THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2019-0512

APPEAL OF THE TOWN OF HAMPTON

MOTION FOR SUMMARY AFFIRMANCE OF AQUARION WATER COMPANY OF NEW HAMPSHIRE

September 20, 2019

Aquarion Water Company of New Hampshire, Inc. ("Aquarion" or "the Company"), hereby moves, pursuant to Supreme Court Rule 25, for summary affirmance of Order No. 26,263 (the "Order") of the New Hampshire Public Utilities Commission (the "Commission"), as affirmed by Order No. 26,287, dismissing a complaint filed by the Town of Hampton after determining that "there is no basis for the complainant's dispute and no need for an independent investigation." Order at 1; HAA at 36.[1]

In the alternative, Aquarion requests that this Court decline to accept the appeal pursuant to Supreme Court Rule 10 (1). In support hereof, Aquarion states as follows:

PROCEDURAL HISTORY

On March 27, 2019, pursuant to RSA 365:1 and N.H. Code of Admin. Rules Part Puc 204, "Complaints Against Public

[1] References to Hampton's Appeal Appendix are noted as "HAA" and the page number.

Utilities," Hampton filed a complaint with the Commission concerning rates charged by and services rendered by Aquarion. HAA at 3. Hampton complained of two things: 1. that Aquarion's customers were entitled to refunds dating back over six years to calendar year 2013 rates because the Company had been earning more than the return on equity used by the Commission in the Company's most recent ratemaking proceeding to establish tariffed rates; and, 2. that Aquarion failed to provide snow removal services for fire hydrants located in Hampton and should be ordered by the Commission to do so.

The Commission investigated Hampton's complaints per RSA 365:1, *et seq.* and Rule Puc 204.01, *et seq.*[2] and found,

> [T]here is no basis for Hampton's complaint. Even when the complaint is viewed in the light most favorable to Hampton, the Town has not demonstrated a violation of law, the terms and conditions of Aquarion's franchise or charter, or a Commission order. *See* RSA 365:1.

Order 26,263 at 5; HAA at 40. "Accordingly, we find that reasonable grounds do not exist to warrant a further investigation pursuant to RSA 365:4 and dismiss the complaint." *Id*.

STANDARD OF REVIEW

Hampton has appealed the Commission's Order pursuant to Supreme Court Rule 10 and RSA 541:6. Rule 10 provides that the Court may, in its discretion, decline to accept an appeal or any question raised therein, from an order of an administrative agency, or may summarily dispose of such an appeal, or any question raised therein, as provided in Rule 25. Pursuant to Supreme Court Rule 25(l)(a) and (c), the Court may summarily affirm an administrative

[2] Part PUC 204 is attached hereto as Attachment 1.

agency's decision when no substantial question of law is presented and the Court does not disagree with the result below, or when the decision is included in the appeal, no substantial question of law is presented, and the Court does not find the decision unjust or unreasonable. Summary affirmance is "a necessary and proper part" of the exercise of judicial power and responsibility. *State v. Cooper,* 127 N.H. 119, 128 (1985).

The Court's review of this appeal is also guided by the standard set forth in RSA 541:13, which reads, in relevant part, that the party seeking to set aside any order or decision of the Commission bears the burden of showing that the Commission's decision is clearly unreasonable or unlawful and shall not be set aside or vacated except for errors of law and that all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable. The Court gives deference to an agency's interpretation of its laws and rules. *Appeal of Murdock,* 156 N.H. 732, 735 (2008); *Fischer v. New Hampshire State Bldg. Code Rev. Brd.*, 154 N.H. 585,589 (2006); *New Hampshire Retire. Sys. v. Sununu*, 126 N.H. 104, 108 (1985). The Court reviews the agency's interpretation to "determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve." *Murdock*, 156 N.H. at 735.

ARGUMENT

This Court Should Summarily Affirm Order No. 26,263 because no substantial question of law is presented in the Petition and the Commission's decision is neither unjust nor unreasonable.

This appeal presents no substantial question of law. The two issues contained in Hampton's complaint fail to set forth "any thing or act" of Aquarion "in violation of any provision of law, or of the terms

and conditions of its franchises or charter, or of any order of the commission" as required by RSA 365:1. The Commission's Order rejecting Hampton's complaint required a determination of factual issues regarding rates and services that are strictly within the expertise and regulatory authority of the Commission.

On myriad occasions this Court has held that the power of the Public Utilities Commission in setting public utility rates is plenary. *Bacher v. Public Serv. Co. of N.H.*, 119 N.H. 356, 358 (1979); *Appeal of N. New England Tel. Operations, LLC*, 165 N.H. 267, 277 (2013); *State v. New England Tel. & Tel.*, 103 N.H. 394, 397 (1961); *Appeal of Pub. Serv. Co. of New Hampshire*, 130 N.H. 748, 750–51 (1988); *Legislative Util. Consumers' Council v. Pub. Serv. Co.* [LUCC], 119 N.H. 332, 341 (1979).

Both issues in Hampton's complaint fall within the "plenary" authority of the Commission to generally supervise public utilities (RSA 374:3) and to establish rates and tariffed services.[3] In *In re Pennichuck Water Works, Inc*., 160 N.H. 18, 26 (2010), this Court held:

> "When we are reviewing agency orders which seek to balance competing economic interests, or which anticipate such an administrative resolution, our responsibility is not to supplant the PUC's balance of interests with one more nearly to our liking." *Id.* (quotation, ellipsis and brackets omitted). "The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted

[3] "The legislature has …granted the PUC 'the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the provisions of this title [XXXIV].' RSA 374:3 (1995)." *In re Pinetree Power, Inc*., 152 N.H. 92, 99 (2005). Included within the Commission's general supervisory authority under RSA Title XXXIV is RSA 374:1 --"Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable."

> such policy to the informed judgment of the [PUC] and not to the preference of reviewing courts." *Appeal of Conservation Law Foundation*, 127 N.H. 606, 616, 507 A.2d 652 (1986) (quotation omitted).

Hampton's complaint is one that required the Commission to balance competing economic issues - - issues involving rates and services to be provided by a regulated public utility. A review of the Order demonstrates that the Commission did not act unjustly or unreasonably, and, therefore applying judicial deference to the Commission's discretion, that Order should be summarily affirmed. *See* Sup. Ct. R. 25(1)(c).

Moreover, Hampton has failed to meet the burden of proof required by RSA 541:13 to demonstrate that the Commission's determination "is clearly unreasonable or unlawful," and under that statute the Commission's Order "not be set aside or vacated."

1. Issue 1 – Complaint Regarding the Rates Charged by Aquarion

The first issue in Hampton's complaint is the allegation that because Aquarion's tariffed rates have resulted in the Company earning more than the return on equity utilized as part of the ratemaking process by the Commission in the Company's last rate case (NHPUC Docket No. DW 12-085, Order No. 25,539 dated June 28, 2013),[4] Aquarion has violated that 2013 order and must be required to make refunds to customers retroactive to 2013. Hampton is wrong.

As this court has acknowledged, "Ratemaking is 'a complex, esoteric area' and 'the Commission has been entrusted with the difficult task of deciding among many competing arguments and

[4] Order No. 25,539 is attached hereto as Attachment 2.

policies' in reaching decisions that serve the public interest." *LUCC*, 119 N.H. at 339. The Court has also noted that, "The Commission has traditionally performed its ratemaking function by determining a proper rate base, a reasonable rate of return thereon, and finally the amount of revenue required to produce the resulting return. *New England Tel. & Tel. Co. v. State*, 95 N.H. 353, 356 (1949)." *LUCC*, 119 N.H.at 341–42. "'The proper rate of return is a matter for the judgment of the Commission, based upon the evidence before it. In fixing the rate the cost of capital may not be ignored; but what that cost may be is also a matter for determination by the Commission upon the evidence. * * * Once determined, it marks the ***minimum*** rate of return to which the company is lawfully entitled." *New England Tel. & Tel. Company v. State*, 95 N.H. at 361 (emphasis added).[5]

The return on equity determined to be reasonable for a utility by the Commission as part of a ratemaking proceeding is but one part of the overall ratemaking process used to ultimately set the rates that become part of a Commission-approved tariff for that utility. It is those final tariffed rates that set the relationship between a utility and its customers, not a utility's rate base, its reasonable expenses, nor its allowed rate of return.

"[T]he vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC, do not simply define the terms of the contractual relationship between a utility and its customers." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (citations omitted). "They have the force and effect of law and bind both the utility and its customers." *Id*.

[5] Since the rate of return used by the Commission in Aquarion's last rate case "marks the *minimum* rate of return to which the company is lawfully entitled," and not the maximum, Hampton's complaint clearly lacks merit.

Hence, when the Commission last set Aquarion's tariffed rates, its Order (Order No. 25,539) did not include any ordering provision regarding the Company's proper return. Instead, the ordering provisions set the Company's revenue requirement (the amount of money deemed necessary for Aquarion to meet its obligations to provide safe and reliable service to its customers) and established permanent tariffed rates to collect that revenue requirement from customers.[6] Those tariffed rates "bind both the utility and its customers" until they are changed by the Commission following another ratemaking proceeding. This Court has acknowledged that

> Often enough, even before the ratemaking proceeding has begun, elements of income and expense are known to have changed from their levels in the test year, and the commission must then decide whether to modify the test year data in order to obtain a more accurate prediction. One commentator has observed that " '[p]hilosophically, the strict test year assumes the past relationship among revenues, costs, and net investment during the test year will continue into the future.' To the extent that these relationships are not constant, the actual rate of return earned by a utility may be quite different from the rate allowed by the commission" citing to C. Phillips, Jr., The Regulation of Public Utilities 182 (1985).

Appeal of Pub. Serv. Co. of New Hampshire, 130 N.H. at 758.

What Professor Phillips observed is all that has happened here -- due to changes in such things as costs, customer count, rate base and the like from the "test year" in Aquarion's last rate case, the actual return on equity earned by Aquarion resulting from the tariff rates it is currently authorized to charge its customers has varied from the return on equity used by the Commission in the ratemaking process. This is

[6] Aquarion's Commission-approved "Tariff for Water Service" is available from the Commission website at https://puc.nh.gov/Regulatory/Tariffs/AquarionWater.PDF .

a common occurrence and the Commission was correct in rejecting Hampton's complaint. Indeed, as noted by the state's Consumer Advocate, if Hampton's complaint had any merit "then any time a utility failed to earn its allowed ROE - a very common condition, if only because of inflationary pressure – the Commission would be obliged to order an immediate rate increase." OCA Response to Complaint of Town of Hampton, May 16, 2019; HAA at 24.

The Court has previously noted that the propriety of a utility's rates should not be the subject of question in court, but is instead a matter for Commission determination:

> '(R)ates charged by a public service company in accordance with its filed schedules allowed by the department cannot be questioned in court proceedings between the customers and the company.'" *Haverhill Gas Co. v. Findlen*, 357 Mass. 417, 418-19, 258 N.E.2d 294, 296 (1970), Quoting *Sullivan v. Boston Consolidated Gas Co.*, 327 Mass. 163, 167, 97 N.E.2d 535, 538 (1951). "Whether unreasonable discrimination exists is for administrative determination. The rule which requires the exhaustion of administrative remedies should be applied." 1 A. Priest, Principles of Public Utility Regulation 301 (1969). We "recognize the soundness of having utility ratemaking matters determined by a commission of experts qualified to make informed judgments in this specialized field." *Legislative Util. Consumers' Council v. Pub. Serv. Co.*, 119 N.H. at 340, 402 A.2d at 626.

Bacher v. Pub. Serv. Co., 119 N.H. 356, 357–58 (1979).

The rates for a public utility are established via a ratemaking proceeding before the Commission. *See Bacher, supra*. Issue 1 of Hampton's complaint asks the Commission to change Aquarion's present rates by ordering refunds from the established rate levels to customers without conducting such a ratemaking proceeding. Such changes in permanent rates outside of a general ratemaking

proceeding based upon only one factor (in this case, the earned return on equity) amounts to "single-issue ratemaking" (that is, instead of investigating and ruling upon all the inputs to the ratemaking process as discussed by the Court in *New England Tel. & Tel. Co. v. State*, 95 N.H. 353, 356 (1949); *LUCC* at 340-41.) Hampton seeks a decrease in rates based upon a variance in only one of the inputs, even though other components of rates may indicate the need for an increase in rates. As the Commission noted in the Order:

> Although the Commission approved an ROE in Aquarion's last rate case, that ROE was only an input into the Commission's calculation of the rates the Commission set for the Company. Examining the individual issue of ROE outside the context of setting appropriate rates leads to single-issue ratemaking, which the Commission "does not favor." *PNE Energy Supply, LLC D/B/A Power New England*, Order No. 25,603 at 14 (December 13, 2013).

Order at 5; HAA at 40.

Single-issue ratemaking is exactly what Hampton seeks in this matter. It wants Aquarion's rates changed based solely upon one factor (its earned return) in isolation to all other factors that are part of the ratemaking process. This request is abhorrent to Commission precedent:

> Single-issue rate cases are frowned upon in utility ratemaking because the objective of ratemaking is not to ensure recovery dollar for dollar of every expenditure made by a utility, but rather to ensure that the company has a reasonable opportunity to earn a reasonable overall return on investments dedicated to public utility functions. In order to make this ultimate determination, it is necessary to match ordinary and necessary expenses with income from the same period, and determine whether the net income is sufficient to provide a reasonable return on allowable rate base. Single-issue rate cases do not allow for this determination of overall net income. They focus on the change in a single expense (or revenue) item since the last rate case, ignoring

> completely what changes may have taken place in the other factors of net income.

In Re Connecticut Valley Elec. Co. Inc., 86 N.H.P.U.C. 947 (Dec. 31, 2001). Thus, per Commission practice and precedent, a change in rates such as the one Hampton desires must be done as part of a comprehensive ratemaking proceeding.

Aquarion is appropriately charging its customers the tariffed rates the Commission approved in Aquarion's last rate case. If Hampton feels that Aquarion's current tariffed rates are improper, instead of filing a complaint under RSA 365:1 alleging that Aquarion had violated a provision of law or the terms and conditions of its franchises or charter, or an order of the Commission (none of which has occurred per the Commission's Order), its proper recourse would be to file a petition with the Commission seeking the commencement of a ratemaking proceeding to examine whether changes are necessary to Aquarion's currently-approved tariffed rates. However, in this case Hampton is, by its own decisions, precluded from filing such a request.

The issue of when Aquarion's rates will be subject to a general rate review by the Commission has been resolved via a Settlement Agreement voluntarily entered into on April 15, 2019 by Hampton, Aquarion, and the Staff of the Public Utilities Commission.[7] The Office of Consumer Advocate separately indicated its concurrence with the settlement and the terms contained therein. Letter of OCA, April 15, 2019, NHPUC Docket Nos. DW 18-161 and DW 18-054.[8] The referenced Settlement was filed with the Commission in its

[7] That Settlement Agreement is attached hereto as Attachment 3.

[8] OCA's letter is attached hereto as Attachment 4.

Docket Nos. DW 18-054 and DW 18-161 on April 15, 2019 and was approved by the Commission on May 2, 2019 in Order No. 26,245.[9]

A material provision of the Settlement Agreement entered into by Hampton specifies: "The Settling Parties agree and recommend the Commission order Aquarion to file a full, general rate case no later than 2020, using the prior year as a test year." Aquarion intends to comply with this Settlement Agreement provision by filing a full, general rate case with the Commission during 2020.[10]

Thus, via the Settlement Agreement, Hampton has contractually agreed that Aquarion's current base rates shall remain in effect until the next ratemaking proceeding is filed in 2020. *See Alpert v. New Hampshire Motor Speedway, Inc.*, No. 2018-0344, 2019 WL 1253580, at *2 (N.H. Feb. 21, 2019) (Because of their contractual nature, settlement agreements "are generally governed by principles of contract law," citing to *Poland v. Twomey*, 156 N.H. 412, 414 (2007).) Hampton's appeal amounts to an attempted end-run around the contractual Settlement Agreement to which it is bound.[11] The Court should not countenance such a maneuver by the Town.[12]

[9] Order No. 26,245 is attached hereto as Attachment 5.

[10] In Order No. 26,245 approving the Settlement Agreement, the Commission also ordered (at 14-15) "that, as part of its next full rate proceeding, Aquarion shall provide a reconciliation between the 2019 Water Infrastructure and Conservation Adjustment revenues it actually bills and the WICA revenues that it would have billed using the 6.86 percent WICA surcharge for the full 12-month period of 2019, with the difference in revenues revealed by that reconciliation to be an adjusting item considered in determination of Aquarion's next authorized revenue requirement in the Company's next full rate proceeding;" As Aquarion must include "revenues it actually bills…for the full 12-month period of 2019…in the Company's next rate proceeding," that rate proceeding cannot occur until after 2019 has ended – *i.e.,* 2020.

[11] It also amounts to an untimely collateral attack on Commission Order No. 26,245.

[12] Since the issues in Hampton's Complaint have already been dealt with as part of a Settlement Agreement, this case is also not one where Mediation under Court Rule 12-A would be productive.

As the parties have settled the issue of when Aquarion must file a full, general rate case, the Commission's rejection of the first issue in Hampton's complaint was proper and this issue presents no case or controversy requiring this Court's involvement.

2. Issue 2 – Complaint Regarding Snow Removal from Fire Hydrants

Hampton's second issue complains that Aquarion should be compelled by the Commission to remove snow from fire hydrants. Hampton cites to no provision of law, regulation or tariff wherein the removal of snow from hydrants is required as part of the Company's services. Indeed, Hampton has impliedly admitted in the April, 2019 Settlement Agreement that the cost of such snow clearing is not included in Aquarion's present rates.[13] Thus, not only is there no basis for requiring Aquarion to remove snow from hydrants, but the Town is asking that Aquarion be ordered to perform that service without compensation. As stated in RSA 378:14 "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." In that the Town is requesting Aquarion perform a service that it recognizes is not covered by Aquarion's schedules on

[13] As noted earlier, the Settlement Agreement calls for Aquarion to file a general rate case in 2020. As part of that proceeding, the Settlement Agreement notes at Paragraph 11, k, "The Settling Parties also agree that Aquarion will conduct a cost of service study in this rate case, pursuant to the Partial Settlement Agreement approved in Order No. 25,539. The Settling Parties also recognize that Hampton requested that Aquarion include the estimated cost of snow removal from Aquarion-owned fire hydrants at Aquarion's expense in the cost of service study. Aquarion disagrees that snow removal costs are appropriate costs to include in a cost of service study." Since the cost of removing snow from hydrants is not part of Aquarion's present cost of service, present rates do not include any compensation to Aquarion for performance of that requested snow removal service.

file, and that Aquarion do so for free, it is requesting the Commission, and this Court, to order something the law does not allow. Such an order requiring Aquarion to perform services without just compensation would lead to an unconstitutional taking of property.

By statute, the Commission has general supervisory power over all public utilities. RSA 374:3, "Extent of Power." The Commission has reviewed this issue, exercised its authority, and rejected Hampton's complaint.

As the Commission's decision is neither unjust nor unreasonable and Hampton's Complaint raises no substantial question of law, the Commission's decision is entitled to deference.

CONCLUSION

Hampton has failed to allege "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, or of the terms and conditions of its franchises or charter, or of any order of the Commission" as required for a complaint under RSA 365:1. This appeal fails to raise any substantial question and the Commission's decision is neither unjust nor unreasonable. (Rule 25 (1)(a) and (c).) Hampton's appeal, even if taken at face value, fails to meet the statutory burden under RSA 541:13 of showing that the Commission's decision is clearly unreasonable or unlawful. As a result, Aquarion respectfully asserts that the court should summarily affirm the decision of the Commission or decline to accept this appeal.

WHEREFORE, Aquarion respectfully requests that this honorable Court:

A. Summarily affirm Commission Order No 26,263 rejecting the Complaint of the Town of Hampton;

or

B. Decline to accept this appeal; and

C. Grant such other and further relief as may be just and proper.

Respectfully submitted this 20th day of September, 2019.

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By its attorney:

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Certificate of Service

I hereby certify that on September 20, 2019, I served the foregoing Motion via e-service or via U.S. Mail* on the Parties and Counsel listed in the Petitioner's Appeal set forth below.

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