

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2017-0452

Appeal of Lakes Region Water Co., Inc.

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APPEAL PURSUANT TO RULE 10 FROM A DECISION OF  
THE PUBLIC UTILITIES COMMISSION

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BRIEF FOR THE PUBLIC UTILITIES COMMISSION

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THE STATE OF NEW HAMPSHIRE

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

COUNTERSTATEMENT OF ISSUES PRESENTED.....1

STATEMENT OF THE CASE AND FACTS .....2

SUMMARY OF THE ARGUMENT .....5

ARGUMENT.....6

    I.    STANDARD OF REVIEW .....6

    II.   THE COMMISSION CORRECTLY DETERMINED THAT LAKES  
          REGION COULD NOT IMPOSE A SECOND BASE CHARGE ON MR.  
          MYKYTIUK FOR CONNECTING HIS BUNKHOUSE BECAUSE  
          SUCH A CHARGE WAS NOT AUTHORIZED UNDER THE  
          UTILITY’S TARIFF. ....6

    III.  THE COMMISSION’S ORDER PROHIBITING LAKES REGION  
          FROM REQUIRING MR. MYKYTIUK TO INSTALL A SECOND  
          METER IN THE FUTURE WAS JUST AND REASONABLE. ....9

CONCLUSION.....12

CERTIFICATE OF SERVICE .....13

**TABLE OF AUTHORITIES**

**Cases**

*Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980)..... 5, 7, 8  
*Appeal of Verizon New Eng., Inc.*, 158 N.H. 693 (2009)..... 6

**Statutes**

RSA 362:2..... 8  
RSA 362:4..... 8  
RSA 363..... 10  
RSA 363:17-a..... 5, 10  
RSA 365:1..... 10  
RSA 378:1..... 7  
RSA 378:3..... 7  
RSA 378:5..... 7  
RSA 378:6..... 7  
RSA 378:7..... 7, 9  
RSA 378:27..... 7  
RSA 378:28..... 7  
RSA 541:13..... 6

**Rules**

N.H. Admin. R., Puc 600..... 8  
N.H. Admin. R., Puc 601.01..... 8  
N.H. Admin. R., Puc 602.05..... 11  
N.H. Admin. R., Puc 602.12..... 11  
N.H. Admin. R., Puc 602.16..... 8  
N.H. Admin. R., Puc 602.18..... 11  
N.H. Admin. R., Puc 606.04..... passim

N.H. Admin. R., Puc 606.04(h) .....	4, 11
N.H. Admin. R., Puc 606.04(j) .....	11
N.H. Admin. R., Puc 606.04(j)(2).....	4, 12
N.H. Admin. R., Puc 606.04(j)(3).....	12

## **COUNTERSTATEMENT OF ISSUES PRESENTED**

1. Whether the Public Utilities Commission correctly determined that Lakes Region Water Company, Inc. could not impose a second base charge on Robert Mykytiuk for connecting the water line in his residence to a new bunkhouse he constructed on his property because Lakes Region's approved tariff did not authorize such a charge.

2. Whether the Public Utilities Commission's order prohibiting Lakes Region from requiring Mr. Mykytiuk to install a second meter in the future was just and reasonable.

## STATEMENT OF THE CASE AND FACTS

Appellee, Robert Mykytiuk, built a garage with a bunkhouse<sup>1</sup> next to his primary residence located at 17 Mayflower Lane in Moultonborough and received an occupancy permit from the town on January 7, 2016. A.<sup>2</sup> 3, 88; CR 264. Mr. Mykytuik ran a water line from his residence to the new bunkhouse. A. 108; CR 65. He connected the new water line in the basement of his house, after the meter, and installed a shut-off so that water running to the bunkhouse could be shut off if necessary. A. 106, 108; CR 268, 272.

Lakes Region Water Company Inc. (“Lakes Region”) learned of the new construction on Mr. Mykytiuk’s property and sent him a letter dated April 26, 2016, describing his bunkhouse as a “second single family dwelling” requiring the installation of a new service connection and meter. A. 7. Lakes Region enclosed an “Application for Service” and asked Mr. Mykytiuk to contact the office to set up an appointment for an inspection. A. 110. Mr. Mykytiuk disagreed with Lakes Region’s characterization of his bunkhouse as a “dwelling” and its assertion that a new service connection and meter were required. Lakes Region inspected the connection to the bunkhouse on May 9, 2016, and was “satisfied that there was no by-pass of the meter in the 1<sup>st</sup> service (unit) and no health hazard associated with the connection.” A. 111. Lakes Region ultimately did not require Mr. Mykytiuk to apply for a separate service line and meter for the bunkhouse, even though it believed it had a right to do so. *Id.* Instead, in June 2016, Lakes Region started

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<sup>1</sup> The new structure constitutes a “bunkhouse” rather than a “dwelling” because no cooking facilities are permitted under the certificate of use and occupancy. A. 3; CR 264.

<sup>2</sup> Citations to the record are as follows: “A.” refers to the Appendix to Brief of Lakes Region Water Co., Inc; “CR” refers to the Certified Record of the Public Utilities Commission for this matter; and “LR Br.” refers to Brief of Lakes Region Water Co., Inc.

billing Mr. Mykytiuk two base charges as if he did have a separate service connection and meter for the bunkhouse. *Id.*

Mr. Mykytiuk filed a complaint against Lakes Region with the Public Utilities Commission (“Commission”) on or about October 3, 2016, objecting to the second base charge on the grounds that Lakes Region’s tariff did not allow for such a charge. A. 1-11; CR 1-12. Lakes Region responded to the complaint by letter dated October 19, 2016, CR 26-57, and the Commission scheduled a hearing for December 14, 2016, CR 60. On December 5, 2016, Lakes Region filed a Motion to Deny Complaint and Exclude Irrelevant Evidence. A. 18-26; CR 87-104. The Commission cancelled the hearing pending a decision on the motion. CR 105. Mr. Mykytiuk filed a response to Lakes Region’s motion on December 14, 2016. CR 107-111. On January 31, 2017, the Commission denied Lakes Region’s motion by Order No. 25,983. A. 27-33; CR 112-19.

The Commission held a hearing on this matter on March 20, 2017. CR 122-206 (Clerk’s Report with exhibits), 207-417 (Transcript of hearing). Lakes Region submitted as one of its exhibits its approved tariff. A. 71-87; CR 159-75. However, it did not present any testimony or argument identifying any provision in the tariff permitting the second base charge that it was applying to Mr. Mykytiuk. Instead, Lakes Region argued that the second base charge was reasonable because the bunkhouse created an additional draw on the water system, and Lakes Region claimed that Mr. Mykytiuk’s connection from his primary residence to his bunkhouse violated New Hampshire Administrative Rules, Puc 606.04. A. 16-17; CR 127-28. That rule, in pertinent part, requires water

utilities to prohibit customers from installing any “branch connection in the service pipe” or permitting “tandem services.” N.H. Administrative Rules, Puc 606.04(h) and (j)(2).

The Commission issued Order No. 26,014 on May 5, 2017, finding that Mr. Mykytiuk had met his burden “in showing that Lakes Region’s decision to impose a second customer charge on him is not authorized under its current tariff.” LR Br. 38. The Commission’s Order (1) directed Lakes Region to refund to Mr. Mykytiuk the second base charges it had collected from him to date, (2) prohibited Lakes Region from imposing a second base charge on Mr. Mykytiuk until it amends its tariff to allow such a charge, and (3) prohibited Lakes Region from requiring Mr. Mykytiuk to install a second service connection and meter in the future, so long as he undertakes no further renovations to the structures on his property. *Id.*

Lakes Region filed a motion for rehearing, acknowledging that its tariff did not address the circumstances of Mr. Mykytiuk’s property, but arguing that the Commission erred in (1) failing to address Lakes Region’s arguments regarding New Hampshire Administrative Rules, Puc 606.04 (h) and (j)(2) and misapprehending the burden of proof, (2) ordering Lakes Region to refund to Mr. Mykytiuk the second base charges it had collected without providing prior notice to Lakes Region that a refund could be ordered in this proceeding, and (3) prohibiting Lakes Region from requiring Mr. Mykytiuk to install a second service connection and meter in the future even if it amends its tariff. A. 117-26; CR 430-39. The Commission denied the motion on July 5, 2017, by Order No. 26,037. LR Br. 41-46; CR 440-45. This appeal followed.



## SUMMARY OF THE ARGUMENT

A utility's tariff on file with the Commission has the force and effect of law and is binding on both the utility and its customers. *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980). It is uncontested that Lakes Region's tariff did not expressly authorize a second base charge for the connection of Mr. Mykytiuk's bunkhouse. That fact is dispositive. Because the charge at issue in this case was not permitted under the express terms of Lakes Region's tariff, the Commission properly ruled that the charge was unlawful. Lakes Region's focus on Administrative Rules, Puc 606.04 is misplaced. That rule applies to utilities, not customers. And in any event, even if the rule could be applied against a customer, and even if Mr. Mykytiuk's bunkhouse connection violated Puc 606.04, the violation of an administrative rule does not authorize a utility to charge a fee not set forth in its tariff. If Lakes Region wishes to impose a second base charge in situations such as this, it must seek to amend its tariff.

The Commission did not unfairly raise a "new issue" in its Order. Given that Lakes Region itself raised the issue of whether the Commission's administrative rules require a second meter and service connection for Mr. Mykytiuk's bunkhouse, the Commission's order addressing that issue was well within the scope of both the proceeding and the Commission's authority under RSA 363:17-a. Where the plain language of the administrative rules do not support Lakes Region's argument that Mr. Mykytiuk's bunkhouse connection constitutes either a "branched connection" or a "tandem service," the Commission's order prohibiting Lakes Region from requiring Mr. Mykytiuk to install a second meter in the future was just and reasonable.

## ARGUMENT

### I. STANDARD OF REVIEW

“A party seeking to set aside an order of the [Commission] has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable.” *Appeal of Verizon New Eng., Inc.*, 158 N.H. 693, 695 (2009) (citing RSA 541:13). “Findings of fact by the [Commission] are presumed prima facie lawful and reasonable.” *Id.* (citing RSA 541:13).

### II. THE COMMISSION CORRECTLY DETERMINED THAT LAKES REGION COULD NOT IMPOSE A SECOND BASE CHARGE ON MR. MYKYTIUK FOR CONNECTING HIS BUNKHOUSE BECAUSE SUCH A CHARGE WAS NOT AUTHORIZED UNDER THE UTILITY’S TARIFF.

It is uncontested that Lakes Region’s tariff did not expressly authorize Lakes Region to apply a second base charge to Mr. Mykytiuk. *See* LR Br. 15 (conceding that the “Tariff does not contain an express provision authorizing a second base charge for an additional residence”); 22 (“It is not contested that Lakes Region’s Tariff neither prohibits nor allows a second customer charge for a second customer use.”). Nevertheless, Lakes Region argues that a second base charge under these circumstances was just and reasonable because New Hampshire Administrative Rules, Puc 606.04 prohibits “branched” connections or “tandem services,” and Lakes Region believes that Mr. Mykytiuk’s connection to his bunkhouse constitutes either a branched connection or a tandem service. The Commission properly rejected this argument because (1) as a matter of law, the charges Lakes Region can apply to a customer are limited to those set

forth in its tariff, and (2) even if Mr. Mykytiuk's water connection constitutes a "branched" connection or "tandem service" under Puc 606.04, that administrative rule applies to utilities, not customers.

Utility rates are set by tariffs or rate schedules required to be filed with the Commission. *See Appeal of Pennichuck Water Works*, 120 N.H. at 566 (citing RSA 378:1, :3, :5, :6, :7, :27, and :28). Tariffs "define the terms of the contractual relationship between a utility and its customers." *Id.* They also "have the force and effect of law and bind both the utility and its customers." *Id.* "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." *Id.* Because Lakes Region's tariff did not authorize a second base charge for the water line connecting Mr. Mykytiuk's bunkhouse, the Commission properly ruled that Lakes Region's decision to apply that charge was unlawful. LR Br. 38, 43. The terms of the tariff are binding on Lakes Region; therefore, the lack of authority in the tariff to charge Mr. Mykytiuk a second base charge is dispositive and the Commission's decision should be affirmed.

Despite the binding nature of its tariff, Lakes Region argues that the second base charge was nevertheless just and reasonable because Mr. Mykytiuk had allegedly "created a second customer use in violation of the Commission rules." LR Br. 13; *see also id.* at 13-23. Lakes Region's focus on New Hampshire Administrative Rules, Puc 606.04 is misplaced. That rule provides, in pertinent part:

Puc 606.04 Valves and Service Connections.

...

(h) *Each utility shall require* that the customer shall not install any tree or branch connection in the service pipe.

...

(j) *Each utility shall require* the following in relation to individual service connections:

- (1) Each service connection shall be provided with an individual shut-off;
- (2) No tandem services shall be permitted; and
- (3) Where such tandem services exist, the shut-offs necessary to comply with this requirement shall be installed.

*Id.* (emphasis added). The plain language of the rule places requirements on *utilities* not customers. That is because the Rules for Water Service set forth in chapter Puc 600 apply to utilities. *See id.* 601.01 (“Application of Rules. Puc 600 shall apply to any utility as defined in Puc 602.16.”). The chapter defines “utility” as “any ‘public utility’ as defined in RSA 362:2 and RSA 362:4 owning, operating or managing any plant or equipment or any part of the same for supplying of water to the public, or engaged in the transmission or sale of water ultimately sold to the public within New Hampshire,” with certain exceptions. N.H. Admin. Rules, Puc 602.16. Therefore, the Commission properly disregarded Lakes Region’s arguments regarding Puc 606.04.

In any event, even if the administrative rule could be applied against customers, Lakes Region’s argument that it could charge a customer a fee not set forth in its tariff because the customer had allegedly violated an administrative rule lacks merit. As discussed above, Lakes Region’s tariff has the force and effect of law. *See Pennichuck Water Works*, 120 N.H. at 566. Lakes Region provides no support for the proposition

that a violation of an administrative rule authorizes a utility to charge a customer a fee not set forth in the utility's tariff. The Commission properly determined that charging Mr. Mykytiuk a second base charge not authorized by Lakes Region's tariff was "in violation of [a] provision of law." LR Br. 43 (citing RSA 378:7).

Finally, Lakes Region argues that the second base charge imposed on Mr. Mykytiuk is "just and reasonable" because his bunkhouse constitutes a separate place of consumption that creates an additional draw on the water system. This argument merely explains why a second base charge would be appropriate in a case such as this, while failing to address the fact that Lakes Region's tariff does not in fact authorize such a charge. As discussed above, Lakes Region may only charge what is set forth in its approved tariff. Accordingly, the Commission properly determined that if Lakes Region wishes to impose a second base charge in situations such as this, it needs to seek to amend its tariff.

**III. THE COMMISSION'S ORDER PROHIBITING LAKES REGION FROM REQUIRING MR. MYKYTIUK TO INSTALL A SECOND METER IN THE FUTURE WAS JUST AND REASONABLE.**

Lakes Region argues that the Commission erred in raising a "new issue" in its Order by allowing Mr. Mykytiuk to continue to "maintain a second use in violation of Rule Puc 606.04." LR Br. 13, 23-25. This argument fails because Lakes Region itself raised the issue of whether a second meter and service line were required, and in any event, Lakes Region has failed to show that the connection of Mr. Mykytiuk's bunkhouse violates Puc 606.04.

RSA 365:1 permits “any person” to “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.” Here, Mr. Mykytiuk filed a complaint with the Commission claiming that Lakes Region was imposing a second base charge on him which was not permitted under Lakes Region’s approved tariff. Lakes Region’s response to the complaint raised issues relating to whether a second meter and service line were required to be installed under the circumstances. CR 26-27. RSA 363:17-a provides,

The commission shall be the arbiter between the interests of the customers and the interests of the regulated utilities as provided by [Title 34] and all powers and duties provided to the commission by RSA 363 and any other provisions of [Title 34] shall be exercised in a manner consistent with the provisions of this section.

Where Lakes Region itself raised the issue of whether the Commission’s administrative rules require a second meter and service line for Mr. Mykytiuk’s bunkhouse, the Commission’s order addressing this issue was well within the scope of both the proceeding and the Commission’s authority under RSA 363:17-a.

Moreover, the Commission’s decision in this regard was just and reasonable given that the evidence did not demonstrate that Mr. Mykytiuk’s connection of his bunkhouse, after the meter, violated Puc 606.04. As discussed above, the administrative rule applies to Lakes Region, not Mr. Mykytiuk. And even if the administrative rule could be applied against Mr. Mykytiuk, the plain language of the administrative rules set forth in Chapter

Puc 600 do not support Lakes Region's assertion that Mr. Mykytiuk's bunkhouse connection constitutes either a "branched" connection or a "tandem service."

First, Puc 606.04(h) prohibits a utility from allowing a customer to "install any tree or branch connection in the service pipe." "Service pipe" is defined as "the connection between the utility's main and the customer's place of consumption and includes the pipe, fittings and valves necessary to make the connection." *Id.* 602.14. In addition, "customer service pipe" is defined as "that section of service pipe from the customer's property line or the curbstop to the customer's place of consumption." *Id.* 602.06. A "meter" is installed by a utility at the place of consumption "for the measurement of water quantities to be used as a basis for determining charges for water service." *Id.* 602.09. Here, Mr. Mykytiuk connected his bunkhouse to the water line in the basement of his house *after* the meter. A. 108; CR 268, 272. Because Mr. Mykytiuk did not connect to the "service pipe," the new water line extending from his residence to the bunkhouse does not violate the rule against branched connections.

Nor does Mr. Mykytiuk's connection violate the rule against "tandem services." Puc 606.04(j) relates to "individual service connections." Puc 602.12 defines "service connection" as "the point of connection between the customer's service pipe and the utility's service line. "Lakes Region's argument that the addition of the bunkhouse has created a "second service" is inconsistent with the definitions of "water service" and "customer" under the rules. Puc 602.18 defines "water service" as "the furnishing of water *to a customer* in this state by a utility." (emphasis added). Puc 602.05 defines "customer" as "*any person, firm, corporation, cooperative marketing association, utility*

or governmental unit or subdivision of a municipality or of the state or nation supplied with water service by a utility.” (emphasis added). The “customer” in this case is Mr. Mykytiuk, not the physical structures on his property. Connecting his bunkhouse to the water line in his home, after the meter, did not service a second customer. Therefore, Lakes Region’s argument that the connection constitutes a “tandem service” under Puc 606.04(j)(2) fails.<sup>3</sup>

Lakes Region has failed to demonstrate that the Commission’s order prohibiting Lakes Region from requiring Mr. Mykytiuk to install a second meter in the future is unjust or unreasonable. Therefore, this Court should affirm the Commission’s order.

### **CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the Public Utilities Commission.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

By its attorneys,

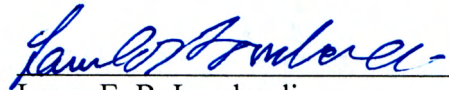
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<sup>3</sup> Moreover, even if Mr. Mykytiuk’s bunkhouse connection constitutes a “tandem service” under the rule, Puc 606.04(j)(3) appears to permit tandem services so long as there is an individual shut-off for the connection. The evidence demonstrated that Mr. Mykytiuk did install a shut-off for the connection to his bunkhouse. A. 108; CR 272.



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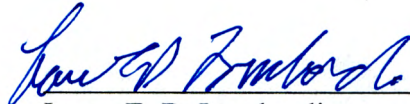
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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing were mailed this 6<sup>th</sup> day of February 2018, postage prepaid, to, Justin C. Richardson, Esq. counsel for Lakes Region Water Co., Inc., and Robert Mykytiuk, pro se.



Laura E. B. Lombardi