

**STATE OF NEW HAMPSHIRE
SUPREME COURT**

Case No: _____

LAKES REGION WATER CO., INC.

RULE 10 NOTICE OF APPEAL FROM THE PUBLIC UTILITIES COMMISSION

June 26, 2020

Justin C. Richardson
NHBA #12148
586 Woodbury Avenue
Portsmouth, NH 03801
justin@nhwaterlaw.com

TABLE OF CONTENTS TO NOTICE OF APPEAL

LAKES REGION WATER CO., INC.

Case No: _____

| | | |
|-----|--|----|
| 1. | Parties and Counsel..... | 1 |
| 2. | Orders Appealed from and Motion for Rehearing..... | 1 |
| 3. | Questions Presented for Review | 2 |
| 4. | Statutes Involved in the Appeal | 2 |
| 5. | Other Documents Involved in the Appeal | 3 |
| 6. | Statement of the Case..... | 3 |
| 7. | Jurisdictional Basis for the Appeal | 5 |
| 8. | Statement of the Reasons for Acceptance of Appeal | 5 |
| 9. | Preservations of Issues | 6 |
| 10. | Certificate of Service | 7 |
| 11. | Order No. 26,340 Directing Lakes Region Water Co., Inc., to Record Corporate Liabilities..... | 8 |
| 12. | Motion for Rehearing of Order No. 26,340 | 17 |
| 13. | Order No. 26,360 Denying Motion for Rehearing | 27 |
| 14. | Order No. 26,096 Investigation to Determine Rate Effects of Federal and State Corporate Tax Reductions | 33 |

STATE OF NEW HAMPSHIRE

SUPREME COURT

Appeal of the Lakes Region Water Co., Inc.

RSA 541 (Rule 10)

A. Parties and Counsel

- | | | |
|----|----------------------------------|---|
| 1. | Party Seeking Review | <u>Counsel</u> |
| | Lakes Region Water Co., Inc. | Justin C. Richardson, Esq. NH Water Law 586 Woodbury Avenue Portsmouth, NH 03801 (603) 591 – 1241 justin@nhwaterlaw.com |
| 2. | All other Parties | |
| | N.H. Public Utilities Commission | Christopher Tuomala, Esq. 21 S. Fruit St., Suite 10 Concord, N.H. 03301-2429 christopher.tuomala@puc.nh.gov |
| | Consumer Advocate | D. Maurice Kreis, Esq. Office of Consumer Advocate 21 South Fruit St Ste 18 Concord NH 03301 donald.kreis@oca.nh.gov |

B. Orders Appealed from and Motion for Rehearing.

1. *Order No. 26,340 Directing Lakes Region Water Company, Inc., to Record Corporate Liabilities* (NOA Page 8).
2. *Motion for Rehearing of Order No. 26,340* (NOA Page 17).
3. *Order No. 26,360 Denying Motion for Rehearing* (NOA Page 27).

C. Questions Presented for Review.

1. Whether the Public Utilities Commission (“Commission”) violated RSA 378:7 by ordering Lakes Region Water Co., Inc. (“Lakes Region”) to record “tax savings deferred liabilities in the amount of \$42,707 annually”¹ and a “\$141,995 excess deferred income tax reserve regulatory liability”² to be credited to customers, and, thereby adjusting rates, when by law rates and orders approving rates may be adjusted only “after a hearing” in cases where “the rates, fares or charges ... are unjust or unreasonable”. RSA 378:7; RSA 365:28.
2. Whether the retroactive credit to customers ordered by the Commission is an unlawful and unreasonable “single issue rate making”.
3. Whether the Commission unreasonably and unlawfully determined that Lakes Region failed to appeal Order No. 26,096 when that order merely “opened an investigation” and the Commission provided no notice it had issued a final order subject to appeal and provided no opportunity to be heard prior to the order becoming final.

D. Provisions of the Constitution, Statutes, Ordinances, Rules or Regulations Involved in the Appeal.

378:7 Fixing of Rates by Commission. – Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges chargeable by any such public utility are insufficient, the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. The commission shall be under no obligation to investigate any rate matter which it has investigated within a period of 2 years, but may do so within said period at its discretion.

Source. 1913, 145:10. PL 242:7. RL 292:7. 1951, 203:46 par. 7, eff. Sept. 1, 1951.

¹ Order No. 26,340, Page 8.

² Order No. 26,340, Page 8.

365:28 Altering Orders. – At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it. This hearing shall not be required when any prior order made by the commission was made under a provision of law that did not require a hearing and a hearing was, in fact, not held.

Source. 1915, 99:4. PL 238:26. RL 287:27. 1951, 203:11 par. 28. 2001, 237:5, eff. July 1, 2001.

374:8 Accounting Systems. –

I. The commission may, whenever it deems it advisable, establish a system of accounts and records to be used by public utilities for their business within this state, may classify them and prescribe a system of accounts for each class, and may prescribe the manner in which said accounts shall be kept.

II. The uniform system of accounts for regulated utilities established under the provisions of this section shall be exempt from the requirements of RSA 541-A, the administrative procedure act. The commission shall file, however, in the office of legislative services a copy of all rules adopted, amended or repealed under this section by the commission.

Source. 1911, 164:6. PL 240:7. RL 289:7. 1951, 203:27. RSA 374:8. 1994, 193:3, eff. July 23, 1994.

E. Other Documents Involved in the Appeal.

1. The certified administrative record, to be provided as specified by Rule 10.
2. Order No. 26,096, *Investigation to Determine Rate Effects of Federal and State Corporate Tax Reductions* (attached hereto at Page 33).

F. Statement of the Case.

On January 3, 2018, the Commission issued Order No. 26,096, *Investigation to Determine Rate Effects of Federal and State Corporate Tax Reductions*, in Docket IR – 18 – 001, in response to the enactment of the “Tax Cuts and Jobs Act” (TCJA) which reduced the federal corporate income tax rate for most utilities from 35 percent to 21 percent.³ Order No. 26,096 directed that all utilities submit proposals for review and that it would open “a separate docket for each of the filings received and *will consider appropriate rate impacts in those company-specific dockets.*” Page 3 (emphasis added).⁴ The Commission never held a hearing nor provided an opportunity to be heard concerning its order opening an investigation.

On October 5, 2018, Lakes Region provided its calculation of the impact of the tax reductions in Docket DW 18 – 056 as directed by the Commission. Lakes Region

³ NOA Page 33.

⁴ NOA Page 35.

calculated that the tax changes resulted in “an overall revenue requirement reduction of \$28,835” and an “overall revenue requirement reduction of \$4,393” for its Step 1 rate increase. However, Lakes Region’s cautioned that: “since the end of the adjusted test year (2014) [used to calculate its rates], the Company has increased its plant in service, has altered its capital structures and increased its operating and maintenances expenses.”

On July 29, 2019, the Commission staff submitted a report prepared by its consultant and a recommendation to the Commission. Staff recommended that: (1) “the Commission direct LRWC to record an annual regulatory liability of \$42,107 to track tax savings realized through the effective date of the Company's next approved base rates in a general rate proceeding”; and (2) “the Commission direct LRWC to record a separate regulatory liability for EDIT⁵ in the amount of \$141,995”. Staff proposed that the mechanism to amortize or refund these credits to customers be determined in Lakes Region’s next rate case.

On August 9, 2019, Lakes Region requested that the Commission reject Staff’s recommendation stating that:

- Staff’s recommendation retroactively and unlawfully adjusts a single component of rates in violation the Settlement Agreement by the Commission in Docket No. DW 15 - 209. The Settlement Agreement [approving its rates] does not allow for single component adjustments. Under the terms of the Settlement Agreement, an exogenous event, if one were to occur, requires a new rate proceeding.
- Lakes Region's rates are just and reasonable. There is no evidence to suggest that it earned more than its allowed return at any time.
- RSA 378:7 prohibits adjustments to rates, absent a hearing and a finding that existing rates are unjust and unreasonable. In this case, the reductions in marginal tax rates were offset by other increases. The tax changes allowed Lakes Region to defer seeking a rate increase based on a 2018 test year, which resulting in savings to customers. The Commission cannot adjust rates outside of the statutory process, particularly when there is no evidence that existing rates were unjust or unreasonable at any time.
- Staff’s proposed retroactive adjustment to rates (or an adjustment its accounts for the same purpose) would result in single issue rate making and a regulatory taking of Lakes Region's investment in its plant and property dedicated to serving the public.

⁵ Excess Deferred Income Taxes.

On March 26, 2020, the Commission issued Order No. 26,340 adopting Staff's recommendation.⁶ On April 27, 2020, Lakes Region moved for rehearing.⁷ On May 27, 2020, the Commission issued Order No. 26,360 denying rehearing.⁸ This appeal follows.

G. Jurisdictional Basis for the Appeal.

RSA 365:21; RSA 541:6.

H. Statement of the reasons why a substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.

1. Irreparable Injury.

Lakes Region will suffer irreparable injury due to the Commission's Order No. 26,340 which ordered Lakes Region to record substantial liabilities or credits to its customers without a hearing and without a finding that Lakes Region's rates were "unjust or unreasonable." By way of example, Lakes Region's net operating income in 2018 was \$259,801 which resulted in it earning an actual rate of return of 7.07%, which is less than its 7.49% allowed rate of return approved by the Commission in its last rate case.

In Order No. 26,340, the Commission ordered Lakes Region to record a liability to be credited to its customers annually in the amount of \$42,107 per year. However, this liability is both retroactive to January 1, 2018 and prospective, meaning that the total refund order to customers will be substantial: \$126,321 as of 12/31/2020. In addition, the Commission ordered Lakes Region to record an Excess Deferred Income Tax (EDIT) liability in the amount of \$141,995. This represents a reduction in Lakes Region's rate base on which it is entitled to earn its allowed rate of return. Order No. 26,340 directed that the EDIT be amortized as adjustment in Lakes Region's next general rate case.

The fact that the Commission has not yet ordered the refund to be paid to customers is immaterial. The Commission ordered both a credit to Lakes Region's customers (\$126,321 as of 12/31/2020) and a reduction to Lakes Region's rate base (\$141,995) without a hearing and without considering whether or not its rates were unjust or unreasonable. The only remaining step appears to be for the Commission to determine over what period customers will be credited. If the requirement to hold a hearing before adjusting rates (RSA 378:7) or modifying rate orders (RSA 365:28) is to have any meaning, the Commission's order must be overturned.

⁶ NOA Page 8.

⁷ NOA Page 17.

⁸ NOA Page 27.

2. Issues of General Importance in the Administration of Justice.

New Hampshire law is clear that before a trial court can render a final decision on the merits, it must provide notice and an opportunity to be heard. *See e.g. New Hampshire Dept. of Environmental Services v. Mottolo*, 155 N.H. 57 (2007) (“having received no notice that the court would consolidate the merits hearing with the temporary hearing, the defendant was effectively denied a full opportunity to develop his evidence and arguments against declaratory relief.”). New Hampshire law is also clear that only final orders of the Commission are subject to rehearing and appeal under RSA 541. *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. 267 (2013) (“We find nothing in the statutory scheme that supports the petitioners' contention that FairPoint was required to move for rehearing of every PUC order that gave rise to the arguments it has raised on appeal.”); *Appeal of Courville*, 139 N.H. 119, (1994) (“final decision that began the statutory appeal period.”).

In this case, the Commission’s Order No. 26,096 opening an investigation directed each utility to “file a proposal with the Commission ... to address the effects of the changes in tax laws”⁹ and stated that it would “open a separate docket for each of the filings received and *will consider appropriate rate impacts in those company-specific dockets.*”¹⁰ The Commission provided no notice nor reason to believe it had made a final determination subject to the requirements for rehearing and appeal under RSA 541. It afforded no opportunity for a hearing. Instead, it directed that “appropriate rate impacts” would be considered in subsequent proceedings. However, in Lakes Region’s case, the Commission changed its mind and refused to consider the appropriate rate impacts, claiming that its first order had become final and was not appealed. Intentionally or not, the result was a bait-and-switch.

This appeal therefore presents an important opportunity to make clear that an agency must provide notice of its intent to render a final decision on the merits. An agency cannot treat preliminary orders opening investigations as final orders, without providing some notice, as explained in *New Hampshire Dept. of Environmental Services v. Mottolo*, 155 N.H. 57 (2007).

I. Preservation of Issues.

Counsel for the Company certifies that every issue raised in this Appeal has been presented to the Commission and has been properly presented for appellate review by a contemporaneous objection or where appropriate, by a properly filed pleading.

⁹ NOA Page 34.

¹⁰ NOA Page 35 (emphasis added).

Respectfully submitted,

**LAKES REGION WATER
COMPANY, INC.**

By its Counsel,

NH WATER LAW



Justin C. Richardson
NHBA #12148
586 Woodbury Ave
Portsmouth, NH 03801
(603) 591-1241
justin@nhwaterlaw.com

Dated: June 26, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to all parties below, the Commission, as well as the NH Attorney General's Office as required by Rule 10 (7).



Justin C. Richardson