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April 25, 2018

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

Re: Docket No. DW 18-026
Hampstead Area Water Co. et al.
Joint Petition for Declaratory Ruling or Rulemaking
Motion to Dismiss

Dear Ms. Howland:

The Office of the Consumer Advocate (OCA) has had the opportunity to review the separate pleadings filed by each of the three petitioners in this docket in opposition to the OCA's pending motion to dismiss their joint petition without prejudice. In light of these pleadings, and in an effort to avoid the necessity of expensive and time-consuming proceedings on rehearing and interlocutory appeal, we are taking this opportunity to clarify our position.

I. Rulemaking

In seeking dismissal of the petition, we do not contend that the Commission lacks authority to amend Part Puc 610 of the Commission's rules, which are those specifically applicable to water utilities with fewer than 600 customers. Without taking a position on the merits of doing so, we do not argue it would be impermissible for the Commission to change the definition of "small water system," presently codified at Puc 602.15, so that all of the petitioners could take advantage of the expedited rate-setting process in Part Puc 610. 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.

Rather, it is our position that the Commission cannot use the rulemaking process to determine that in all cases water companies below a certain size are entitled to a specified return on equity (ROE) beyond that which would ordinarily be applicable. The question of whether such a premium is necessary in order for rates to be "just and reasonable" pursuant to RSA 378:7 can

only be resolved after an adjudicative hearing because the statute contains an explicit hearing requirement.

The Puc 610 rules as presently codified accommodate the RSA 378:7 hearing requirement in two ways. First, Puc 610.07 provides an informal mechanism the OCA or other parties can invoke to challenge the results of the expedited rate-setting process. Second, and most significantly, Puc 610.08 requires the Commission to resolve expedited rate proceeding for small water companies either by rejecting the request, instituting a full-blown rate case, or issuing an order *nisi* approving the results of the expedited rate-setting process. Puc 602.11 defines "order nisi" as "an order that will ripen or take effect at some set date in the future unless the order is rescinded by the commission before that date." The effect of such an order is to provide the OCA and other parties with an opportunity to demand the hearing reserved to them as of right by RSA 378:7.

These procedural protections, and any legislative approval of them that can be inferred from the Joint Legislative Committee on Administrative Rules (JLCAR) having allowed Part Puc 610 to go into effect, do not provide justification for carving out a specific aspect of rate-setting and placing it completely beyond challenge via hearing. Nevertheless, in its response to the dismissal motion, Abenaki Water Company makes precisely the opposite argument. *See* Abenaki Objection to OCA Motion to Dismiss at 3, ¶ 11 ("the legislature expressly authorized single-issue rate-related dockets for small water systems when it approved the Commission's PART Puc 610 rules" and the *nisi* requirement in Rule Puc 610.08 "further illustrates that the legislature authorized special treatment of small water systems"). In effect, Abenaki is claiming that the JLCAR managed to repeal by implication the hearing requirement enshrined in RSA 378:7, as applied to certain water companies. This is absurd.

As we noted in the dismissal motion, there is specific statutory authority for the Puc 610 rules to be found in RSA 365:8, II, which directs the Commission to promulgate rules containing "[s]tandards and procedures for streamlined review or other alternative processes to enhance the efficiency of the commission and respond to the needs of the utility's ratepayers and shareholders." An ROE premium for small water companies is not a standard or procedure for streamlined review within the meaning of RSA 365:8, II. It is a substantive outcome that *must* be preceded by a hearing pursuant to RSA 378:7.

In arguing to the contrary, Lakes Region Water Company draws the Commission's attention to certain language in the House bill that was enacted as Chapter 193 of the Laws of 1994 and ultimately codified in relevant part as RSA 365:8. The language in question states that the bill "[e]xpands the rulemaking authority of the public utilities commission, including giving the commission rulemaking authority relating to all utilities law under title 34." The Commission must bear in mind that this language is *not* part of the statute but is, rather, contained in the "analysis" portion of the bill appended to the measure by the Office of Legislative Services.

Only a few weeks ago, the New Hampshire Supreme Court reiterated the classic principles of statutory construction that preclude the Commission from giving effect to this bureaucratic gloss on the plain language of RSA 365:8. *See Langevin v. Travco Ins. Co.*, 2018 N.H. LEXIS 21 at *5-6 ("We interpret legislative intent from the statute as written and will not . . . add language

that the legislature did not see fit to include. . . . Absent an ambiguity, we will not look beyond the language *of the statute* to discern legislative intent") (emphasis added, citations omitted). The notion that by enacting RSA 365:8, a specific and detailed list of rules for the Commission to adopt, the Legislature intended to provide the agency with sweeping authority to promulgate rules about anything within its jurisdiction, cannot be squared with the applicable canons of statutory interpretation nor with the principle, discussed in the OCA's dismissal motion, that an agency may only promulgate rules when specifically authorized to do so.

II. Declaratory Order

Although the OCA believes that a rulemaking may be an appropriate forum to address the concerns reflected in the petition, we remain emphatically of the view that this is not an occasion for the issuance of a declaratory ruling. As noted by Lakes Region Water Company, the Administrative Procedure Act defines "declaratory ruling" as "an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency." RSA 541-A:1, V.

Thus it was appropriate for the Commission to issue a declaratory ruling about whether a utility converting from propane to compressed natural gas requires additional franchise authority pursuant to RSA 374:22, *see Liberty Utilities*, Order No. 26,087 in Docket No. DG 17-068 (2017); about whether a solar developer is a public utility as defined in RSA 362:2, *see Vivint Solar, Inc.*, Order No. 25,859 in Docket No. DE 15-303 (2016); about whether, given a particular set of factual circumstances, a company was required to register as a competitive electric supplier pursuant to the Puc 2000 rules, *see Freedom Logistics, LLC*, Order No. 25,775 in Docket No. DE 14-305 (2015); about whether a particular company remained a duly registered electric power aggregator within the meaning of the Puc 2000 rules, *see Resident Power Natural Gas and Electric Solutions*, Order No. 25,467 in Docket No. DE 13-057 (2013); about the meaning of certain terms of a wholesale power purchase contract previously approved by the Commission under the federal Public Utility Regulatory Policies Act of 1978, *see Public Service Co. of N.H.*, Order No. 25,184 in Docket No. DE 09-174 (2010) and *Alden T. Greenwood d/b/a Alden Engineering Co.*, Order No. 24,638 in Docket No. DE 05-150 (2006); about whether an incumbent local exchange carrier was required to provision certain network elements to competitive carriers on an unbundled basis pursuant to the federal Telecommunications Act, *see Boardview Networks, Inc.*, Order No. 24,564 in Docket No. DT 05-041 (2005); about whether plans to interconnect a biomass power producer with an adjacent and affiliated lumber mill triggered public utility regulation pursuant to RSA 362, *see Hemphill Power & Light Co.*, Order No. 24,352 in Docket No. DE 04-113 (2004); about whether Florida Power & Light would become a public utility within the meaning of RSA 362:2 by acquiring the transmission substation adjacent to the Seabrook nuclear power plant, *see Florida Power & Light Co.*, Order No. 24,258 in Docket No. DE 03-186 (2003); and about whether a developer of a subdivision would become a public utility pursuant to RSA 362:2 by supplying electricity to occupants of the subdivision, *see 5 Way Realty Trust*, Order No. 24,137 in Docket No. DE 01-088 (2003); to cite every example occurring over the past 15 years in which the Commission has granted declaratory relief on a fully litigated basis.

In each of these cases, the petitioner had a legitimate need to resolve uncertainty about the applicability of preexisting legal requirements to a particular factual situation – the classic

declaratory judgment scenario. These petitioners, in contrast, are asking the Commission to resolve what is essentially a mixed question of fact and law: whether the statutory requirement for just and reasonable rates warrants the adoption of an ROE premium for water companies below a certain size and, if so, what that premium should be. To issue a declaratory judgment in these circumstances would be an improper attempt to squeeze a square factfinding peg through the round hole of RSA 541-A:1, V.

III. Due Process and Fundamental Fairness

The pleadings submitted in opposition to the OCA's dismissal motion are consistent with the overall theme of this docket to date: a perpetually moving target. The initial petition sought to muddle two questions that should not be conflated: the question of whether more water companies should be eligible to take advantage of the expedited rate-setting processes authorized by the Puc 610 rules, and the question of whether small water companies are inherently riskier from an investor perspective so as to warrant an ROE premium. Now, presumably because it is convenient, the petitioners have abandoned their unified front; each has retained separate counsel to advance separate, somewhat inconsistent, and, in at least one instance, internally contradictory arguments for why dismissal is inappropriate.

Lakes Region Water Company desires "clarity, if not a rule," and continues to press for both a declaratory proceeding and a rulemaking. Lakes Region Objection to Motion to Dismiss at 5 ¶ 15. Hampstead seeks a "generic investigatory docket." Hampstead Area Water Company, Inc.'s Objection to Motion to Dismiss at 1, ¶ 2. Abenaki, acknowledging the pendency of a rate case in connection with its Rosebrook system (Docket No. DE 17-165), wants this docket to proceed because it "needs certain information for its rate case" but also contends that "rulemaking may also be useful." Abenaki Water Company Objection to OCA Motion to Dismiss at 2 ¶ 9. Five paragraphs later, Abenaki seems to take a contradictory position. *See id.* at 4 ¶ 14 ("The OCA suggests the appropriate forum for Abenaki and its joint petitioner's request is in rulemaking. Abenaki does not agree that this is an absolute outcome because there are problems with deciding the return in only a rulemaking.").

This proceeding in its present posture is manifestly unfair to the residential customers of these utilities. Two of the companies – Hampstead and Abenaki – have pending rate cases but in each instance the utility is seeking to extract the ROE issue from those proceedings for resolution here, while at the same time explicitly claiming they are not attempting to cause the Commission to experiment with single-issue ratemaking. The third company – Lakes Region – contends it is simply seeking a determination as to the specific applicability of RSA 378:27 (the statute governing *temporary* rates in a pending rate case) to "very small water systems." Lakes Region Objection at 4, ¶¶ 7 and 9.

Lakes Region contends that in requesting dismissal of the joint petition, the OCA "is seeking to protect residential customers by any means necessary." *Id.* at 2 ¶ 5. This is an incorrect and unfair suggestion. The OCA acknowledges that it is bad for both customers and shareholders when a utility of any size is unable to attract the capital its needs to provide service. The OCA likewise acknowledges that it may be impractical for these companies to rely on ROE experts in rate cases, in the same manner of much bigger utilities, particularly given that rate case expenses

are ultimately recovered from customers. The OCA does not oppose a generic investigation into the substantive issues implicated by the petition.

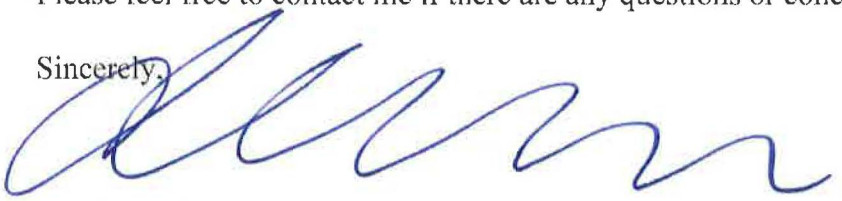
However, the Commission is not at liberty to use the its statutory authority to conduct investigations and supervise utilities as a means to avoid its statutory obligation to conduct hearings before setting rates and/or to skirt the formalities required by the Administrative Procedure Act before adopting requirements that will apply to future rate proceedings. Nor can the Commission cure the difficulties Hampstead and Abenaki brought upon themselves by hiring an ROE expert but failing to introduce her testimony in their pending rate cases.

IV. Conclusion

The OCA stands prepared to work with the other parties, and Commission Staff, in an effort to provide the petitioners with a forum for addressing their issues without sacrificing the statutorily and constitutionally protected interests of their customers. 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.

Please feel free to contact me if there are any questions or concerns about the foregoing.

Sincerely,



D. Maurice Kreis
Consumer Advocate

cc: Service List