inferences in the light most favorable to [the plaintiff]." Graves v. Estabrook, 149 N.H. 202, 203 (2003).
18. The Town's Complaint has clearly set forth a claim upon which relief may be granted.

**B. Based on the undisputed facts and upon the law, the Commission should not have dismissed Count II in Hampton's Complaint Pursuant to N.H. RSA 365:1 as to Aquarion's not clearing snow from its hydrants**

19. With regard to Count II, the Commission in its June 24, 2019 Order in dismissing this Count merely states, "With regard to the fire hydrants, the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear them of snow." This is a ruling on the merits rather than a ruling made in accordance with the well-established standard of review set forth above for ruling on a Motion to Dismiss.
20. In so ruling, the Commission apparently believes that RSA 365:1 that is cited in the Town's Complaint as the basis for Count II only applies where the Company is alleged to have violated its tariff or "committed any wrongdoing." The Commission's interpretation of RSA 365:1 is unreasonable and unlawful, because RSA 365:1

explicitly allows for complaints to be made to the Commission concerning “any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law...”, not just for violations of its tariff.

21. Hampton’s Complaint in Count II alleges, and Aquarion does not dispute, that it neglects and refuses to shovel snow from its private fire hydrants to keep them clear, and relies instead upon Hampton’s highly trained and compensated firefighters to do this hard labor function, for which Aquarion pays nothing to the Town. Complaint Paragraph 4.
22. Hampton’s Complaint in Paragraph 3 notes that it pays Aquarion over half a million dollars a year for the availability of the water these Aquarion owned fire hydrants provide in the event of a fire. Complaint, Paragraph 3.
23. Hampton’s Complaint in paragraph 5 goes on to cite the longstanding principle of law discussed by our Supreme Court in Clapp v. Jaffrey, 97 N.H. 456, 459 (1952) to the effect that tax monies cannot be used for the advantage of private individuals, especially where such individuals do not pay a fee for such service. Thus, the Complaint goes on to state, “Hampton taxpayers are illegally being forced to pay their firefighters to maintain private property of Aquarion.”
24. Hampton’s Complaint in Paragraph 7 goes on to state that Aquarion has even refused to update the cost of service study that it is to prepare for its 2020 rate case, which will not be heard until after another winter snow season has passed and another year of firefighter shoveling has occurred, paid for by Town of Hampton taxpayers, even those taxpayers who are not served by Aquarion water, which is the case for most of Hampton taxpayers whose properties are located to the west of Interstate 95.
25. As with Count I, Count II of Hampton’s Complaint clearly sets forth a claim upon which relief may be granted.
26. As with Count I, the Commission’s dismissal of Count II of Hampton’s Complaint violates the applicable standard of review and is unlawful and unreasonable.
27. In light of all the above, the Town of North Hampton Water Commissioners’ efforts to join in Hampton’s Complaint and intervene in these proceedings should not be deemed moot, especially where the Town of North Hampton, as one of the three Towns served by Aquarion suffers similar injuries to Hampton’s from the matters complained about in Counts I and II of Hampton’s Complaint.

WHEREFORE, the Town of Hampton requests that the Commission:

- A. Rehear and reconsider its decision pursuant to N.H. RSA 365:21 and RSA 541;

- B. After such rehearing, vacate its dismissal as to both Counts I and II of Hampton's Complaint and schedule this Complaint for full hearing; and
- C. Grant such other and further relief as may be just.

Respectfully submitted,

THE TOWN OF HAMPTON  
By its Town Attorney



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Dated: July 22, 2019

**Certificate of Service**

I hereby certify that I have this date served a copy of the above Motion electronically to the service list.



Mark S. Gearreald, Esq.