

STATE OF NEW HAMPSHIRE

SUPREME COURT

**Town of Hampton's Rule 10 Appeal
from Decisions of the Public Utilities Commission**

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STATE OF NEW HAMPSHIRE

SUPREME COURT

Appeal of the Town of Hampton

RSA 541 (Rule 10)

A. Parties and Counsel

1. Party Seeking Review

Town of Hampton

Counsel

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2. All other Parties

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B. Orders Appealed From and Motion for Rehearing.

1. *Order No. 26,263 Dismissing Hampton's Complaint.*¹
2. *Hampton's Motion for Rehearing Pursuant to N.H. RSA 541:3.*²
3. *Aquarion's Objection to the Town of Hampton's Motion for Rehearing.*³
4. *Office of Consumer Advocate's letter joining in Aquarion's Objection to Hampton's Motion for Rehearing.*⁴
5. *Order No. 26,287 Denying Motion for Rehearing.*⁵

C. Questions Presented for Review.

1. Whether the Public Utilities Commission ("Commission") erred by dismissing the Town of Hampton's Complaint without a hearing or investigation when the Complaint alleged a "reasonable basis" under RSA 365:4 that Aquarion Water Company of New Hampshire's ("Aquarion") rates were excessive based on: (a) its Annual Reports which showed that its earnings exceeded those allowed by order of the Commission; and (b) the Staff Audit Report which confirmed that: "[t]he Company appears to have been overearning, based on the Rate of Return calculations ... since 2013."
2. Whether the Commission erred by dismissing the Town statutory complaint that the rates charged to customers resulted in earnings that exceeded those allowed by order of the Commission, contrary to

¹ Appendix, Page 36.

² Appendix, Page 42.

³ Appendix, Page 49.

⁴ Appendix, Page 52.

⁵ Appendix, Page 53.

RSA 365:1 & 29 and RSA 378:7, based on a "single-issue" rate doctrine (not codified in any rule or statute).

3. Whether the Commission erred by dismissing the Town of Hampton's Complaint without a hearing or investigation when the Complaint alleged that Aquarion charges the Town over half a million dollars per year for Public Fire Protection Service but unreasonably refuses to clear snow from its hydrants, thereby requiring the Town's taxpayers located outside of Aquarion's franchise to subsidize the cost of fire protection service they do not receive.

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

1. **RSA 365:1 Complaint Against Public Utilities.** – 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.
2. **RSA 365:4 Investigation.** – If the charges are not satisfied as provided in RSA 365:3, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate the same in such manner and by such means as it shall deem proper, and, after notice and hearing, take such action within its powers as the facts justify.
3. **RSA 365:29 Orders for Reparation.** – On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.
4. **RSA 374:1 Service.** – Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.

5. **RSA 374:2 Charges.** – All charges made or demanded by any public utility for any service rendered by it or to be rendered in connection therewith, shall be just and reasonable and not more than is allowed by law or by order of the public utilities commission. Every charge that is unjust or unreasonable, or in excess of that allowed by law or by order of the commission, is prohibited.

6. **RSA 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.

E. Other Documents Involved in the Appeal.

The relevant portions of the administrative record and Aquarion Water Company of New Hampshire's Annual Report to the Public Utilities Commission for the Year Ending December 31, 2018, (see in particular Appendix, pages 135 and 136) are included in the Appendix to this Notice of Appeal.

Orders and other years of Annual Reports by Aquarion referenced in the proceeding are available on the web site of the Commission.

F. Statement of the Case.

On March 27, 2019, the Town of Hampton filed its Complaint with the Commission.⁶ The Complaint included two counts. Count I alleged that Aquarion's actual earnings exceeded the rates of return allowed by the Commission in Order No. 25,539 which authorized the Company to earn a

⁶ Appendix, Page 3.

rate of return on equity (ROE) of 9.6% and an overall rate of return of 7.49%.⁷

Count II alleged that the Town has “approximately 268 Aquarion owned fire hydrants and pays Aquarion over half a million dollars per year for the availability of the water these hydrants are to provide in the event of a fire”.⁸ However, “Aquarion neglects and refuses to shovel snow from its private hydrants to keep them clear, despite the Town of Hampton's having complained to Aquarion about its reliance upon highly trained and compensated Hampton firefighters to do this hard labor function, for which Aquarion pays nothing to the Town.”⁹ The Town requested that the Commission “[o]rder Aquarion to perform clearing of snow from the fire hydrants that it owns in the Town of Hampton”.¹⁰

On April 2, 2019, the Commission’s Executive Director requested that Aquarion respond to the Town’s Complaint on or before April 16, 2019. On April 8, 2019, the Office of Consumer Advocate filed a notice of intent to participate on behalf of residential ratepayers.¹¹

On April 16, 2019, Aquarion filed a response to the Town’s Complaint.¹² On May 16, 2019, the Town responded.¹³ On May 17, 2019, the Office of Consumer Advocate filed an opposition to oppose the Town’s Complaint but requested that “the Commission exercise its authority under RSA 378:7 to commence a general rate proceeding immediately to address the over-earning situation described in the memorandum from Chief Auditor Moran appended to the Hampton complaint. *The statute requires the Commission to take such action “[w]henver” rates are unjust and unreasonable, and over-earning is the quintessence of rates that are unjust and unreasonable because they are excessive.*”¹⁴ On May 21, 2019, Aquarion filed a response to the Office of Consumer Advocate’s response.¹⁵

On June 24, 2019, the Commission issued Order No. 26.263, *Order Dismissing Complaint*, stating:

⁷ Appendix, Page 4; Complaint, Page 1, Para 1.

⁸ Appendix, Page 7; Complaint, Page 4, Para. 3.

⁹ Appendix, Page 7; Complaint, Page 4, Para. 4.

¹⁰ Appendix, Page 8; Complaint, Page 5, Para. A.

¹¹ Appendix, Page 12.

¹² Appendix, Page 13.

¹³ Appendix, Page 20.

¹⁴ Appendix, Page 25; OCA Response, Page 2 (emphasis added).

¹⁵ Appendix, Page 13-15; Aquarion Response to OCA, Pages 1 to 3.

“We find that there is no basis for Hampton’s complaint. Even when the complaint is viewed in the light most favorable to Hampton, the Town has not demonstrated a violation of law, the terms and conditions of Aquarion’s franchise or charter, or a Commission order. See RSA 365:1. Although the Commission approved an ROE in Aquarion’s last rate case, that ROE was only an input into the Commission’s calculation of the rates the Commission set for the Company. Examining the individual issue of ROE outside the context of setting appropriate rates leads to single-issue ratemaking, which the Commission “does not favor.” PNE Energy Supply, LLC D/B/A Power New England, Order No. 25.603 at 14 (December 13, 2013). The record is devoid of evidence, furthermore, that Aquarion violated its tariff or charged illegal rates.”¹⁶

“The Commission has stated that in the context of underearning, “an authorized rate of return ... is not a guarantee of those earnings,” and has prohibited utilities from setting higher temporary rates on that basis. Hampstead Area Water Company, Inc., Order No. 20,311 at 3 (November 22, 1991). The preferred mechanism to address the issue of overearning or underearning by a utility is a full rate proceeding, which we note is set for 2020, pursuant to Order No. 26,245. With regard to the fire hydrants, the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear them of snow.”¹⁷

“Accordingly, we find that reasonable grounds do not exist to warrant a further investigation pursuant to RSA 365:4 and dismiss the complaint. As an investigation is not warranted at this time, neither the OCA’s request for a full rate case nor North Hampton’s joinder in Hampton’s complaint and motion for intervention need to be addressed as they are moot.”¹⁸

On July 23, 2019 the Town filed a *Motion for Rehearing Pursuant to N.H. RSA 541:3*.¹⁹ In its *Motion*, the Town explained that the Commission erred in dismissing Count I because Aquarion’s rates resulted in earnings that exceeded those allowed by prior orders of the Commission,²⁰ that “the

¹⁶ Appendix, Page 40; Order No. 26.263, Page 5.

¹⁷ Appendix, Page 40; Order No. 26.263, Page 5.

¹⁸ Appendix, Page 40-41; Order No. 26.263, Pages 5 – 6.

¹⁹ Appendix, Pages 42-48; Motion for Rehearing, Pages 1 – 7.

²⁰ Appendix, Page 42; Motion for Rehearing, Paras 2 – 10.

Commission's ordered rate of return of 9.6% in Order No. 25,539, and its overall rate of return of 7.49% as derived therefrom have been violated by Aquarion";²¹ and that the "rates of return achieved by Aquarion [were] "extortionate charges to customers" in the words of the Commission's Order No. 25,539 at page 19."²² The Town's *Motion* explained that, by dismissing its Complaint, the Commission's Order "unreasonably and unlawfully cuts off the remedies available under RSA 365:1 and RSA 365:29" which expressly allow refunds to customers when rates are unlawful or unreasonable.

As to Count II, the Town's *Motion* sought rehearing on the grounds that it "pays Aquarion over half a million dollars a year for [public fire protection service for] the availability of the water these Aquarion owned fire hydrants provide in the event of a fire"²³ but Aquarion "neglects and refuses to shovel snow from its private fire hydrants to keep them clear, and relies instead upon Hampton's highly trained and compensated firefighters to do this hard labor function, for which Aquarion pays nothing to the Town."²⁴

On July 29, 2019, Aquarion filed an objection to the Town's *Motion*.²⁵ Also on July 29, 2019, the Office of Consumer Advocate joined in Aquarion's objection but again acknowledged that it "shares the concern of the Town of Hampton that Aquarion is earning an unreasonably high return on equity."²⁶

On August 14, 2019, the Commission issued Order No. 26,287, *Order Denying Rehearing*. In its Order, the Commission failed to address the issues raised in the Town's *Motion for Rehearing*, stating that it was not required to do so because "Hampton is doing little more than repeating the same arguments it made prior to the issuance of Order No. 26.263. Hampton has not offered any new evidence that was not available at the time of the initial decision."²⁷ The Commission again did not address the substance of the Town's Complaint.

²¹ Appendix, Page 43; Motion for Rehearing, Page 2, Para 4.

²² Appendix, Page 43; Motion for Rehearing, Page 2, Para 9.

²³ Appendix, Page 46; Motion for Rehearing, Page 5, Para 22.

²⁴ Appendix, Page 46; Motion for Rehearing, Page 5, Para 21.

²⁵ Appendix, Page 49.

²⁶ Appendix, Page 52; Letter of the Consumer Advocate, Page 1.

²⁷ Appendix, Page 55; Order No. 26,287, Page 3.

G. Jurisdictional Basis for the Appeal.

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.

This appeal provides an important opportunity to clarify that when a customer files a complaint alleging a “reasonable basis” that a utility is earning more than its allowed returns, the Commission is required by RSA 365:4 to conduct an investigation and hold a hearing. In this case, the Annual Reports of the utility itself and the Staff Audit Report confirmed that Aquarion’s actual earnings substantially exceeded those allowed by order of the Commission.

The Commission’s Order No. 26,263 dismissed the Town’s Complaint stating that its “preferred mechanism to address the issue of overearning or underearning by a utility is a full rate proceeding, which we note is set for 2020”.²⁸ However, by dismissing the Town’s Complaint in order to consider over-earning in a future proceeding, the Commission denied the Town and its residents the statutory right to reparations for rates that are unjust and unreasonable, contrary to RSA 365:1 & 29, RSA 374:2 and RSA 378:7. The result is that the Commission: (1) denied the statutory remedy for reparation of excessive rates charged for the two year period prior to the Complaint as provided by RSA 365:29; and (2) allowed the Company’s unjust and unreasonable rates to remain in effect until the effective date of its next rate case, to be filed in 2020.

In addition, the Town’s Complaint alleged that Aquarion charges the Town over half a million dollars per year for public fire protection service but unreasonably refuses to clear snow to make its hydrants and fire protection service accessible during winter months, thereby requiring the Town and its taxpayers located outside of Aquarion’s franchise to subsidize the cost of fire protection service they do not receive.

In its Order dismissing the Town’s Complaint, the Commission found, without any investigation or hearing, that “the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear

²⁸ Appendix, Page 40; Order No. 26,263, Page 5.

them of snow.”²⁹ This appeal provides an important opportunity to clarify that the Commission is required to investigate and hold a hearing when a complaint alleges facts sufficient to demonstrate that the fire protection service provided by the utility is inadequate or not “reasonably safe and adequate and in all other respects just and reasonable.” RSA 374:1.

I. Preservation of Issues.

Counsel for the Town 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.

Respectfully submitted,

Town of Hampton

By its Counsel,

Date: August 30, 2019



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CERTIFICATE OF COMPLIANCE

I certify that a copy of the within Notice of Appeal and its accompanying Appendix have been mailed this day to counsel for all other parties as follows: Christopher R. Tuomala, Esq., PUC, 21 S. Fruit St., Suite 10, Concord, NH 03301-2429, Robert A. Bersak, Esq., Eversource Energy, 780 N. Commercial St., Manchester, NH 03105-0330, D. Maurice Kreis, Esq., Office of Consumer Advocate, 21 South Fruit St., Suite 18, Concord, NH 03301 and Gordon J. MacDonald, Attorney General, 33 Capitol Street, Concord, NH 03301-6397 and

²⁹ Appendix, Page 40; Order No. 26,263, Page 5.

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