

STATE OF NEW HAMPSHIRE

SUPREME COURT

#2017-0452

APPEAL OF LAKES REGION WATER CO., INC.

BRIEF OF LAKES REGION WATER CO., INC.

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QUESTION PRESENTED FOR REVIEW

1. Whether the Public Utilities Commission (“Commission”) erred by allowing a customer to receive water service for a second dwelling without paying for a second base charge when RSA 378:1 provides that utility service is to be “rendered in accordance with the rules adopted by the commission” and the Commission’s Rule Puc 606.04 prohibits “branched” and “tandem” services which connect separate dwellings using a single service line; and
2. Whether the Commission erred by denying rehearing concerning a new issue not previously noticed but determined in Order No. 26,014, specifically that the Company could not amend its Tariff in the future to require a separate service line (as required by Rule Puc 606.04), when RSA 541:3 permits rehearing as to any issue “covered or included in the order.”

STATEMENT OF THE CASE

On or about November 4, 2014, Robert Mykytiuk, a utility customer (the “Customer”) of Lakes Region Water Co., Inc. (“Lakes Region”) constructed a second dwelling on his property for his personal use. The second dwelling allowed him to rent his existing residence near Lake Winnepesaukee as a vacation rental. The second dwelling is connected “in tandem” with the existing residence, using a single service line running from existing dwelling to the second dwelling.¹ The Commission’s Rule Puc 606.04 prohibits water utilities from allowing construction of “branched” and “tandem” services.

¹ See *Appendix*, Page 48 (plans showing buildings); Pages 26, 57 & 70 (photographs); Pages 107 – 108 (showing service pipe configuration).

On April 26, 2016, the Company notified the customer that he had constructed an additional dwelling and was required to apply for a second service.² On June 30, 2016, after the customer refused to submit an application for the new service, the Company assessed a second customer charge. On August 2, 2016, the Customer filed an informal complaint with the Commission questioning the charges.³ On August 3, 2016, Lakes Region responded to the informal complaint.⁴ On August 12, 2016, Mark Naylor, Director of the Commission's Gas and Water Divisions informed the Customer that the charges were correct as follows:⁵

Staff has reviewed the company's response and we do not disagree with the decision to charge two base charges for the two dwelling units on your property. If you are dissatisfied with the outcome of the conversations that you have had with Commission Staff as we worked to reach a resolution to your concerns, your next step is to file a formal complaint or request a hearing with the Commission.

On October 4, 2016, the customer requested a formal complaint proceeding before the Commission.⁶

During the proceedings before the Commission, the Company argued repeatedly that RSA 378:1 requires the Company to charge for water service "rendered in accordance with the with the rules adopted by the commission pursuant to RSA 541-A" and the Commission's rules, specifically Rule Puc 606.04, prohibit branched and tandem services. Staff Director Naylor testified that he "agreed that there should be a separate service line, there should be a separate meter. It is a second dwelling unit."⁷

² See Appendix, Page 110.

³ The August 12, 2016 complaint is referenced in the Commission's *Notice at Appendix*, Page 12. However, the August 2, 2016 complaint does not appear to be in the certified record.

⁴ See Appendix, Page 53.

⁵ See Appendix, Page 104.

⁶ See Appendix, Page 1.

⁷ Transcript, Pages 175-176; *Certified Record*, Pages 382 -383.

On May 5, 2017, the Commission determined in Order No. 26,014 that Lakes Region Tariff does not contain a provision which authorizes a second charge to be assessed. The Commission ordered Lakes Region to refund the second base charge.⁸ The Commission determined that Lakes Region could revise its Tariff in the future to provide for a second customer charge. However, the Commission determined a new issue not in its notice for the hearing⁹ when it ordered in the last sentence that of Order No. 26,014 that Lakes Region could not revise its Tariff to require a separate service line for the customer's second dwelling.

On June 5, 2017, Lakes Region requested rehearing, *inter alia*, on the grounds that RSA 378:1 provides that its approved rates are for water service “rendered in accordance with the with the rules adopted by the commission pursuant to RSA 541-A” and Rule Puc 606.04 specifically prohibits branched and tandem services. Lakes Region also requested rehearing because in ordering that Lakes Region could not amend its Tariff in the future, the Commission determined a new issue not previously noticed and “overlooked significant operational and regulatory reasons”¹⁰ that the Commission rules “prohibit tandem services, 606.04 (j)(2); require individual shut offs, 606.04 (j)(1); and require that the “size, design, material and installation of the service pipe shall conform to such requirements of the utility”, 606.04 (d).”¹¹

On July 5, 2017, the Commission issued Order No. 26,037 denying rehearing. This appeal followed.

⁸ The Company complied with this requirement after its *Motion for Rehearing* was denied.

⁹ See Notice, Appendix, Page 12.

¹⁰ *Motion for Rehearing*, Appendix Pages 123-124.

¹¹ *Motion for Rehearing*, Appendix, Page 124.

STATEMENT OF FACTS

A. The Commission's Findings of Fact.

Order No. 26,014 found that: “On October 4, 2016, Robert Mykytiuk filed a complaint with the Commission against Lakes Region Water Company, Inc. (Lakes Region or the Company), alleging that Lakes Region cannot require him to pay an additional quarterly base charge¹ of \$135.26 under the terms of its tariff. The additional base charge relates to a second structure on Mr. Mykytiuk’s property located at 17 Mayflower Lane in the Town of Moultonborough.”¹²

“In March 2016, the Company learned that Mr. Mykytiuk had completed construction of an additional structure on his property. During construction, Mr. Mykytiuk tapped into the service connection to his primary residence to supply water to the new structure. Shortly thereafter, Lakes Region sent a letter to Mr. Mykytiuk requesting an inspection of the water service connection along with an application for service relating to the new structure.”¹³

“On May 9, 2016, Lakes Region sent a supervisor to the Mykytiuk residence to inspect the new service connection. Lakes Region concluded that the new structure required a separate service connection, but chose not to install a separate connection at that time. Instead, Lakes Region started to bill Mr. Mykytiuk an additional base charge of \$135.26 per quarter. The additional charge first appeared on Mr. Mykytiuk’s June 2016 water bill and has continued to appear on subsequent bills to date. Mr. Mykytiuk took exception to Lakes Region’s interpretation of the terms of its tariff and, in his complaint, submitted that the new structure is

¹² *Order No. 26,014, Page 1.*

¹³ *Order No. 26,014, Pages 1 – 2.*

an accessory dwelling unit and that he is not required to have separately metered water service.”¹⁴

Order No. 26,014 explains that the Company’s Utility Manager, Leah Valladares, testified as follows: “Leah Valladares of Lakes Region testified that Mr. Mason informed Mr. Mykytiuk as early as March 2015 – when construction had started – of the need to install a second service line. Tr. at 120-121. On April 26, 2016, Ms. Valladares sent a letter to Mr. Mykytiuk enclosing an application for service and requesting the service inspection. Tr. at 121. Lakes Region wanted to inspect the line because there was a potential bypass hazard and health hazard. Tr. at 122. Ms. Valladares explained that it was the Company’s standard practice to install a separate meter and charge a second base charge on properties with two separate structures. She discussed an exception to the practice, the McGuire property, and said there are plans to set it up with two accounts. Tr. at 130. Ms. Valladares testified that there are two properties in Balmoral that have two structures on them with two separate meters and accounts. Tr. at 127-18. She also mentioned that there was another property in Wentworth Cove that has two dwellings on the property and it is set up with two accounts and two meters. Tr. at 131. Upon viewing Mr. Mykytiuk’s second dwelling, Ms. Valladares confirmed that it is approximately 1,575 square feet, is not connected to the main residence and has – to the best of her knowledge – one sink, two baths, two water closets, two lavatories, a shower, a dishwasher and a washing machine. Tr. t 132-34.”¹⁵

“Ms. Valladares stated that Lakes Region decided not to disconnect Mr. Mykytiuk in April 2016 after being satisfied that there were no health concerns and that Mr. Mykytiuk had

¹⁴ Order No. 26,014, Page 2.

¹⁵ *Order No. 26,014*, Page 5.

not bypassed recording water usage on the meter. Moreover, Lakes Region did not want to cause an undue hardship on Mr. Mykytiuk. Tr. at 135. Mr. Mykytiuk is current on his billing of the two base charges. Tr. at 136.”¹⁶

“Ms. Valladares was asked to describe the connections that were contained in Exhibit 5, which portrayed the water service connections at Mr. Mykytiuk’s residence. She explained that a branch connection is one in which the service line branches and goes to multiple dwellings. A branch connection is made prior to the meter. Tr. at 143. She considered a tandem connection to be one which went to a second place of consumption after the meter. Tr. at 145. She viewed Mr. Mykytiuk’s arrangement as a tandem connection. She testified that Puc 606.04(h), prohibits any type of branch or tree connection. Tr. at 144. She opined that there would be more costs for supplying the demand to a separate structure. Tr. at 146. Ms. Valladares recommended that a second service line be installed and a meter be installed at the second place of consumption, because, in her view, the current configuration does not comply with the Commission’s rules. Tr. at 149.”¹⁷

“Ms. Valladares concluded that, financially, the current situation is not fair. Mr. Mykytiuk built a separate dwelling and it should have two service lines, and he should be charged as two customers because he has created “an increased draw on the system.” Tr. at 150. Ms. Valladares acknowledged that Lakes Region’s tariff refers to a “minimum charge per customer per quarter” which she and the Company typically call the “base charge,” but that such minimum charge does not refer to any charges that are levied per unit. Tr. at 168-69. The “metered rate” is the charge for usage and it is measured in hundreds of cubic feet. Tr. at 169.

¹⁶ *Order No. 26,014, Pages 5 – 6.*

¹⁷ *Order No. 26,014, Page 6.*

Ms. Valladares admitted that Lakes Region’s tariff needs to be revised; that there is no specific working definition about what tandem service is; and that Lakes Region commonly refers to terms like customers, place of consumption, structures and premises, as being individuals as a general rule. Tr. at 171-172.”¹⁸

The Commission’s Staff Director Mark Naylor agreed that Lakes Region had properly determined that a second base charge was required. Order No. 26,014 describes his testimony as follows: “Mark Naylor, the Director of the Commission’s Gas and Water Division, was asked by the Commission to testify. Mr. Naylor confirmed that he sent an email to Mr. Mykytiuk on April 12, 2016, stating that he did not disagree with Lakes Region charging him two base charges for the two structures on his property. He considered it to be a compromise instead of digging up the service connection and installing another service line and a meter. He said it is not correct to assert that adding a second dwelling unit to an existing service does not create cost. It creates demand that must be satisfied by the utility. The utility is required to meet demand every minute of every day, and must be set up to handle peak demand on its system whenever it occurs. He said when you add additional customers, it adds to peak demand. Mr. Naylor read from the American Water Works Association M1 Manual and stated that demand costs are associated with providing facilities to meek the peak rates of use or demands placed on the system by the customers. Tr. at 174-177.”¹⁹

“Mr. Naylor agreed with the suggestion that “customer” and “dwelling unit” should be treated synonymously. Tr. at 178. He testified that he considers a tandem service line to be a single service line that serves two end-users or two or potentially more customers. Tr. at 180. A

¹⁸ *Order No. 26,014, Page 6.*

¹⁹ *Order No. 26,014, Page 7.*

branched service would be before the meter, but he thought that tandem or branched is a distinction without a difference. Tr. at 180-181. To Mr. Naylor, it does not matter in which structure Mr. Mykytiuk actually resides. Whichever one he uses and whichever one he rents, according to Mr. Naylor, “It’s a separate place of consumption.” Tr. at 184. In this case, it is the second unit that creates additional demand on the system. Id. To rectify the situation, Mr. Naylor suggested that what is needed is a clear definition of what a customer is and what a place of consumption is, and a clear definition of how service is formally requested. Tr. at 186. He thinks a tariff change is in order to make it clearer. Tr. at 187. Mr. Naylor also considered what the effect would be if Mr. Mykytiuk sold the property with two dwelling units on it and they were both then occupied full time. Mr. Naylor said it “furthers the point” that ideally there should be two meters and two service lines because demand may be too much for the meter. Tr. at 190-191.”²⁰

B. Additional Facts in the Certified Record Helpful to the Understanding of the Issues.

Although not necessary to decide the legal issues in this case, it is important to understand the relationship between Lakes Region’s approved rates and its obligation to provide service in accordance with the Commission’s rules and the fixed customer charge at issue in this proceeding which was not a rate case or a case involving discriminatory rates²¹ wherein a record was developed concerning the Lakes Region’s rates. The following ‘facts’ are provided to explain the importance of the fixed customer charge.

Lakes Region’s systems, being located in New Hampshire’s Lakes and White Mountain Regions, serves primarily seasonal customers who own second homes that may be unoccupied

²⁰ *Order No. 26,014, Pages 7 – 8.*

²¹ *Cf. RSA 365:29.*

for prolonged periods. During off-peak seasons, use is low. However, during peak holiday periods such as during weekends in July and August, demand is high which requires larger storage tanks, larger pipe diameters, and larger treatment and production (wells and pumps) facilities. As a result, Lakes Region's rates are designed to recover the fixed capital costs to make service available during periods of peak demand. Its base per customer charge is high while its metered consumption is correspondingly low. For example, the Customer's bill that is the subject of this complaint shows that the fixed customer charge is \$270.52 (75%) of the total bill of \$359.94 for service rendered as of June 30, 2016, while the metered consumption charge is only \$89.42.²² The addition of a summer vacation rental large enough for "8 children and several grand-children and it never felt confined or crowded"²³ places significant additional peak demand. Lakes Region does not recover the costs to serve this additional peak demand in the absence of an additional fixed customer charge.

Staff Director Mark Naylor explained this relationship in his testimony as follows:²⁴

[176]

"It's not correct to assert that adding a second unit to an existing service does not create cost. It does. It creates demand cost. The cost to the Company for providing facilities to meet its peak demands arises from the peak day that is measured on a -- you know, year-round, what is the peak day, Department of Environmental Services requires a utility, like Lakes Region and all the others, to be able to provide that peak demand, plus a safety factor over that, on a 365 day basis. They must be able to produce that amount of water 365 days. When you add additional places of consumption, when you add additional customers,

²² *Appendix*, Page 11.

²³ *Appendix*, Page 60.

²⁴ *See Certified Record beginning at Page 383, Transcript beginning at Page 176.*

which is what this is, it adds to the peak demand. And that may not have an out-of-pocket” [177]

cost today or tomorrow, it will result in cost that the Company will have to face.

And this is part of why I agreed that this was a reasonable compromise. It would help the customer not to have to dig up service line and go through other expense to put in a second line, a second meter.

But it's -- my agreement with the compromise was based on my understanding of how rates are set and demand costs are considered in the setting of rates. And demand costs, and I'm reading from -- this is very basic information from the American Water Works Association M1 Manual, "Demand costs are associated with providing facilities to meet the peak rates of use or demands placed on the system by the customers." I explained that reasoning to Mr. Mykytiuk when we were on the telephone subsequent to this August 12th email. I explained why I agreed with the compromise. He, obviously, didn't like my answer, and wasn't happy that I wasn't providing some other answer, but I did not hang up on him, by the way. We concluded the call when we were not [178]

making any more progress.

But that's -- I felt it was important to point out not only that Staff agreed to a reasonable compromise, but it's based on something, not just thin air. So, thank you.

BY MR. CLIFFORD:

Q. So, I have a follow-up. Then, would you tend to agree or not that a "dwelling unit" and "customer" should be treated interchangeably or is there a distinction or a distinction without a difference, in your view?

A. They should be treated synonymously. Adding an outdoor spigot to an existing residence is simply something that's complementary to a residential use, or, you know, a slop sink in a basement or a garage, that's complementary to a residential use. **This is a separate unit. It**

particularly, because it's, and he has indicated this, it's a rental unit, a seasonal unit, it contributes directly to an increased seasonal demand that has a cost. So, --

MR. CLIFFORD: Okay. I don't have any further questions of this witness.

CHAIRMAN HONIGBERG: Mr. Richardson, [179]

do you have any questions for Mr. Naylor?

MR. RICHARDSON: Just two or three brief ones.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q. So, I'm looking at Page 10 of the tariff. I can show it to you, if you'd like, but I'm just going to read you one sentence from it. And it talks about "General metered service". And it says "This schedule is available to all water service in the franchise area." And that's really the description is "water service". Now, that term isn't defined, right?

A. Correct.

Q. Now -- but, when I look at RSA 378, it says the company provides service under 378:1 in compliance with the Commission's rules. So, I guess, do you, like I do, connect the dots and say "Well, when the Company provides water service, it's obligated to follow the rules"?

A. Of course. Yes.

Q. Okay. And I'll show you just something similar to Exhibit 5. We don't have to get that out, but let me hand it to you. Actually, let me [180]

use Exhibit 5, so we don't create conflicting documents.

CHAIRMAN HONIGBERG: Good idea.

(Atty. Richardson handing document to the witness.)

BY MR. RICHARDSON:

Q. So, I want to point your attention to the line going from one building to the other, where the word "tandem" is written. Is that your understanding of what is meant in the Commission's rules by a "tandem" connection that's prohibited by rule?

A. Yes. A tandem service is a single service line that serves two end-users. I think that's pretty clear, however it's structured. It's one service line providing water service to two or potentially more customers.

Q. And, if -- and, so, a "tandem" specifically refers to when it goes from one building behind the meter to another, right? And that's what that shows?

A. Yes.

Q. And, if it were to occur before the meter, is it your conclusion that would be a "branched" [181] service line, which is also prohibited by rule?

A. Yes. They're really -- they're indistinguishable, as far as I'm concerned. It's the same thing. It's providing service to two or more customers from one service line. It creates a lot of problems, which has been discussed earlier. Inability to detect leaks, you know, where the leaks are, or one customer at the end of that, taking service off that line, refuses to pay, and the other does pay, disconnection of service problems. So, that's why it's prohibited.

(emphasis added).

Director Naylor's testimony confirms that the rates for water service are for service that is to be "rendered in accordance with the rules adopted by the commission". If a customer could disregard those rules by adding vacation rentals, apartments or other primary uses without paying an additional fixed customer charge, Lakes Region would not recover its costs to provide service to customers during peak demand when it is needed most.

SUMMARY OF ARGUMENT

The Commission erred by failing to address the central issue in the proceeding: that Lakes Region's Tariff governs water utility service that it is "rendered in accordance with the rules adopted by the commission" (RSA 378:1) and the Commission's rules specifically prohibit both branched and tandem services. Puc 606.04 (h) & (j). By constructing a second dwelling on his property, the customer created a second use or place of consumption which requires a separate service line, meter and customer account. Despite repeated requests of Lakes Region and the testimony of Staff Director Naylor who agreed that the Customer had created a second customer use in violation of the Commission rules, the Commission allowed the Customer to maintain a second use in violation of Rule Puc 606.04 while paying rates that are less than required by RSA 378:1. Lakes Region therefore requests that this Court reverse or vacate and remand Order No. 26,014 and Order No. 26,037.

ARGUMENT

I. THE COMMISSION FAILED TO APPLY RSA 378:1 AND ITS OWN RULES.

In Order No. 26,014, the Commission did not address the central issue in this case: that Lakes Region's Tariff governs water utility service that it is "rendered in accordance with the rules adopted by the commission" (RSA 378:1) and the Commission's rules specifically prohibit both branched and tandem services. Puc 606.04 (h) & (j).²⁵ By failing to do address this issue, the Commission allowed the customer to receive "water service" for two separate uses or places of consumption: his personal residence and a summer vacation rental. His service is no different

²⁵ See e.g., Lakes Region's November 30, 2016 *Witness Summary and Exhibit List*, Page 2; Lakes Region's December 5, 2016 *Motion to Dismiss*, Para. 5 ("**The Commission's Laws, Rules and Tariff Control.** The Commission has adopted specific rules which control the outcome of this proceeding: For example, Puc 606.04 (h) requires that all water utilities "shall require that the customer shall not install any tree or branch connection in the service pipe." Puc 606.04 (j) requires that all water utilities "shall require" that "[n]o tandem services shall be permitted."").

than a building with two apartments or a duplex which are considered separate customers under the Commission's rules.

On Page 8, Order No. 26,014, it appears that the Commission misunderstood RSA 378:1 which provides that Lakes Region's approved rates which are for "*service rendered in accordance with the rules adopted by the Commission*" RSA 378:1 (emphasis added). The Commission omitted this language in its explanation on Page 8 of Order No. 26,014 stating:

"Every public utility shall keep on file "schedules showing the rates, fares, charges and prices for any service rendered." RSA 378:1."

This critical language omitted from RSA 378:1 limits the application of Lakes Region's rates for "water service" in its Tariff to "service rendered in accordance with the rules adopted by the Commission pursuant to RSA 541-A". The Commission's Rule Puc 606.04 specifically prohibits tandem services. As a result, Lakes Region's rate for "water service" under its approved Tariff does not include service that exceeds what is allowed by rule, such as the addition of a seasonal vacation rental to an existing residential use. This is more than what is allowed by rule and as explained by Lakes Region and Staff Director Naylor carries a significantly greater cost. The fact that Lakes Region's Tariff does not specifically require a separate charge for a second dwelling does not mean that a customer can receive water service that the Commission's rules do not allow, paying only a single charge for multiple dwellings or uses.

This is precisely what the Commission allowed in Order No. 26,014 when it determined that the customer's burden of proof was only to prove that "Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff".²⁶ The Commission

²⁶ Order No. 26,014, Page 9.

erred as the customer's burden of proof was to demonstrate that the rate charged by Lakes Region was "unjust and unreasonable" or in violation of the law. *See e.g. RSA 378:7; RSA 365:29.* The Commission did not find that Lakes Region's charges were unjust or unreasonable or that Lakes Region had violated any law. The Commission found that Tariff does not contain an express provision authorizing a second base charge for an additional residence. While this is true, the second service did not comply with Rule Puc 606.04 and Lakes Region was not obligated to provide a second water service in violation of Rule Puc 606.04 at effectively no charge.

Lakes Region *repeatedly* explained to the Commission that its rules prohibit water in tandem to a second dwelling and that allowing a second dwelling without a second customer charge would result in free or discounted service in violation of law. For example, on November 30, 2016, Lakes Region explained:²⁷

“Terms of Service. Lakes Region's approved Tariff is based each separate apartment, residence, condominium unit, or business being charged as a separate service. Lakes Region is obligated to provide service in accordance with the Commission's water service rules and DES regulations which do not allow cross connections between separate customers receiving service. Allowing a second residence, apartment or business to be constructed and treated as a single customer could result in service that violated the Commission's rules, below, and DES back flow and cross connections regulations intended to protect public health.

Rates. Lakes Region's rates are based on each separate customer or residence paying for the cost to receive service. Allowing this customer to pay only a single charge would result in subsidy by Lakes Region's existing customers, contrary to rate making principles which require that rates be just and reasonable and do not result in subsidy between customers. *See e.g. RSA 378:7; Pennichuck East Utilities, Order No. 25,051* (December 11, 2009) (“those customers would not be paying their fair share of the fixed costs that existing ... customers pay and the

²⁷ *See Appendix, Pages 16 – 17.*

effect would be a subsidy”). Lakes Region is prohibited by law from providing free or discounted service to customers, which this customer would receive if the second owner’s quarters did not pay for a separate service. *RSA 378:14 & 17*.

Commission Regulations. The Commission’s regulations require that each separate apartment or service location be treated as a separate customer. For example:

- Subsection (h) of *Puc 606.04 Valves and Service Connections*, provides that: “Each utility shall require that the customer shall not install any tree or branch connection in the service pipe.” In this case, the customer has installed a second branch connection in direct violation of Rule 606.04.
- Subsection (j) of *Puc 606.04* further provides that each utility “shall require” that all service connections have “an individual shut-off” and that “[n]o tandem services shall be permitted”! The customer has not provided a separate service line with a separate shutoff and has instead constructed a tandem service that is specifically prohibited by rule.
- The Commission’s rules and its regulation of water utilities are based on each separate residence, apartment or place of consumption being treated as a separate customer. *Rule Puc 602.05* defines the term "Customer" in the singular 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.” Water service is defined by *Puc 602.18*, again in the singular, as “the furnishing of water to a customer in this state by a utility.” In each instance, the Commission’s rules refer to a customer in the singular, not in the plural. *See e.g. Puc 602.06*;²⁸ *Puc 602.12*;²⁹ *Puc 602.14*.³⁰ The Commission’s water service rules do not contemplate separate or unrelated customers being served on a single service line.
- The Commission’s rules require a separate service line for each customer because service to multiple unrelated customers, apartments, businesses or other customers on a single service line would violate DES rules against cross connection and backflow prevention (as well as *Puc 604.04*). It is contrary to the rules and practice employed by the Commission when approving rates. It is a

²⁸ *Puc 602.06* "Customer service pipe" means that section of service pipe from the customer's property line or the curbstop to the customer's place of consumption.

²⁹ *Puc 602.12* "Service connection" means the point of connection between the customer's service pipe and the utility's service line.

³⁰ *Puc 602.14* "Service pipe" means the connection between the utility's main and the customer's place of consumption and includes all of the pipe, fittings and valves necessary to make the connection.

practice that is prohibited by law and no reason exists to depart from that requirement here.”³¹

On December 1, 2016, Lakes Region’s *Motion to Deny Complaint and Exclude Irrelevant Evidence*³² explained these requirements again, stating:

“5. **The Commission’s Laws, Rules and Tariff Control.** The Commission has adopted specific rules which control the outcome of this proceeding: For example, Puc 606.04 (h) requires that all water utilities “shall require that the customer shall not install any tree or branch connection in the service pipe.” Puc 606.04 (j) requires that all water utilities “shall require” that “[n]o tandem services shall be permitted.” Puc 603.03 requires that a meter be installed on all service lines, unless a waiver is granted.³³ As a result, a separate service line and meter are required by the Commission’s rule.

6. The law prohibits water service at rates that are free or discounted. RSA 378:14 (“Free Service, Etc. – No public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.”); RSA 378:17. Requiring Lakes Region to serve Mr. Mykytiuk’s two residences under a single base charge would result in him receiving free or discounted service in violation of RSA 378:14 & 17 and traditional rate making principles which require that rates be just and reasonable. *Pennichuck East Utilities, Order No. 25,051* (December 11, 2009) (“those customers would not be paying their fair share of the fixed costs that existing ... customers pay and the effect would be a subsidy”).

7. Lakes Region’s approved Tariff establishes rates for “water service” in each division. This means “water service” in compliance with the laws and rules of the Commission. Those rules *require* a separate service line for each residential, commercial or other customer. Branched or tandem “water service” is prohibited by Puc 606.04. The established rate in Lakes Region’s Tariff requires that each separate residential, commercial or other customer pay both a base charge for “water service” to recover fixed costs and provide revenue stability *and* a consumption charge. Lakes Region’s Tariff does not allow a customer to receive free or discounted “water service” by constructing branched or tandem services, in violation of the Commission’s water service rules, to provide water service to two (or more) separate residences.”³⁴

³¹ See Appendix, Pages 16 – 17.

³² See Appendix, Pages 18, 19 – 20.

³³ “All water sold by a utility shall be billed on the basis of metered volume sales unless a waiver is granted by the commission pursuant to Puc 201.05 for unmetered service.”

³⁴ See Appendix, Pages 18, 19 – 20.

In addition, Staff Director Naylor testified that the Commission's rules prohibited the connection of a second dwelling and required a second customer charge.³⁵ Lakes Region clearly presented these issues to the Commission in its closing statement.³⁶ Despite these repeated requests, Order No. 26,014 did not apply or even address the Commission's rules. It appears that the Commission believed it unnecessary to do so because it determined that "Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff."³⁷ However, this logic is flawed because RSA 378:1 limits the water service that Lakes Region is required to provide to service rendered in accordance with the Commission's rules.

Lakes Region's Tariff *assumes* and the Commission's rules *require* that separate and distinct uses or buildings have separate service lines (and meters) "except in unusual situations such as service to an apartment or to a condominium". Rule Puc 606.04 (g). Its Tariff states that its schedules of rates are for: "all *water service* in the franchise area"³⁸ (emphasis added) in each of its systems. The term "water service" is not defined by the Tariff. It is defined by the Commission's Rule Puc 602.18 as "the furnishing of water to a customer in this state by a utility." The term customer is singular, not plural. The Tariff assumes, exactly as Lakes Region argued and Staff Director Mark Naylor testified, that the rates for water service under RSA 378:1 are rates for water service "rendered in accordance with the rules adopted by the Commission".

By overlooking this requirement in RSA 378:1, the Commission allowed the Customer to receive a second water service in violation of Rule Puc 606.04 without paying a second customer charge that applies to each separate water service required by rule. In effect, it allowed the customer to disregard its rules and faulted Lakes Region for not prohibiting in its Tariff a form of

³⁵ See *Statement of Facts, supra*.

³⁶ *Transcript*, Pages 193 – 202; *Certified Record*, Pages 400 – 409.

³⁷ *Order No. 26,014*, Page 9.

³⁸ See *Appendix*, Pages 81, 82 & 83.

service that Lakes Region is not allowed to provide by law. Taken to its logical extreme, the Commission's reasoning would not allow the Company to charge for a third, a fourth or a hundredth dwelling on the same lot.

II. THE COMMISSION IS REQUIRED TO COMPLY WITH ITS OWN RULES AND STATUTORY OBLIGATIONS.

It is a bedrock principle of New Hampshire law that the Commission's rules are binding on both the utility and the Commission. *Appeal of Bethlehem (N.H. Dep't of Envtl. Servs.)*, 154 N.H. 314, 327 (2006) ("The law of this State is well settled that an administrative agency must follow its own rules and regulations.") *quoting Appeal of Town of Nottingham (N.H. Dep't of Envtl. Servs.)*, 153 N.H. 539, 554-55 (2006). *See also Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992) *quoting Petition of State Police*, 126 N.H. 72, 76 (1985) ("an agency's interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the plain meaning of its regulations"). An agency "must also comply with the governing statute, in both letter and spirit," *Appeal of Morin*, 140 N.H. 515, 519 (1995).

The Commission appeared to believe that it had some authority to allow service to a customer that is expressly prohibited by Rule Puc 606.04 on a case by case basis. In doing so, the Commission erred because "[a]n agency may not add to, change, or modify the statute by regulation or through case-by-case adjudication." *Appeal of Local Gov't Ctr.*, 165 N.H. 790, 809 (2014) *quoting In re Jack O'Lantern, Inc.*, 118 N.H. 445, 448 (1978) and *Appeal of Monsieur Henri Wines, Ltd.*, 128 N.H. 191, 194 (1986) ("[w]e have long held that "[a]n agency may not add to, change, or modify [statutory law] by regulation or through case-by-case adjudication." *In re Jack O'Lantern, Inc.*, 118 N.H. 445, 448, (1978). [...] Rulemaking authority is granted to allow administrative agencies to effectuate their statutory purposes by "fill[ing] in [the] details,"

and "[i]ndeed, a legislative enactment that gives a board greater discretion than that needed to 'fill in details' is invalid." *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567, 568 (1978). The legislature may not delegate the "power to make the law"; it may only confer "authority or discretion as to its execution, to be exercised under and in pursuance of the law." *State v. Normand*, 76 N.H. 541, 546 (1913).”).

Simply, the Commission was bound to apply RSA 378:1 and its own rules as written which prohibit tandem services. By failing to apply RSA 378:1 and its own rules to this case, the Commission allowed the customer to receive a greater financial advantage and imposed a greater financial burden on Lakes Region than allowed by law.

III. THE COMMISSION ERRED BY FAILING TO EXPLAIN ITS RULES ON REHEARING.

On rehearing, Lakes Region renewed its request that the Commission apply RSA 378:1 and Rule 606.04 to the circumstances of this case. The Commission failed to do so. On Page 3 of Order No. 26,037 denying rehearing, it again omitted the language in RSA 378:1 which rates are for water service “rendered in accordance with the rules adopted by the commission pursuant to RSA 541-A”. The Commission stated:

“In this case, the thing or act complained of was the imposition of the second base charge. See RSA 378:1 (utility must have a published tariff “showing the rates, fares, charges and prices for any service rendered”). The authorization for such a charge was not in Lakes Region’s tariff and Mr. Mykytiuk proved that omission by a preponderance of the evidence. “[W]e are obliged to give effect to the plain language used in the tariff.” *Appeal of Verizon New England*, 158 N.H. at 700. Because a second base charge is not in Lakes Region’s tariff, the imposition of one on Mr. Mykytiuk is “in violation of [a] provision of law” under RSA 378:7.

The Commission failure to address the critical language in RSA 378:1 is inexcusable. RSA 541:4 *requires* Lakes Region to specify in its motion for rehearing “every ground upon which it

is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:5 then *requires* that the Commission “either grant or deny the same”.

The Commission did add a reference to RSA 378:7. However, RSA 378:7 does not apply unless the Commission issues an order determining that “the rates, fares or charges demanded or collected ... are unjust or unreasonable, or in any [ways] in violation of any provision of law”.

RSA 378:7 states in full:

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 [ways] 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.

The Commission made no determination that Lakes Region violated RSA 378:7. It did not determine that Lakes Region’s rates were “unjust or unreasonable” and there is no evidence that would support such a determination in the record. In fact, Order No. 26,014 determined that Lakes Region could revise its Tariff to assess a second customer charge on this Customer. By doing this, the Commission acknowledged that Lakes Region’s decision to charge a separate customer charge for each use was just and reasonable. The Commission’s reference to RSA 378:7 does not address the issue presented to the Commission which was that Lakes Region’s approved rates for water service under RSA 378:1 do not allow it to provide service to multiple

dwellings “except in unusual situations such as service to an apartment or to a condominium” where it is understood, if not stated, that separate charges apply for each use. Puc 606.04 (g).

In any case, the Commission in denying Lakes Region’s motion for rehearing because it failed to explain how its rules applied or did not apply under RSA 378:1. It is not contested that Lakes Region’s Tariff neither prohibits nor allows a second customer charge for a second customer use. However, this conclusory finding fails to address the issue presented by Lakes Region and Staff Director Mark Naylor, i.e. that the Customer had constructed two separate and distinct uses: a residential use and a vacation rental. A separate customer charge for water service applies to each and RSA 378:1 and Rule Puc 606.04 does not allow Lakes Region to serve both uses using a single service line, except in unusual situations such as an apartment where Lakes Region would charge for two uses.

New Hampshire law is clear that when the Commission “structures its decision solely by summarizing evidence presented by the contending parties and describing the parties' opposing views, without making specific factual findings in support of its own conclusions, ... it fails to meet its statutory obligation to make “a concise and explicit statement of the underlying facts supporting [its] findings” ... and its order will therefore be vacated and remanded for a new hearing.” *Appeal of City of Nashua*, 138 N.H. 261, 263-264 (1994) *citing Appeal of Loudon Road Realty Trust*, 128 N.H. 624, 626-27 (1986); *Appeal of Portsmouth Trust Co.*, 120 N.H. 753, 759 (1980); and RSA 541-A:20 (now codified at RSA 541-A:35) (citations omitted) (emphasis added). *See also Appeal of Pinetree Power, Inc. (N.H. PUC)*, 152 N.H. 92, 98 (2005) (“[t]he PUC was required to make findings sufficiently detailed to provide this court with an adequate basis upon which to review its decision.”); *Petition of Support Enforcement Officers*, 147 N.H. 1, 9 (2001); *Appeal of Town of Newington (N.H. Dep't of Env'tl. Servs.)*, 149 N.H. 347, 354-55

(2003) (“[b]ecause we cannot determine what reasoning DES relied upon ... we vacate DES' ruling”). This Court should reverse or vacate and remand Order No. 26,014 and Order No. 26,037 in light of the evidence that the Customer has two separate uses of his property: one as a residential use and the other as a vacation rental and are required by rule to be treated as separate water services under the Commission’s rules.

IV. THE COMMISSION ERRED BY FAILING TO RECONSIDER A NEW ISSUE DETERMINED IN ITS ORDER

In the last sentence of Order No. 26,014, the Commission determined a new issue that was not previously noticed for the hearing when it ordered that: “In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so long as he undertakes no further renovations to the structures on his property.” Because the Commission did not provide notice of this issue, Lakes Region did not present evidence or arguments as to significant operational problems that would arise if the Commission did not apply Rule Puc 606.04. Lakes Region explained these operational problems in its *Motion for Rehearing* as follows:

- First, for operational reasons, a separate turn off should always be required when a building may be unoccupied during winter months. Pipes freezes due to loss of heating, water leaks in internal plumbing and other issues can result in water loss and property damage.³⁹ As presently configured, both buildings could be rented separately or occupied while the owner is away. Service cannot be shut-off without turning off water supply to both buildings. If a freeze, leak or other problem arose in one building while its was unoccupied

³⁹ For this and other reasons, insurance policies typically (and prudent practice always) require that whenever a building is unoccupied for more long periods, the water line into a building be turned off.

or its owner away, the first or second building might be un-accessible. It is important that Lakes Region be able to turn off each building separately, especially when they may be separately occupied, accessed or owned by different persons at any time.

- Second, as separate service line and meter are required because the present configuration prevents the utility from disconnecting one customer service without disconnecting both. This is an additional reason why the Commission's rules contemplate separate meters and curb stops being installed in the case of apartments. Puc 606.04 (g) ("Curb stops shall be placed at the customer's property line except in unusual situations such as service to an apartment or to a condominium."). The owner of the property could offer either unit for long term rental at any time.
- Third, meter service is required by the Commission's rules and DES water conservation rules. Having one meter serve two units leaves Lakes Region unable to allocate costs in a rental environment where, for example, a leakage occurs in internal plumbing. Having a meter in a separate building that Lakes Region may be unable to access if the owner is away makes it more difficult and costly for Lakes Region to provide service. Lakes Region is not allowed to refuse service. RSA 374:1. It can only require that the service connections comply with the terms of its tariff and the rules adopted by the Commission.

These are just a few of many reasons why the Commission's rules prohibit tandem services, 606.04 (j)(2); require individual shut offs, 606.04 (j)(1); and require that the "size, design, material and installation of the service pipe shall conform to such requirements of the

utility”, 606.04 (d). Even Staff Director Naylor alluded to these problems in his testimony.⁴⁰

Lakes Region failure to present evidence concerning these issues because the issue before the Commission in this proceeding was whether Lakes Region’s requirement of a second base charge was unjust or unreasonable in light of the Commission’s rule Rule Puc 606.04 (j) which specifically prohibits tandem services. What a future tariff could or could not require was not an issue noticed in the proceeding. RSA 541:3 provides that any party “may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order”. The Commission erred by denying rehearing on this issue.

CONCLUSION

The Commission erred by failing to address the central issue in the proceeding: that Lakes Region’s Tariff governs water utility service that it is “rendered in accordance with the rules adopted by the commission” (RSA 378:1) and the Commission’s rules specifically prohibit both branched and tandem services. Puc 606.04 (h) & (j). By constructing a second dwelling on his property, the customer created a second use or place of consumption which requires a separate service line, meter and customer account. Despite repeated requests of Lakes Region and the testimony of Staff Director Naylor who agreed that the Customer had created a second customer use in violation of the Commission rules, the Commission allowed the Customer to maintain a second use in violation of Rule Puc 606.04 while paying rates that are less than required by RSA 378:1. Lakes Region therefore requests that this Court reverse or vacate and remand Order No. 26,014 and Order No. 26,037.

⁴⁰ *See Statement of Facts, supra.*

Respectfully submitted,

Lakes Region Water Company, Inc.,

By its Attorneys,

UPTON & HATFIELD, LLP

Date: December 22, 2017



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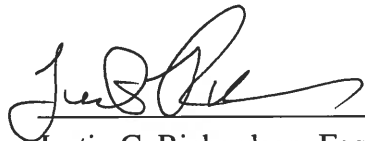
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Certificate of Service

I hereby certify that two copies of the foregoing have this day been forwarded to Robert Mykytiuk, *pro se*, and to Laura E.B. Lombardi, Esq., counsel for the Public Utilities Commission.



Justin C. Richardson, Esq.

Statutes

TITLE XXXIV PUBLIC UTILITIES

CHAPTER 378 RATES AND CHARGES

Schedules, Etc., Generally

Section 378:1

378:1 Schedules. – Every public utility shall file with the public utilities commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges and prices for **any service rendered or to be rendered in accordance with the rules adopted by the commission pursuant to RSA 541-A**; provided, however, that public utilities which serve as seasonal tourist attractions only, as determined in accordance with rules adopted by the commission pursuant to RSA 541-A, shall be exempt from the provisions of this chapter.

Source. 1911, 164:7. PL 242:1. RL 292:1. 1951, 203:46 par. 1. RSA 378:1. 1983, 115:1, eff. July 24, 1983.

Equality of Rates, Etc.

Section 378:10

378:10 Preferences. – No public utility shall make or give any undue or unreasonable preference or advantage to any person or corporation, or to any locality, or to any particular description of service in any respect whatever or subject any particular person or corporation or locality, or any particular description of service, to any undue or unreasonable prejudice or disadvantage in any respect whatever.

Source. 1911, 164:7. PL 242:11. RL 292:11. 1951, 203:46 par. 10, eff. Sept. 1, 1951.

Section 378:14

378:14 Free Service, Etc. – No public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.

Source. 1913, 99:2. PL 242:15. RL 292:15. 1951, 203:46 par. 14, eff. Sept. 1, 1951.

Section 378:18

378:18 Special Contracts for Service. – Nothing herein shall prevent a public utility from making a contract for service at rates other than those fixed by its schedules of general application, if special circumstances exist which render such departure from the general schedules just and consistent with the public interest and, except as provided in RSA 378:18-b, the commission shall by order allow such contract to take effect.

Source. 1913, 99:2. PL 242:19. RL 292:19. 1951, 203:46 par. 18. RSA 378:18. 1996, 186:3, eff. June 3, 1996.

Regulations

Puc 602.05 "Customer" means 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.

Puc 602.06 "Customer service pipe" means that section of service pipe from the customer's property line or the curbstop to the customer's place of consumption.

Puc 602.12 "Service connection" means the point of connection between the customer's service pipe and the utility's service line.

Puc 602.13 "Service entrance" means the point at which the customer service pipe enters the customer's building.

Puc 602.14 "Service pipe" means the connection between the utility's main and the customer's place of consumption and includes all of the pipe, fittings and valves necessary to make the connection.

Puc 602.18 "Water service" means the furnishing of water to a customer in this state by a utility.

Puc 604.02 Cross-Connections. Each utility shall conform to all requirements of the department of environmental services relative to cross-connections.

Puc 606.04 Valves and Service Connections.

(a) Each utility shall locate, operate and inspect each valve on its distribution system at least once every 5 years.

(b) A utility annually shall locate, operate and inspect valves which are:

- (1) Larger than 12 inches in diameter;
- (2) Located on major transmission lines; or
- (3) Otherwise critical to system operation.

(c) A utility shall keep a record of each valve showing the size, type, location, date of inspection and the results of each inspection.

(d) Each utility shall require that the size, design, material and installation of the service pipe shall conform to such requirements of the utility as may be incorporated in its rules and regulations.

(e) The utility shall require that the minimum size of the service pipe shall not be less than 3/4 inch nominal size except under unusual circumstances, such as might exist in a residence with very low demand located very close to the main.

(f) All service pipes shall be laid at a depth sufficient to prevent freezing, except where services are not intended for use during freezing weather and are actually drained during such periods.

(g) Curb stops shall be placed at the customer's property line except in unusual situations such as service to an apartment or to a condominium.

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

(i) A utility may require the customer to leave the trench open and customer service pipe uncovered until it is inspected by the utility and shown to be free from any irregularity or defect.

(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.

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 16-834

**COMPLAINT OF ROBERT MYKYTIUK AGAINST
LAKES REGION WATER COMPANY, INC.**

ORDER ON HEARING ON MERITS

ORDER NO. 26,014

May 5, 2017

APPEARANCES: Robert Mykytiuk, *pro se*; Upton & Hatfield, LLP, by Justin C. Richardson, Esq., for Lakes Region Water Company, Inc.; and Staff of the Public Utilities Commission by John S. Clifford, Esq.

The Commission orders Lakes Region Water Company, Inc., to refund certain base charges it has collected from its customer, Robert Mykytiuk, and prohibits the company from imposing such charges unless and until they are included in the company's tariff.

I. PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

On October 4, 2016, Robert Mykytiuk filed a complaint with the Commission against Lakes Region Water Company, Inc. (Lakes Region or the Company), alleging that Lakes Region cannot require him to pay an additional quarterly base charge¹ of \$135.26 under the terms of its tariff. The additional base charge relates to a second structure on Mr. Mykytiuk's property located at 17 Mayflower Lane in the Town of Moultonborough.

In March 2016, the Company learned that Mr. Mykytiuk had completed construction of an additional structure on his property. During construction, Mr. Mykytiuk tapped into the service connection to his primary residence to supply water to the new structure. Shortly

¹ The parties have used the term "base charge" interchangeably with the "Minimum charge per customer per quarter," which is the phrase used in the Company's tariff. *See* NHPUC No. 6 – Water, 7th Rev. Page 10, Nov. 28, 2016.

thereafter, Lakes Region sent a letter to Mr. Mykytiuk requesting an inspection of the water service connection along with an application for service relating to the new structure.

On May 9, 2016, Lakes Region sent a supervisor to the Mykytiuk residence to inspect the new service connection. Lakes Region concluded that the new structure required a separate service connection, but chose not to install a separate connection at that time. Instead, Lakes Region started to bill Mr. Mykytiuk an additional base charge of \$135.26 per quarter. The additional charge first appeared on Mr. Mykytiuk's June 2016 water bill and has continued to appear on subsequent bills to date. Mr. Mykytiuk took exception to Lakes Region's interpretation of the terms of its tariff and, in his complaint, submitted that the new structure is an accessory dwelling unit and that he is not required to have separately metered water service.

By letter dated October 11, 2016, the Commission notified Lakes Region and Mr. Mykytiuk that it would treat the matter as a formal complaint. On November 10, 2016, the Commission issued a letter setting a hearing for December 14 and directing the parties to file witness lists, summaries of testimony, and exhibits by November 30. Both parties made timely filings. On December 5, 2016, Lakes Region filed a Motion to Deny Complaint and Exclude Irrelevant Evidence. As a result of that filing, the Commission canceled the December 14 hearing so it could properly address the issues raised in Lakes Region's motion. Mr. Mykytiuk filed an objection to the motion on December 14. The Commission issued an order on January 31, 2017, limiting certain testimony of both parties. A final hearing on the merits was held before the Commission on March 20, 2017. Mr. Mykytiuk's complaint and all other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at

<http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-834.html>

II. POSITIONS OF THE PARTIES

A. Robert Mykytiuk

Mr. Mykytiuk stated that Lakes Region is prohibited from charging him a separate base charge for his additional structure because such a charge is not included in the tariff on file with the Commission. Tr. at 10. If authority existed in the tariff for a second base charge, Mr. Mykytiuk would pay it. Tr. at 112.

Mr. Mykytiuk offered the testimony of Karel Crawford, a State Representative who represents District 4 which covers the area of Moultonborough where Mr. Mykytiuk lives. Ms. Crawford testified that she searched the tariff to determine if Lakes Region could charge a second base charge for the second building. She could not find where that was permitted under Lakes Region's tariff. Tr. at 19. When she contacted Amanda Noonan, the Director of Consumer Services and External Affairs at the Commission, Ms. Noonan indicated she could not find where a second base charge is permitted in Lakes Region's tariff. Tr. at 19. Ms. Crawford agreed that Mr. Mykytiuk has installed a "tandem" service line on his property to provide water service to the second structure, Tr. at 23, but she thinks that there should be clarification in the rules or in Lakes Region's tariff to be clear when a customer will be charged a second base fee. Tr. at 27.

Mr. Mykytiuk next called Kevin Quinlin to testify. Mr. Quinlin is the president of the Balmoral Improvement Association and a member of the Moultonborough Planning Board. Tr. at 36. Mr. Quinlin stated that he had several conversations with Lakes Region's president, Thomas Mason, concerning the issues Mr. Mykytiuk was having with Lakes Region and the second base charge. Tr. at 37. Mr. Quinlin reviewed the regulations and tariff and could not find any basis for the fee through his own research. *Id.* Mr. Quinlin stated that the Moultonborough

Planning Board was aware of the issue and that the sense of the board was that the rule should be “one lot, one fee.” Tr. at 41.

Mr. Mykytiuk also presented testimony on his own behalf at the hearing. The thrust of Mr. Mykytiuk’s complaint is that Lakes Region is not permitted to charge him a separate base charge and/or install a separate meter under the terms of the Company’s tariff. He offered several exhibits. Exhibit 2 contained pictures showing where the service line comes into the first structure on his property. The photo shows another water line connected to the service line and going to the second structure, and a shutoff valve for that water line after the meter. He does not believe that this is a tandem service. Tr. at 66-67. He also offered a picture of a house owned by another Lakes Region customer, which has one service pipe serving two structures on the customer’s property. Tr. at 68. According to Mr. Mykytiuk, that customer is not paying two base charges. Mr. Mykytiuk claims there are others who pay two base charges, but there is nothing in the tariff requiring them to have separate meters. Tr. at 68-69. Mr. Mykytiuk agreed that the other customers who have single water meters may have installations that predate the Commission’s adoption of its rules. Tr. at 92-93. He claims there is ambiguity in N.H. Code of Admin. Rules Puc 606.04(j), which does not allow for tandem service. Tr. at 95. Mr. Mykytiuk stated that he was threatened with disconnection if he did not allow Lakes Region to inspect the service connection. He complied with the request. Tr. at 74-78.

On cross examination, Mr. Mykytiuk acknowledged that what he actually rents out is his primary residence, and he sometimes stays on the second floor of the new second structure. The main house is rented through a vacation rental by owner program. Tr. at 107-108. He acknowledged that he would have to pay the second base charge if it were in fact in Lakes Region’s tariff. Tr. at 112.

B. Lakes Region

Leah Valladares of Lakes Region testified that Mr. Mason informed Mr. Mykytiuk as early as March 2015 – when construction had started – of the need to install a second service line. Tr. at 120-121. On April 26, 2016, Ms. Valladares sent a letter to Mr. Mykytiuk enclosing an application for service and requesting the service inspection. Tr. at 121. Lakes Region wanted to inspect the line because there was a potential bypass hazard and health hazard. Tr. at 122. Ms. Valladares explained that it was the Company's standard practice to install a separate meter and charge a second base charge on properties with two separate structures. She discussed an exception to the practice, the McGuire property, and said there are plans to set it up with two accounts. Tr. at 130. Ms. Valladares testified that there are two properties in Balmoral that have two structures on them with two separate meters and accounts. Tr. at 127-18. She also mentioned that there was another property in Wentworth Cove that has two dwellings on the property and it is set up with two accounts and two meters. Tr. at 131. Upon viewing Mr. Mykytiuk's second dwelling, Ms. Valladares confirmed that it is approximately 1,575 square feet, is not connected to the main residence and has – to the best of her knowledge – one sink, two baths, two water closets, two lavatories, a shower, a dishwasher and a washing machine. Tr. t 132-34.

Ms. Valladares stated that Lakes Region decided not to disconnect Mr. Mykytiuk in April 2016 after being satisfied that there were no health concerns and that Mr. Mykytiuk had not bypassed recording water usage on the meter. Moreover, Lakes Region did not want to cause an undue hardship on Mr. Mykytiuk. Tr. at 135. Mr. Mykytiuk is current on his billing of the two base charges. Tr. at 136.

Ms. Valladares was asked to describe the connections that were contained in Exhibit 5, which portrayed the water service connections at Mr. Mykytiuk's residence. She explained that a branch connection is one in which the service line branches and goes to multiple dwellings. A branch connection is made prior to the meter. Tr. at 143. She considered a tandem connection to be one which went to a second place of consumption after the meter. Tr. at 145. She viewed Mr. Mykytiuk's arrangement as a tandem connection. She testified that Puc 606.04(h), prohibits any type of branch or tree connection. Tr. at 144. She opined that there would be more costs for supplying the demand to a separate structure. Tr. at 146. Ms. Valladares recommended that a second service line be installed and a meter be installed at the second place of consumption, because, in her view, the current configuration does not comply with the Commission's rules. Tr. at 149.

Ms. Valladares concluded that, financially, the current situation is not fair. Mr. Mykytiuk built a separate dwelling and it should have two service lines, and he should be charged as two customers because he has created "an increased draw on the system." Tr. at 150. Ms. Valladares acknowledged that Lakes Region's tariff refers to a "minimum charge per customer per quarter" which she and the Company typically call the "base charge," but that such minimum charge does not refer to any charges that are levied per unit. Tr. at 168-69. The "metered rate" is the charge for usage and it is measured in hundreds of cubic feet. Tr. at 169. Ms. Valladares admitted that Lakes Region's tariff needs to be revised; that there is no specific working definition about what tandem service is; and that Lakes Region commonly refers to terms like customers, place of consumption, structures and premises, as being individuals as a general rule. Tr. at 171-172.

C. Staff

Mark Naylor, the Director of the Commission's Gas and Water Division, was asked by the Commission to testify. Mr. Naylor confirmed that he sent an email to Mr. Mykytiuk on April 12, 2016, stating that he did not disagree with Lakes Region charging him two base charges for the two structures on his property. He considered it to be a compromise instead of digging up the service connection and installing another service line and a meter. He said it is not correct to assert that adding a second dwelling unit to an existing service does not create cost. It creates demand that must be satisfied by the utility. The utility is required to meet demand every minute of every day, and must be set up to handle peak demand on its system whenever it occurs. He said when you add additional customers, it adds to peak demand. Mr. Naylor read from the American Water Works Association M1 Manual and stated that demand costs are associated with providing facilities to meet the peak rates of use or demands placed on the system by the customers. Tr. at 174-177.

Mr. Naylor agreed with the suggestion that "customer" and "dwelling unit" should be treated synonymously. Tr. at 178. He testified that he considers a tandem service line to be a single service line that serves two end-users or two or potentially more customers. Tr. at 180. A branched service would be before the meter, but he thought that tandem or branched is a distinction without a difference. Tr. at 180-181. To Mr. Naylor, it does not matter in which structure Mr. Mykytiuk actually resides. Whichever one he uses and whichever one he rents, according to Mr. Naylor, "It's a separate place of consumption." Tr. at 184. In this case, it is the second unit that creates additional demand on the system. *Id.* To rectify the situation, Mr. Naylor suggested that what is needed is a clear definition of what a customer is and what a place of consumption is, and a clear definition of how service is formally requested. Tr. at 186.

He thinks a tariff change is in order to make it clearer. Tr. at 187. Mr. Naylor also considered what the effect would be if Mr. Mykytiuk sold the property with two dwelling units on it and they were both then occupied full time. Mr. Naylor said it “furthers the point” that ideally there should be two meters and two service lines because demand may be too much for the meter. Tr. at 190-191.

III. COMMISSION ANALYSIS

The Commission has broad authority to hold hearings on complaints against utilities both by statute, RSA 365:1 *et seq.*, and pursuant to its rules. N.H. Code of Admin. Rules Puc 204. The Commission is charged with setting rates that are just and reasonable. RSA 378:7. Every public utility shall keep on file “schedules showing the rates, fares, charges and prices for any service rendered.” RSA 378:1.

In this case, we find that Lakes Region’s tariff does not specifically address the situation presented here, where Mr. Mykytiuk has built a second dwelling on his property. The tariff refers to “customer(s)” throughout, but there is nothing in the tariff about when a second meter or separate service must be installed, or what is or is not a tandem service as prohibited by our rules under Puc 606.04(j). Our own rules define customer as any person supplied with water by a utility. Puc 602.05. They define service connection as the point of connection between the customer’s service pipe and the utility’s service line. Puc 602.12. What Mr. Mykytiuk has done is to add a new line to his second structure after the metering point in the main residence.

While the tariff does not address the present situation, additional consumption does not come without cost to Lakes Region. If both units are fully occupied, it is incumbent upon Lakes Region under our rules to be able to satisfy peak demand to both structures at the same time.

According to Mr. Naylor, this situation has the potential to create additional demand on Lakes Region's system.

Mr. Mykytiuk points to the new Accessory Dwelling Unit (ADU) law which goes into effect on June 1, 2017, which provides that "separate systems shall not be required for the principal and accessory dwelling units." RSA 674:72 V. That law is not yet in effect and we take no position on whether Mr. Mykytiuk's second structure would qualify as an ADU under the new law, or what the new law may mean in the context of this, or any other case, where an ADU is added to a home after the date the new law takes effect.

Under the terms of its present tariff, there is no basis for Lakes Region to require Mr. Mykytiuk to pay a second base charge every month for his newly constructed unit. We acknowledge that this new unit may create additional demand on Lakes Region's system and expect Lakes Region will propose revisions to its tariff to address similar situations.


Mr. Mykytiuk has met his burden of proof by a preponderance of evidence pursuant to Puc 203.25 in showing that Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff. Until such time as Lakes Region's tariff is amended, the Company shall not impose a second base charge on Mr. Mykytiuk, and Lakes Region is directed to refund to Mr. Mykytiuk the second base charges it has collected from him to date. The Company is not precluded from making additional inspections in the future. In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so long as he undertakes no further renovations to the structures on his property.

Based upon the foregoing, it is hereby

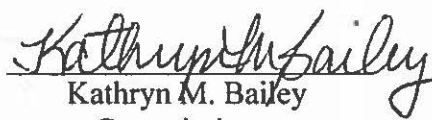
ORDERED, that pursuant to RSA 365:29, Lakes Region shall refund the fees charged to Mr. Mykytiuk for the second base charge, with interest, and it is

FURTHER ORDERED that Lakes Region shall not impose a second base charge on the property at 17 Mayflower Lane in the Town of Moultonborough, or on any similar configuration, until such time as Lakes Region receives approval to impose a second charge under the terms of a properly filed tariff amendment.

By order of the Public Utilities Commission of New Hampshire this fifth day of May, 2017.

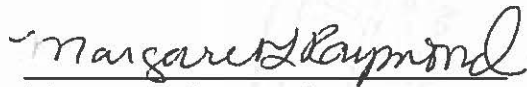


Martin P. Honigberg
Chairman



Kathryn M. Bailey
Commissioner

Attested by:



Margaret L. Raymond
Assistant Secretary

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Docket #: 16-834-1 Printed: May 05, 2017

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION
DW 16-834**

**COMPLAINT OF ROBERT MYKYTIUK AGAINST
LAKES REGION WATER CO., INC.**

ORDER DENYING MOTION FOR REHEARING

ORDER NO. 26,037

July 5, 2017

For the reasons set forth below, the Commission denies the motion for rehearing on Order No. 26,014 dated May 24, 2017 (Order), regarding a complaint filed by Robert Mykytiuk against Lakes Region Water Co., Inc.

I. PROCEDURAL BACKGROUND

On October 4, 2016, Robert Mykytiuk filed a complaint with the Commission against Lakes Region Water Co., Inc. (Lakes Region or the Company), alleging that Lakes Region cannot require him to pay an additional quarterly base charge¹ of \$135.26 under the terms of its tariff. The additional base charge relates to a second structure on Mr. Mykytiuk's property located at 17 Mayflower Lane in the Town of Moultonborough.

The Commission issued an order on May 24, 2017, following a hearing on the merits, granting the relief requested by Mr. Mykytiuk. The Commission found that Lakes Region was not authorized to charge him a second base charge under the terms of its tariff, and ordered Lakes Region to refund the sums that Mr. Mykytiuk had paid for the second base charge. Lakes Region's motion argues that the Commission: (i) erred on the burden of proof; (ii) erred by

¹ The parties have interchangeably used the term "base charge" to describe what is the "Minimum charge per customer per quarter" as described in the Company's tariff. See NHPUC No. 6 – Water, 7th Rev. Page 10, Nov. 28, 2016.

ordering reparation without notice; and (iii) erred by stating that the company could not require a separate meter or service line for Mr. Mykytiuk in the future.

For a complete procedural history of this matter and all docket filings, other than any for which confidential treatment has been requested of or granted by the Commission, go to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-834.html>

II COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for “good reason” when the moving party demonstrates that the decision is “unlawful or unreasonable.” RSA 541:3, RSA 541:4; *see Rural Telephone Company*, Order No. 25,291 at 9 (November 21, 2011). Good reason exists if there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (April 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (November 12, 2010). Although Lakes Region raised the same arguments in its motion for rehearing as it did at hearing, for clarity we will discuss each of the issues raised in the motion.

A. Burden of Proof

The Order states that the customer's burden was to prove that “Lakes Region's decision to impose a second customer charge on him is not authorized under its current tariff.” *Order* at 9. Lakes Region claims that it is the customer's burden of proof to demonstrate that the rate is unjust or unreasonable or otherwise in violation of law, citing RSA 378:7 and RSA 365:29.

Mr. Mykytiuk must meet his burden of proof by a preponderance of the evidence under N.H. Code Admin. Rule Puc 203.25. A preponderance of evidence means “such evidence as

when weighed with that opposed to it has more convincing force, and from which it results that a greater probability is in favor of the party upon whom the burden rests.” *Appeal of Rockingham Cnty. Sheriff’s Dept.*, 144 N.H. 194, 197 (1999) (citation omitted). The burden of proof for administrative adjudications generally is a fair preponderance of the evidence. *See In re Preisendorfer*, 143 N.H. 50, 55 (1998) (citing *In re Polk License Revocation*, 90 N.J. 550, 449 A.2d 7, 12-16 (N.J. 1982)). Mr. Mykytiuk met his burden.

“Whenever the commission shall be of opinion ... 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 ... the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force.” RSA 378:7. Under RSA 365:1 a person can make a complaint over any “thing” or “act” claimed to have been done or omitted by a utility. In this case, the thing or act complained of was the imposition of the second base charge. *See* RSA 378:1 (utility must have a published tariff “showing the rates, fares, charges and prices for any service rendered”). The authorization for such a charge was not in Lakes Region’s tariff and Mr. Mykytiuk proved that omission by a preponderance of the evidence. “[W]e are obliged to give effect to the plain language used in the tariff.” *Appeal of Verizon New England*, 158 N.H. at 700. Because a second base charge is not in Lakes Region’s tariff, the imposition of one on Mr. Mykytiuk is “in violation of [a] provision of law” under RSA 378:7.

B. Ordering Reparations Without Notice

Lakes Region’s motion states that a notice of hearing is required under RSA 365:29 before reparations may be awarded. A plain reading of the statute does not require that a formal notice of reparation be made prior to Commission determination.

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.

RSA 365:29.

A request for a hearing is sufficient to serve as a request for reparation under RSA 365:29. *Stebbins Commercial Properties*, Order No. 25,364 (May 14, 2012). The New Hampshire Supreme Court has noted that the “Commission has authority to act upon its own motion or upon complaint in behalf of the public in any situation where service or rates may be directly affected by its order.” The Commission must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power. “One such power is to award restitution if one has been unjustly enriched at the expense of another.” *Granite State Transmission v. State*, 105 N.H. 454, 456 (1964); *see Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539 (1980).

In this case, the Commission was presented with a utility imposing a charge that was not authorized by a tariff and we found that charge to be unauthorized and unjust. Under established precedent, the Commission has authority to order the refund of an overcharge and the statute does not require the Commission to announce, in advance, that it is considering that remedy. Mr. Mykytiuk requested a refund of all fixed charges as part of his closing argument. March 20, 2017, Hearing Transcript (Tr). at 206. The Commission acted on that request, but it could have done so regardless of whether Mr. Mykytiuk asked for such relief.

C. Separate Meter or Service Line


Lakes Region objects to the final sentence in the order that reads, “In the event its tariff is revised, the Company shall not require Mr. Mykytiuk to install a second meter in the future so

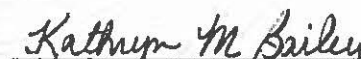
long as he undertakes no further renovations to the structures on his property.” *Order* at. 9.

Lakes Region offers no legal authority on the issue of whether the Commission can order Lakes Region to refrain from requiring a separate meter or service line against Mr. Mykytiuk. As the arbiter between the interests of the ratepayers and the interests of utilities, RSA 363:17-a, the Commission may determine disputes between utilities and their customers. In this case, we have resolved a dispute between Mr. Mykytiuk and Lakes Region. Based on the facts of this case, we have found that such a restriction on future treatment of Mr. Mykytiuk is a just and reasonable result and within our role under RSA 363:17-a.

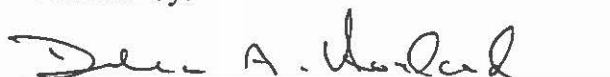
In sum, we find that Lakes Region did not present new evidence that was otherwise unavailable until now and did not identify specific matters that we overlooked or mistakenly conceived in issuing our prior order. Accordingly, we deny Lakes Region’s motion for rehearing.

By order of the Public Utilities Commission of New Hampshire this fifth day of July, 2017.


Martin P. Honigberg
Chairman


Kathryn M. Bailey
Commissioner

Attested by:


Debra A. Howland
Executive Director

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Docket #: 16-834-1 Printed: July 05, 2017

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