



Please respond to the Portsmouth office

May 2, 2018 NHPUC 3MAY'18AM10:48

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Re: Hampstead Area Water Company, et al., Joint Petition for a
Declaratory Ruling Docket No. 18 - 026

Dear Executive Director Howland:

Concord Office

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On April 25, 2018, the Office of Consumer Advocate filed a five-page, single spaced, letter clarifying its April 11, 2018 *Motion to Dismiss*. Lakes Region offers this response by letter to explain why the Commission should disregard the Consumer Advocate's proposed clarification of its motion.

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First, the Consumer Advocate's letter is not truly a clarification. It presents new arguments that, by rule, were required to be presented in the original motion. See Rule Puc 203.07 ("A motion shall clearly and concisely state: ... The facts and law which support the motion"). It contains an entire page citing "every example occurring over the past 15 years in which the Commission has granted declaratory relief on a fully litigated basis" that appear to be new argument, not raised in any objections. Lake Region disagrees with the Consumer Advocate's arguments. However, Rules Puc 203.07 & 203.10, Commission practice, and due process require a party to request leave to amend its motion in order to introduce new arguments subsequent to the deadline for objections.

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Allowing the Consumer Advocate to bypass this requirement forces Lakes Region and other small water companies to incur costs to response a second time to a motion that the Consumer Advocate now acknowledges "produces no satisfactory outcome." Page 5. Multiple pleadings delay proceedings before the Commission which Rule Puc 203.07 is intended to avoid. The Motion itself is a detour leading to a dead end. The clarification offers no solution except to require that cost of equity be determined in each individual rate case which neither small water utilities nor their customers can afford.

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Second, the Consumer Advocate makes allegations concerning Staff's "posture" during the technical conference after the parties returned to make settlement offers. The Consumer Advocate alleges on Page 5 that:

At the technical session that followed the recent prehearing conference, there seemed to be progress toward that end *but, inexplicably, Staff opted to shut down the discussion and insisted that the proceedings on the dismissal motion should simply move forward. The Commission ought to instruct its Staff to reconsider this posture because the dismissal motion produces no satisfactory outcome.* Either the Commission will grant the motion, in which case the issues raised by the petitioners remain unresolved, or the Commission will reject the motion, in which case the OCA will be compelled to seek rehearing as the first step toward interlocutory appellate proceedings. (emphasis added).

The Consumer Advocate's characterizations of Staff's position is erroneous, inappropriate and unhelpful. Staff undertook significant effort to bring the parties together in response to the Commission's suggestion that parties be flexible in order to find a way to reach the merits of the issues. As the Chairman stated during the prehearing conference:

CHAIRMAN HONIGBERG: Okay. Well, if that's the bottom line, then you'll have to -- we'll get there eventually. But I encourage you to have a nice conversation when we leave about what all of the problems are and what the possible solutions to those problems are.
[...]
And some flexibility on the part of those who are taking procedural positions. You know, let's be reasonable. If a different type of proceeding is required, let's see how much can be done with the filings as they are."

Transcript, April 13, 2018, Pages 49 – 50. To that end, Lakes Region, the other utilities and staff all made *bona fide* settlement offers in an effort to agree to a schedule and procedure. Those settlement offers occurred during the "technical sessions" portion of the pre-hearing conference as authorized by RSA 541-A:31, V (c)(1). Lakes Region does not agree that Staff "shut down the discussion" or engaged in any form of "posturing". The discussions were focused and lasted several hours. Staff proposed and discussed solutions even though, as the Commission is aware, Staff took no position on the Consumer Advocate's *Motion*. In the absence of an agreement by the interested parties on the *Motion* and a procedure, Staff reasonably concluded it was not reasonably possible to propose a schedule. The Consumer Advocate's suggestion that Staff is responsible for the failure of other interested parties to reach agreement is flawed. Staff's approval was not required to resolve the Consumer Advocate's *Motion to Dismiss*. Rightly or wrongly, an agreement was not reached. The blame for that, if it can be assigned at all, cannot be assigned to Staff.

Rule 203.20 provides that: “All participants in settlement conferences shall treat discussions at settlement conferences as confidential and shall not disclose the contents of such discussions to third parties or seek to introduce them into evidence.” The settlement offers made, and Staff’s responses to them, occurred at the Commission’s direction as part of the prehearing conference. It is entirely inappropriate to introduce such information into the record and request that the Commission “instruct its Staff to reconsider”. This rule is critical because, if the Commission allowed the Consumer Advocate to introduce settlement discussions into the record, parties would be unable to freely express their positions and concerns to resolve cases. Lakes Region therefore requests that the Commission disregard the Consumer Advocate’s clarification as required by Rule 203.20 and give it no weight.

Lastly, turning briefly to the merits, the Consumer Advocate acknowledges that a rulemaking proceeding is within the Commission’s authority. *Clarification*, Page 1 (“we do not contend that the Commission lacks authority to amend Part Puc 610 of the Commission’s rules ... Nor do we contend it would be impermissible for the Commission to reexamine the “generic return on equity” formula presently contained in Rule Puc 610.03.”). Lakes Region therefore considers this aspects of the Consumer Advocate’s *Motion to Dismiss* to be withdrawn.

Concerning declaratory rulings, the Consumer Advocate offers citations to ten dockets which it explains represent “every example occurring over the past 15 years in which the Commission has granted declaratory relief on a fully litigated basis”. This information is immaterial. What the Commission may or may not have done in prior proceedings has no bearing on what it is authorized to do in this case. *Appeal of Monsieur Henri Wines*, 128 N.H. 191, 194 (1986) quoting *In re Jack O’Lantern, Inc.*, 118 N.H. 445, 448 (1978) (“an agency may not add to, change, or modify statutory law ... through case-by-case adjudication.”). While prior decisions are not controlling, Lakes Region notes that the Office of the Consumer Advocate has requested broad, declaratory relief in other proceedings. For example, in Order No. 24,331 (2004) the Consumer Advocate sought a declaratory ruling requiring that a credit be applied to all utility customers. In Docket No. 18 – 001, the Consumer Advocate sought “a calculation of the change in tax liability the utility will experience as a result of the Tax Cuts and Jobs Act and come forward with a proposal for passing the relevant savings on to customers.”¹

RSA 541-A:1, V, authorizes the Commission to issue declaratory rulings as to the “specific applicability” of its governing statutes. The “specific applicability” means more than just a determination of whether a statute applies or does not apply. For example, in the case *In re Maxi Drug, Inc.*, 154 N.H. 651, 654 (2006), the Supreme Court reviewed a petition for a declaratory ruling that: “(1) DHHS’s recoupment procedure violated federal and state law; (2) the monies DHHS recovered were owed to the petitioners; and (3) DHHS would not institute any similar recovery procedures in the future.” The Supreme Court’s decision states that it

¹ The Consumer Advocate commenced Docket No. 18 – 001 as a complaint. However, complaints address only past events or charges. RSA 365:1 (“any thing or act claimed to have been done or to have been omitted”). The Commission recognized that its authority is much broader (Note 3) and it opened an investigation to determine “how the 2017 Tax Act ... will affect the expenses of each of the New Hampshire public utilities. If the changes in the tax laws will reduce the tax obligations and increase the net incomes..., it will then be necessary to determine how those reduced obligations should be reflected in rates.” Order No. 26,096, Page 2. For all legal purposes, this Commission exercised its broad authority to investigate utilities and issue declaratory orders.

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“ordered the commissioner to issue a declaratory ruling” on those questions. *Id.*, 154 N.H. at 655.

The joint petitioners, like those in *Maxi Drug*, seek a declaratory ruling on the “specific applicability” of statutory requirements to their unique circumstances. To construe the statute as the Consumer Advocate suggests would render declaratory rulings meaningless when the law requires that government be “accountable and responsive” (N.H. Const. Part I, Art. 8) and provide “a certain remedy, by having recourse to the laws ... completely, and without any denial; promptly, and without delay; conformably to the laws.” (N.H. Const. Pt. I, Art. 14). For these and other good reasons in the record, Lakes Region requests that the Commission give the Consumer Advocate’s clarification no weight and deny the *Motion to Dismiss* by secretarial letter. This will allow the parties to agree upon a procedural schedule in an appropriate proceeding.

If you have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Justin Richardson", with a long horizontal flourish extending to the right.

Justin C. Richardson

jrichardson@uptonhatfield.com

cc: Official service list in Docket No. 18 – 026