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NHPUC 16APR'19PM3:51

Ms. Debra A. Howland  
Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 S. Fruit Street, Suite 10  
Concord, New Hampshire 03301

**Re: Docket No. DW 19-065**  
**Complaint of the Town of Hampton against Aquarion Water Co. of New Hampshire**

Dear Director Howland:

On March 27, 2019, the Commission received a Complaint from the Town of Hampton (the "Town") against Aquarion Water Company of New Hampshire, Inc. ("Aquarion") concerning Aquarion's return on equity and snow removal from fire hydrants. That Complaint was docketed as Docket No. DW 19-065.

By Secretarial letter dated April 2, 2019, the Commission notified Aquarion that it was treating this matter as a formal complaint pursuant to RSA 365:1 and 365:2 and N.H. Code Admin Rules Puc 204. The Commission required that Aquarion respond to the Complaint on or before April 16, 2019. Pursuant to Puc 204.03(b), Aquarion hereby provides its response and advises the Commission and the Town that it disputes the Complaint.

RSA 365:1, "Complaint Against Public Utilities" reads:

Any person may make complaint to the commission by petition setting forth in writing 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.

RSA 365:1 forms the statutory basis for the Commission's complaint rules at Puc 204. Under RSA 365:1, a complaint must set forth "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." Nothing in the Town's Complaint sets forth any "thing" or "act" of Aquarion that violates "any provision of law," "its franchise," "or any order of the commission."

On that basis alone, the Complaint must be rejected. *See Public Service Co. of New Hampshire*, 86 N.H.P.U.C. 407, 414 (June 28, 2001). Nevertheless, Aquarion will respond and present other independent reasons why the Complaint must be rejected.

There are two unrelated issues set forth in the Complaint. The first issue is that Aquarion's recent returns exceed the allowed ROE of 9.6% that was established in its last rate case (Docket No. DW 12-085). The second issue is that Aquarion does not shovel the snow around fire hydrants in its service territory.

### **ISSUE NUMBER 1**

As noted, this issue in the Complaint states that Aquarion's recent returns exceed the allowed ROE of 9.6% that was established in its last rate case. The Town asks that the Commission order Aquarion to: A. "rebatе to its customers the earnings, with interest thereon, that Aquarion has received and retained from and including 2013, that exceed the rates of return on equity and allowed rate of return ordered by the Commission after the contested hearing in DW 12-085"; B. to award the Town attorney's fees and costs; and, C. for other just relief. The Town's requests are inconsistent with the law and this Commission's regulatory precedents.

First, it is important to note the Town does not allege Aquarion has violated the rates set forth in its approved Tariff. The rates being charged by Aquarion are indeed those reviewed and approved by the Commission as set forth in its Tariff.<sup>1</sup> In New Hampshire, the Supreme Court has ruled that a utility's Tariff has the force and effect of law:

The 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. They have the force and effect of law and bind both the utility and its customers.

*In re Verizon New England*, 163 N.H. 693, 695 (2010) (brackets, quotations and citations omitted). Therefore, the Town's request that the Commission ignore the Tariff and arbitrarily order changes in rates without notice or hearing cannot be granted.

The Town's Complaint and requested relief would require this Commission to engage in single-issue ratemaking as well as the establishment of retroactive rates - - both practices that this Commission has routinely rejected.

The Town, by addressing just one single part of Aquarion's overall rates (i.e., ROE) to the exclusion of other components of the ratemaking process (e.g., increases in rate base, increases in the cost of service, etc.) has asked the Commission to adjust Aquarion's rates

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<sup>1</sup> Further, the underlying base rates contained in Aquarion's Tariff are ones the Commission has found to be just and reasonable pursuant to RSA 378:7. *See* Order No. 25,539 (June 28, 2013) at 15. Likewise, the surcharge rates that Aquarion has implemented through its tariff have been found to be just and reasonable pursuant to RSA 378:7. *See* Order Nos. 25,751 (January 12, 2015) at 6; 25,857 (January 7, 2016) at 5; 25,977 (January 13, 2017) at 5; and 26,094 (December 29, 2017) at 5.

downwards by ordering rebates to customers. Such a request for single-issue ratemaking must be rejected.

The Commission has a longstanding policy against single-issue ratemaking. *See, e.g., PNE Energy Supply*, Order No. 25,603 in Docket No. DE 12-295 (2013) at 14 (“the Commission does not favor single issue ratemaking”); *Energy Efficiency Rate Mechanisms*, Order No. 24,934 in Docket No. DE 07-064 (2009) at 22 (“it would be appropriate to propose revenue decoupling in the context of a rate case in order to avoid single-issue ratemaking”); *Statewide Low-Income Electric Assistance Program*, Order No. 23,980 in Docket No. DE 02-034 (2002) (“single-issue ratemaking” is “a practice we have traditionally eschewed”). As the Commission stated in 2001, “[s]ingle-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. . . . Single-issue rate cases . . . 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.” *Connecticut Valley Electric Co.*, Order No. 23,887 in Docket No. 01-224, 86 NH PUC 947, 950-51 (2001).

Based upon the Commission’s extensive precedent, the Town’s request for single-issue ratemaking should be rejected.

Moreover, not only does the Town seek to adjust only a single portion of Aquarion’s rates, but it also asks that the requested adjustment be made retroactively to 2013. This request flies in the face of this Commission’s precedent and the state’s Constitutional prohibition on retrospective laws.

Essentially all of the law on the subject of retroactive making in New Hampshire comes from a 1980 decision of the New Hampshire Supreme Court in *Appeal of Pennichuck Water Works*, 120 N.H. 562, 419 A.2d 1080 (1980).

In *Pennichuck*, the utility, a water company, billed its customers quarterly. On December 29, 1978, Pennichuck filed new permanent rate schedules and asked that they become effective on all bills rendered on or after January 31, 1979. The Commission rejected Pennichuck’s request and set an effective date for temporary rates of April 30, 1979. Pennichuck appealed the Commission’s decision that temporary rates were to be effective only on bills rendered on or after April 30, 1979, rather than January 31, 1979. The Supreme Court concluded that the Commission could not lawfully have established temporary rates to be effective on all bills rendered on or after January 31, 1979, as requested by Pennichuck, as the earlier date would run afoul of the State Constitution’s prohibition on retrospective laws.

The Court began by noting that establishing utility rates by the Commission is a legislative function. Moreover, the vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the Commission, do not simply define the terms of the contractual

relationship between a utility and its customers, they have the force and effect of law and bind both the utility and its customers.

The Court noted:

As such, the customers of a utility have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change. Once customers consume a unit of those services, they are legally obligated to pay for it and in that sense the transaction has been completed and the charges are set in accordance with the rates then in effect and on file with the PUC or with rates later approved by the PUC based on a pending request for change. ***If the PUC were to allow a rate increase to take effect applicable to services rendered at any time prior to the date the petition for the rate increase was filed, it would be retroactively altering the law and the established contractual agreement between the parties. In essence, such action would be creating a new obligation in respect to a past transaction, in violation of part 1, article 23 of our State Constitution*** and, due to the retroactive application, would also raise serious questions under the Contract Clause of the Federal Constitution, U.S. CONST. art. I, 10, cl. 1; *see Geldhof v. Penwood Associates*, 119 N.H. 754, 755, 407 A.2d 822, 823 (1979). Moreover, "it is a basic legal principle that a rate is made to operate in the future and cannot be made to apply retroactively . . ." *Southwest Gas Corp. v. Pub. Serv. Comm'n.*, 86 Nev. 662, 669, 474 P.2d 379, 383 (1970).

*Pennichuck*, 120 N.H. at 565-66 (emphasis added).

Instead of filing a complaint against Aquarion pursuant to RSA 365:1, if the Town feels that Aquarion's rates are unjust or unreasonable, the proper course of action would have been to file a petition for a rate case pursuant to RSA 378:7. The Town was informed of that by the Commission prior to the filing of its Complaint during the December 3, 2018 Prehearing Conference in Docket No. DW 18-161 where the Chair noted: "He wants us to order you to come in for a rate case, if you don't do it voluntarily." Transcript at p. 30. The Chair continued, "I think it's perfectly appropriate for you to make your case to Staff and the Company that it's time now, that it's worth the expense of the rate case to do a lot of good things, to get all the work that they have done over the last five or six years into rate base..." *Id.* at 32.

However, as noted in the Complaint itself, the Town has already agreed to an "Aquarion Rate Case Filing in 2020." In the Complaint, the Town refers to a Settlement wherein the parties have agreed to the timing of Aquarion's next rate case. *See* Count II, paragraph 6 of the Complaint, where the Town states, "As part of the settlement in DW 18-161, Aquarion is to file a full rate case in 2020 ... ." The referenced Settlement was filed with the Commission in Docket Nos. DW 18-054 and DW 18-161 on April 15, 2019.

Thus, consistent with the Chair's advice during the Prehearing Conference of December 3<sup>rd</sup>, the Town, Aquarion, the Office of Consumer Advocate, and Commission Staff, as settling

parties, have consensually agreed upon the timing of Aquarion's next rate case, and the filing of a rate case petition by the Town now would be contrary to the referenced Settlement.

For these reasons, the first issue of the Complaint does not set forth a matter within the scope of RSA 365:1; it does not allege any violation by Aquarion of its franchise, its Tariff, or any Commission Order; it seeks a remedy that would require the institution of single-issue ratemaking; and seeks a retroactive payment going back six years in violation of the New Hampshire Constitution's prohibition on retrospective laws. Therefore, this first issue of the Complaint must be rejected.

## **ISSUE NUMBER 2**

The second issue is that Aquarion does not shovel the snow around fire hydrants in its service territory. The Town requests that the Commission: A. "Order Aquarion to perform clearing of snow from the fire hydrants that it owns in the Town of Hampton using Aquarion's own employees or Aquarion paid contractors"; B. "Order Aquarion to include the cost of such snow clearing in the cost of service study for the next rate case"; and, C. for other just relief. The Town's request is internally inconsistent, is not required by law or Commission decision, and is untimely – therefore it also must be rejected.

By its own request, the Town admits that the costs of clearing snow from fire hydrants located within the Town are not currently included in Aquarion's rates. Thus, the Town is asking the Commission to order Aquarion to perform an uncompensated service. Such an order requiring Aquarion to perform services without just compensation would lead to an unconstitutional taking of property. Hence, the Commission should reject the Town's request.

Aquarion's Tariff does not require it to perform the snow shoveling services demanded by the Town, nor is there any settlement or Commission order requiring such services. The Tariff at paragraph 35 requires this: "Public fire hydrants will be installed and maintained by the Company upon receipt by the Company of a written order from the properly authorized officers of the Town or Fire Precinct." The Tariff does not require Aquarion to shovel snow away from fire hydrants and such snow shoveling is not included in "maintenance."

The American Water Works Association's Manual of Water Supply Practices M 17, "Fire Hydrants: Installation, Field Testing, and Maintenance" does not include snow removal as a maintenance practice. Similarly, the Commission's Rules do not include snow removal as a fire hydrant maintenance responsibility - - Puc 606.03, "Fire Protection and Hydrants," at subparagraph (c) states: "Hydrants maintained by the utility shall be inspected and flushed at least once each year, and shall be checked for freezing as often as necessary to insure that they are functioning properly." There is no mention of shoveling snow.

Aquarion and the Town previously reached a detailed understanding concerning the tasks included in "maintenance" of fire hydrants. On March 23, 2007, this understanding was filed on behalf of Aquarion in Docket No. DW 05-119; a copy of that understanding was

attached to the Town's Petition to Intervene in Docket No. DW 17-114 as Exhibit C and is available from the Commission's Virtual File Room at

[http://www.puc.state.nh.us/Regulatory/Docketbk/2017/17-114/MOTIONS-OBJECTIONS/17-114 2017-08-14 HAMPTON ATT PETITION INTERVENE.PDF](http://www.puc.state.nh.us/Regulatory/Docketbk/2017/17-114/MOTIONS-OBJECTIONS/17-114%2017-08-14%20HAMPTON%20ATT%20PETITION%20INTERVENE.PDF) . A

detailed engineering assessment from consultant Tata & Howard reviewing Aquarion's hydrant maintenance plan was included in that filing. Nowhere in that seven-page review of hydrant maintenance activities is snow removal included as a maintenance activity.

Finally, as part of its Complaint regarding snow removal from hydrants, the Town refers again to the Settlement filed in Docket Nos. DW 18-054 and DW 18-161. *See* Paragraph 6 of Count II of the Complaint. In the referenced Settlement, the Town and other parties have agreed to the following regarding hydrant snow removal:

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. The Settling Parties agree that nothing in this Agreement prohibits Hampton from raising the issue in later proceedings, including but not limited to the Complaint already filed in DW 19-065.

Under this Settlement provision, the agreed-upon course of action is to deal with the snow removal issue as part of cost of service in the company's next rate case.

Thus, Issue #2 of the Complaint has not alleged any "violation of any provision of law, or of the terms and conditions of [Aquarion's] franchises or charter, or of any order of the commission," and therefore fails to allege any cognizable complaint under the statute or the Commission's rules. The Complaint must be rejected.

Per Puc 204.02(c), a copy of this response is being furnished to the complainant as well as the Commission and parties on the service list for this proceeding.

Please let me know if you have any questions.

Sincerely,

**AQAURION WATER COMPANY OF  
NEW HAMPSHIRE, INC.**

By its attorney:



Robert A. Bersak  
Chief Regulatory Counsel  
Eversource Energy Service Company

cc: Town of Hampton – Frederick W. Welch, Town Manager (via U.S. Mail)  
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