

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 13-041

LAKES REGION WATER COMPANY, INC.

Petition for Emergency Rates

Order Denying Motion for Rehearing

ORDER NO. 25,557

August 2, 2013

APPEARANCES: Upton & Hatfield, LLP, by Justin C. Richardson, Esq., for Lakes Region Water Company, Inc.; Office of the Consumer Advocate on behalf of residential ratepayers, by Rorie E.P. Hollenberg, Esq.; and Marcia A. Brown, Esq. for the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

Lakes Region Water Company, Inc. (Lakes Region or Company) filed a petition for emergency rates on February 4, 2013, asking the Commission to increase existing rates to cover 2012 income tax liabilities asserting that it had insufficient cash available. On February 5, 2013, the Office of the Consumer Advocate (OCA) filed its notice of participation pursuant to RSA 363:28, and Staff promptly requested discovery. The Commission issued an Order of Notice that directed Lakes Region to answer the discovery requests by February 22 and set a hearing date of March 6. The Commission held hearings on March 6 and 7, 2013, and the parties filed closing statements on April 29, 2013.

On June 4, 2013, the Commission issued Order No. 25,516 and denied Lakes Region's petition. After finding "Lakes Region should have sufficient cash to pay its 2012 federal and state income tax liabilities," the Commission concluded that "the evidence does not support a conclusion that the affairs of this Company are at such a crisis that 'immediate and substantial

disaster threatens unless prompt relief is given.”” Order No. 25,516 at 7, quoting *Petition of Public Service Co. of N.H.*, 97 N.H. 549, 551 (1951).

On July 5, 2013, Lakes Region timely filed a motion for rehearing pursuant to RSA 541:3 and Puc 203.33. On July 15, 2013, the OCA and Staff filed objections. On July 16, 2013, Lakes Region requested oral argument.

II. POSITIONS OF THE PARTIES AND STAFF

A. Lakes Region

Lakes Region gives four reasons supporting its motion for rehearing. First, Lakes Region claims the Commission wrongfully included \$52,202 of rate recoupment charges in calculating 2012 earnings and that this error violated its constitutional property rights. Second, Lakes Region claims the Commission “misread” the evidence when it calculated that Lakes Region had “net operating income for 2012 of \$211,781, even after tax liabilities are accounted for.” Order at 8. Third, Lakes Region claims the Commission was required to grant relief because it twice rejected Lakes Region’s requests for relief based on the same 2012 income taxes during a prior rate case, thus “prevent[ing] the Company from recovering any income tax expense,” and again alleging violation of its state and federal constitutional property rights. Finally, Lakes Region objects to the Commission’s comment faulting Lakes Region for amending prior tax returns which “substantially reduced the availability of net operating loss carry-forwards and Section 179 carry-forwards that could have shielded future income.” Order at 10. Lakes Region says tax laws required it to amend the prior returns.

B. OCA

OCA objects to Lakes Region’s motion because the “Commission has already considered and rejected the issues the Company raises in its Motion.” OCA also suggests the

Commission revisit its order authorizing Lakes Region to recover costs paid to its consultants as part of the most recent rate case, Order 25,454 (Jan. 17, 2013) in Docket No. DW 10-141, given Lakes Region's statement in this motion that its consultants provided poor services.

C. Staff

Staff objects to the motion for rehearing. As to Lakes Region's argument that the Commission should not have considered the \$52,202 in rate recoupment as 2012 earnings, Staff argues that: (1) Lakes Region itself included those earnings in its 2012 statements filed in this docket as well as in its 2012 income tax returns; (2) if the Commission were to eliminate the rate recoupment revenues from Lakes Region's 2012 earnings, that change would also necessitate a reduction in the 2012 taxes owed as a result of those revenues which is something Lakes Region did not calculate; (3) Lakes Region errs in its calculation of a revised rate of return resulting from the removal of these revenues because it fails to adjust for reductions in its income tax expense and inclusion of these income tax expense adjustments would demonstrate that Lakes Region still over-earned during 2012; (4) Lakes Region's proposed methodology of accounting for the rate recoupment revenues would be a violation of Commission Rules; and (5) Lakes Region failed to demonstrate the necessity of including income tax payments in rates in both the DW 10-141 rate case as well as the DW 13-041 emergency rate petition. Staff, therefore, argues there is no constitutional violation.

In response to Lakes Region's second argument that the Commission erred by treating increases in unpaid liabilities on its 2012 cash flow statement as cash available to pay taxes, Staff states that Lakes Region is confusing balance sheet and income statement concepts with cash flow statement concepts. Specifically, Staff argues: (1) as previously indicated, Lakes Region's proposed methodology of accounting for the rate recoupment revenues would be a

violation of Commission rules; (2) Lakes Region's implication that the Commission did not consider its obligation to pay interest on its outstanding debt is incorrect because its present approved rates include a cost of debt component; (3) Lakes Region's argument that the changes in asset and liability accounts reflected on the 2012 cash flow statement equate to a demonstration of additional cash on hand is erroneous and demonstrates Lakes Region's lack of understanding of Statement of Cash Flow concepts; and (4) Lakes Region's argument that the Commission ignored its capital investment and debt service obligations in its decision is false because statements actually contained in Order No. 25,516 demonstrate that the Commission was mindful of Lakes Region's obligations in this regard.

Staff also notes an apparent discrepancy in the 2012 Cash Flow Statement with regard to \$69,913 in payments that were originally indicated as being made to the shareholder during 2012 but which Lakes Region now states were not made to the shareholder. The Company, however, has failed to clarify to whom this expenditure was made and for what purpose.

Staff objects to Lakes Region's third argument that the Commission erred by failing to consider the Company's legal obligation to repay accounts payable incurred due to prior rate deficiencies. Staff argues that: (1) Lakes Region misunderstands the purpose of utility ratemaking in that rates are not designed to consider past accounts payables; and (2) Lakes Region misunderstands the purpose of emergency rates by failing to show that its financial affairs are at such a crisis point that immediate and substantial disaster threatens unless prompt relief is given. Staff argues that the Commission's rejection of the 2012 tax liability was not a violation of Lakes Region's constitutional rights.

Lastly, Staff objects to Lakes Region's argument that the Commission erred by concluding that Lakes Region "[s]ubstantially reduced the availability of net operating loss

carry-forwards and Section 179 carry-forwards that could have shielded future income.”

Motion at 13. Staff objects to the manner in which Lakes Region describes these events and argues that, in any event, the issue did not play a role in the Commission’s order.

III. COMMISSION ANALYSIS

A. Standard of Review.

Lakes Region must satisfy the “good reason” standard to prevail on its motion for rehearing. RSA 541:3. “Good reason” means the order was “unlawful or unreasonable,” which requires the movant to identify new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n.*, 117 N.H. 999, 1004 (1977), or to identify specific matters that were “overlooked or mistakenly conceived” by the Commission, *see Dumais v. State*, 118 N.H. 309, 311(1978) and RSA 541:4. “A successful motion for rehearing does not merely repeat prior arguments and request a different outcome.” *Public Service Co. of N.H.*, Order No. 25,168 (Nov. 12, 2010) at 10 (citations omitted).

Lakes Region’s petition for emergency rates is governed by RSA 378:9, which gives the Commission authority to grant a temporary rate increase outside the normal ratemaking process when “an emergency exists.” An “emergency exists” when a “the affairs of th[e] company are at such a crisis that immediate and substantial disaster threatens unless prompt relief is given.” *Petition of Public Service Co. of N.H.*, 97 N.H. 549, 551 (1951). The statute vests “wide discretionary powers” in the Commission when deciding “whether a crisis is of sufficient severity to warrant relief.” *Id.* at 550. We concluded that Lakes Region did not meet its burden of demonstrating such an emergency, and that there was no “threat of imminent and substantial disaster.” In its motion for rehearing Lakes Region fails to identify:

(1) new evidence that could not have been presented in the underlying proceeding,¹ or (2) specific matters that we “overlooked or mistakenly conceived” in denying relief.

B. The Commission properly included rate recoupment charges in Lakes Region’s 2012 earnings.

Lakes Region’s first argument is that we should not have included the \$52,202 in rate recoupment charges in figuring its 2012 earnings. Lakes Region claims this inclusion was incorrect because: (1) the recoupment charge reflected reimbursement for underpayment over prior years and should not be considered in this proceeding; (2) Lakes Region only began collecting the recoupment charge with its November 2012 bills and thus did not have the money available in 2012; (3) consideration of these earnings constituted “double counting;” and (4) the suggestion that Lakes Region should have paid its 2012 income taxes in part with this rate recoupment money was a “taking” in violation of the state and federal constitutions. Motion at 7-9.

Lakes Region made the first three arguments at the hearing on emergency rates and they were rejected based upon the evidence presented. Lakes Region does not explain how we “overlooked or mistakenly conceived” these arguments, nor does it point to any new evidence that could not have been presented before which sheds a different light on these arguments. Lakes Region simply disagrees with the order.

Lakes Region makes the constitutional argument for the first time in its motion for rehearing. RSA 541:3 limits a motion for rehearing to “to any matter determined in the action or proceeding, or covered or included in the order.” An alleged constitutional taking of Lakes

¹ Lakes Region President Thomas Mason submitted an affidavit in support of the motion for rehearing. The information provided was not in the record before the Commission and Lakes Region has not moved to reopen the record. The affidavit and attachments predict a possible tax liability in 2013 which is a new issue and thus not appropriate for consideration in a motion for rehearing. The affidavit otherwise repeats arguments made at the hearing in this matter and during the prior rate case.

Region's recoupment was not "determined in the ... proceeding," nor "included in the order." See *In re Alexander*, 163 N.H. 397, 406 (2012). Thus it is not a proper basis for requesting rehearing.

The constitutional claim would nonetheless fail on its merits. The U.S. Supreme Court defined the "constitutional limitations on rate regulation" in *Federal Power Comm'n. v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). "The opinion in *Hope* establishes a limited and simplified constitutional yardstick. Briefly, the constitution requires only that the regulatory body engage in a rational process of balancing consumer and investor interests to produce a rate that is just and reasonable." *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 274 (1988). The state and federal constitutions are not concerned with the nuts-and-bolts of a particular rate decision, such as consideration of recoupment charges in deciding an emergency rate request, but only with the end result. "Under *Hope*, the particular ratemaking methodology employed by the regulatory agency is, for the most part, constitutionally irrelevant. The only limitation on the methodology is that it produce neither confiscatory nor exploitative rates." *Id.* at 275. The end result in this case satisfies that constitutional standard.

C. The Commission properly determined Lakes Region's net operating income for 2012.

Although Lakes Region agrees that its records show a 2012 net operating income of about \$211,000, Motion for Rehearing at 1, Closing Memorandum at 16, Lakes Region nonetheless argues we erred in using that information as "a statement of the Company's ability to pay its 2012 (and 2013) tax obligations." Motion at 9. Lakes Region argues that, despite the \$211,000 in net operating income, it still did not have the cash to pay 2012 income taxes. In particular, Lakes Region claims that: (1) it was error to consider the \$52,202 rate recoupment money as 2012 earnings for the reasons stated above; (2) it was error not to

reduce that income figure by the amount of Lakes Region's interest payments on debt; (3) the \$211,000 figure included an increase in accounts payable and in accrued expenses but that was not "cash available to pay taxes;" and (4) it was error not to consider payments Lakes Region made for plant and equipment and principle payments on debt in determining the money Lakes Region had available to pay its tax bills. Motion at 9-12.

As discussed above, Lakes Region is repeating arguments it made at the hearing and does not satisfy the rehearing standard. Staff presented testimony that explained how Lakes Region earned its approved rate of return and received sufficient income to pay the 2012 taxes. The issue is Lakes Region's inability to manage cash flow, which, in this case, we found did not rise to an "emergency" as that term is defined under RSA 378:9.

Lakes Region interjects in its argument that payment of \$123,356 to its shareholder was not cash but instead comprised services and cash; with a cash value of \$53,443. We find this argument concerning. As noted by Staff, if Lakes Region's explanation is true, there was an unidentified withdrawal of \$69,913 in 2012.

D. The Commission properly denied an adjustment for an expected 2012 income tax liability in the context of this emergency rate proceeding.

Lakes Region complains we are "denying the Company its legal right to recover its income tax expense." Motion at 6. This is another argument repeated from the underlying hearing as well as from Docket No. 10-141 and thus fails to provide a basis for rehearing.

The argument also fails on its merits. In Docket No. DW 10-141, we approved new rates based on a 2009 test year and we excluded from the revenue requirement the 2012 income tax liability at issue here. *See*, Order No. 25,391 (July 13, 2012) and Order No. 25,408 (Sept. 6, 2012) (denying motion for rehearing). At that time, Lakes Region estimated its 2012 tax expenses to be \$68,732 and Staff expressed concern that the tax liability resulted

from a recent adjustment to past tax-year retained earnings which had not been approved by the Commission. We reminded Lakes Region, consistent with our longstanding practice, that “future tax liability, if supported by the evidence, should be recovered as part of a Commission-approved revenue requirement for a more current test year in a future rate case filing by Lakes Region.” Order No. 25,408 (Sept. 6, 2012) at 5. Instead, Lakes Region filed this request for emergency relief. The evidence at hearing and at the time of the emergency relief filing, however, failed to show that there was an emergency. For example, Lakes Region had sufficient 2012 net income to pay its expenses, it is now earning slightly above its authorized rate of return, it took no steps to obtain installment payments over time from the taxing authorities, and it made \$123,356 in non-mandatory payments to a shareholder. Although a new rate case based on a test year that would include tax liabilities from 2012, and perhaps 2013, would incur recoverable expenses and be time consuming, those factors do not excuse Lakes Region from proving that a true emergency exists under RSA 378:9. We did not deny Lakes Region’s right to recover tax expenses; we disagreed with Lakes Region’s claim of an emergency.

Our denial of emergency rate relief also does not amount to a wrongful “taking.” Applying the constitutional standards discussed above, our decision that the 2012 tax liability is not an emergency under RSA 378:9 gave rise to “neither confiscatory nor exploitative rates.” On the contrary, Lakes Region is currently authorized to earn a fair rate of return and in fact is *over-earning* to a small degree. Pursuant to *Bluefield Waterworks & Improvement Co. v. Public Serv. Comm’n. of W.Va.*, “[a] public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public....” *Bluefield Waterworks & Improvement Co. v. Public Serv. Comm’n. of W.Va.*, 262

U.S. 679, 692 (1923). Given that Lakes Region is over-earning, the Commission has permitted Lakes Region to earn a return on its investment. Its rates are neither confiscatory nor exploitative and thus there is no taking. As we reminded Lakes Region in Order No. 25,408, if it believes its revenue requirement is insufficient, it can seek recovery of expenses such as taxes through an appropriate future rate case pursuant to RSA 378:3.

E. The unavailability of certain loss carry-forwards does not warrant relief.

Lakes Region's last argument is to dispute our statement that, "Staff and the parties agree that by amending [several prior tax] returns Lakes Region substantially reduced the availability of net operating loss carry-forwards and Section 179 carry-forwards that could have shielded future income." Order at 10. Lakes Region says it had no choice but to amend the returns, whereas we wrote that, "[d]espite requests in discovery and at hearing, Lakes Region produced no definitive evidence that its decision to amend its federal tax returns was required by the Internal Revenue Code. Instead, Lakes Region produced general information ... that was not relevant to the decision to amend the tax returns." *Id.*

Lakes Region repeats this argument without providing new evidence or explaining further what we "overlooked or misconceived." Moreover, this dispute has no bearing on the pending motion. Our comment about the tax returns was one of several "concerns" we had with actions by Lakes Region, but was not a basis for denying emergency rate relief. Lakes Region even acknowledged that this issue is "immaterial." Motion at 14.

F. Financial Manager Responsibilities

In Order No. 25,391 in Docket No. DW 10-141, we authorized Lakes Region to hire a manager who would be responsible for: (1) Lakes Region's efforts in maintaining ongoing compliance with state and federal laws, including environmental and labor regulations; (2)

Lakes Region's internal efforts at financial restructuring, including the development of rate filings, as needed; (3) the day-to-day management of Lakes Region's finances, including payment arrangements with its creditors; and (4) the development of financial planning related to capital projects, including the Mt. Roberts proposal. Order at 25. We also stated that the Commission would "continue to monitor Lakes Region's ongoing financial and managerial challenges closely, and request that Lakes Region provide Staff with timely information regarding its financial condition and operational status." Order at 26. Although we established no deadline for a report on the listed responsibilities, we believe it is appropriate for Lakes Region's manager to provide the Commission with an update. To that end, we will order Lakes Region to provide the report updating the Commission on the listed responsibilities no later than close of business of September 13, 2013.

The report should also identify: (1) Lakes Region's plan for payment of its present and future taxes; (2) a proactive plan on what it will take to make Lakes Region bankable with access to capital; (3) whether Lakes Region plans to utilize State Revolving Fund(SRF) financing; (4) an explanation as to how the unidentified withdrawal of \$69,913, as now indicated by Lakes Region with regard to its 2012 Statement of Cash Flow, was used; and (5) Lakes Region's specific plan for operating its business under the traditional utility regulatory model.

Finally, we considered Lakes Region request for oral argument on its motion for rehearing. We will deny the request because we do not believe it would help us decide the issues.

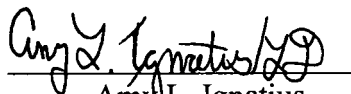
Based upon the foregoing, it is hereby

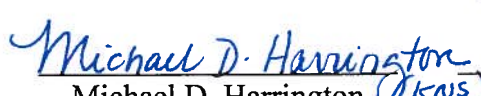
ORDERED, that Lakes Region's Motion for Oral Argument is DENIED; and it is


FURTHER ORDERED, that Lakes Region's Motion for Rehearing is DENIED; and it is

FURTHER ORDERED, that Lakes Region shall file a report no later than close of business September 13, 2013 updating the Commission on the following: (1) Lakes Region's efforts in maintaining ongoing compliance with state and federal laws, including environmental and labor regulations; (2) Lakes Region's internal efforts at financial restructuring, including the development of rate filings, as needed; (3) the day-to-day management of Lakes Region's finances, including payment arrangements with its creditors; (4) the development of financial planning related to capital projects, including the Mt. Roberts proposal; (5) Lakes Region's plan for payment of its present and future taxes; (6) a proactive plan on what it will take to make Lakes Region bankable with access to capital; (7) whether Lakes Region plans to utilize SRF funding; (8) an explanation as to how the unidentified withdrawal of \$69,913 was used; and (9) Lakes Region's specific plan for operating its business under the traditional utility regulatory model.


By order of the Public Utilities Commission of New Hampshire this second day of August, 2013.


Amy L. Ignatius
Chairman


Michael D. Harrington
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director

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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.