

STATE OF NEW HAMPSHIRE

SUPREME COURT

#2017-0452

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APPEAL OF LAKES REGION WATER CO., INC.

REPLY BRIEF OF LAKES REGION WATER CO., INC.

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REPLY ARGUMENT

Lakes Region Water Co., Inc. (“Lakes Region”) offers this Reply Brief to address two issues raised in the State’s opposing Brief. Section I of this Reply Brief responds to the State’s argument concerning the second base charge and explains why the Commission erred when it determined that Lakes Region could not assess a second base charge. Section II of this Reply Brief responds to the State’s argument concerning Rule Puc 606.04 and explains that the State’s interpretation is erroneous and that the Commission never made such a determination during the proceeding. As a result, Lakes Region requests that this Court vacate and remand the Commission’s orders with instructions to apply its rules to the circumstances of this case.

I. LAKES REGION PROPERLY ASSESSED A SECOND BASE CHARGE.

The State makes two arguments in support of the Commission’s order that Lakes Region could not assess second customer charge even though it determined that “Mr. Mykytiuk has built a second dwelling on his property.”¹ The State argues that: “[t]he Commission properly rejected [Lakes Region’s] 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.” Pages 6 – 7. Lakes Region responds to each argument as follows:

A. A Tariff Provision is not Necessary Where the Commission’s Rules Control the Water Service that Lakes Region is Allowed to Provide.

In its Brief, the State misunderstands the law governing Lakes Region’s Tariff and its obligation to provide water service in accordance with the rules adopted by the Commission.

¹ Page 8 of Order No. 26,014 at Lakes Region’s Brief, Page 37.

Lakes Region's Tariff contains rate schedules for: "all water service in the franchise area"². The term "water service" is not defined in the Tariff because 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." Lakes Region's rates are for "water service" in compliance with the rules adopted by the Commission which prohibit branched and tandem services. Lakes Region is not required to establish rates for tandem or branched services that the rules do not allow.

The Commission's Water Division Director, Mark Naylor understood this when he testified, exactly as RSA 378:1 states, that: Lakes Region's Tariff establishes rates are for "water service" that is "rendered in accordance with the rules adopted by the Commission".³ Clearly, if the Commission's rules allowed tandem services to serve a second dwelling on the same premises, then Lakes Region could not disconnect his service (or assess a second base charge) in the absence of a Tariff provision. However, the question in the proceeding, which the Commission failed to address, is that the Commission's Rules Puc 606.04 (h) & (j) prohibit branched and tandem services from being used to serve multiple dwellings on the same property, except in "unusual circumstances" such as apartments or condominiums under Rule Puc 606.04 (g) where a meter is required and customer charge is applied for each dwelling.

The State's argument that Lakes Region must incorporate the requirements of Rule Puc 606.04 (h) & (j) into its Tariff, ignores the fact rates apply to "service rendered or to be rendered in accordance with the rules adopted by the commission pursuant to RSA 541-A". RSA 378:1. By law, the Commission is also required to follow its own rules. This means that once the Commission determined that "Mr. Mykytiuk has built a second dwelling on his property"⁴ – it

² See *Appendix*, Pages 81, 82 & 83.

³ Director Naylor's Testimony is contained in the Statement of Facts in Lakes Region's Brief.

⁴ Page 8 of Order No. 26,014 at Lakes Region's Brief, Page 37.

was required by its rules to consider whether that second dwelling was either: (1) an “unusual situations such as service to an apartment or to a condominium” where a separate curb stop and service line are not required under Rule Puc 606.04 (g); or (2) a tandem (or branched) service line which is prohibited by Rule 606.04 (h). In the first case, the service is allowed but a separate meter and customer charge are required. In the latter case, the service is prohibited and, as Director Naylor explained, Lakes Region and Staff only allowed the service to continue, subject to a second base charge, to avoid the hardship of disconnection.⁵

The law requires Lakes Region to provide service in accordance with the rules adopted by the commission. Because those rules specifically prohibit tandem services, Lakes Region did not need to adopt this prohibition in its Tariff. Lakes Region appeals because it asked the Commission to apply its rules. The Commission erred in its refusal to do so.

B. Rule 606.04 Governs Lakes Region, its Customers, and the Commission.

On the second point, the State argues for the first time that “[t]he plain language of the rule [Puc 606.04] places requirements on *utilities* not customers.” Page 8 (emphasis in original). The Commission did not make any findings or determinations on this point at any time during the proceeding. On this basis alone, this Court should vacate and remand the Commission’s orders with instructions to make findings concerning its interpretation of the rule for review. RSA 541-A:35.⁶

In fact, the State’s interpretation of Rule Puc 606.04 is erroneous for several reasons: First, as explained in Lakes Region’s Brief, the Commission is required to follow its own rules.

⁵ See Lakes Region’s Brief, Pages 10 to 11 (Staff’s testimony describing the “compromise” to which staff agreed to allow a second base charge in lieu of disconnection).

⁶ RSA 541-A:35 provides that: “A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”

It cannot adopt a rule requiring Lakes Region to prohibit the customer from constructing branched and tandem services— only to disregard the rule when the customer refuses to comply with the utility’s requirements. Such an interpretation (which the Commission never adopted) would build “a fortress out of the dictionary” while forgetting that rules “always have some purpose or object to accomplish.” *Appeal of Ashland Elec. Dep’t*, 141 N.H. 336, 341 (1996). The State’s overly technical interpretation of Rule Puc 606.04 to apply only to the utility and not the customer misses the point that the Rule is also binding on the Commission when deciding cases before it.

Second, the State misunderstands Rule Puc 606.04 (h) in light of the Commission’s water service rules and the manner in which water utility service is provided. The rule states that “[e]ach utility shall require that the customer shall not install any tree or branch connection in the service pipe” – not because the rule is intended to apply only to the utility (and not the customer) – but because water utility service (unlike gas and electric service) is delivered on to the customer’s property by means of a “customer service pipe” that is constructed and owned by customer. *See* Rule 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.”); Rule Puc 602.12 (““Service connection” means the point of connection between the customer's service pipe and the utility's service line.”). Rule 606.04 governing “Service Connections” would have no meaning if it did not apply to customers who own the service line.

The Commission erred by failing to explain and apply its own rules to this case.

II. THE STATE ARGUES AN INTERPRETATION OF RULE PUC 606.04 THAT THE COMMISSION NEVER MADE.

The State argues that Lakes Region is precluded the Commission's determination that a second meter could be required for the second dwelling 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 ... violates Puc 606.04." Page 9.

Lakes Region moved for rehearing in order to introduce evidence explaining the important operational reasons that the Commission's rules require separate service lines for each building or dwelling. *See Lakes Region's Motion for Rehearing*, Pages 7 – 8; *Appendix*, Pages 123 – 124. The Commission denied hearing on the ground that "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." *Order No. 26,037*, Page 5; *Brief*, Page 45. Lakes Region does not understand how the Commission could arrive at such a conclusion when Lakes Region's *Motion for Rehearing, supra*, contains specific citations to the Commission's rules governing water service. The Commission's statement that "Lakes Region offers no legal authority on the issue" is incorrect.

In its Brief, the State argues not that Lakes Region failed to raise any issues of law, but argues that Rule 606.04 that allows any customer (as Mr. Mykytiuk did in this case) to connect additional dwellings as long as they are connected behind the meter. *State's Brief*, Pages 9, 10 – 12. This interpretation suffers from several flaws: First, the Commission never interpreted or applied Rule Puc 606.04 in its decision. There is no evidence in the record that the Commission agrees or disagrees with the interpretation now being advanced by the State. It appears to Lakes

Region that the State is simply arguing for an interpretation of the rules to support the Commission's decision, where the Commission itself never applied its rules.

Second, the State's interpretation that a customer can simply connect a second dwelling behind the meter ignores that the rules prohibits both branched connections (before the meter) and tandem services (after the meter). Under the State's interpretation of the rule, a customer could add any number of apartments, duplexes or condominium units behind the meter without creating a tandem connection. In one of Lakes Region's *metered* systems, the customer would avoid paying the second base charge, which represents 75% of the charges.⁷ In an un-metered system,⁸ the additional dwelling(s) would receive service at no additional charge because the base charge is the only charge. The State's interpretation also creates operational problems which the Commission never heard because it denied rehearing.⁹

The State's interpretation conflicts with that the Commission's Water Division Director, Mark Naylor, who agreed that Mr. Mykytiuk had constructed a branched or tandem service to connect his second dwelling in violation of the Commission's rules. He testified as follows:¹⁰

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

⁷ See *Appendix*, Page 11. The base charge is \$270.52 (75%) of the total bill of \$359.94 for service rendered as of June 30, 2016. The metered consumption charge is only \$89.42 (25%). As noted in its Brief, Lakes Region's rates are designed in this manner because over 50% of the homes are vacation rentals which means that the bulk of the cost of its system is the cost to make the system available to meet peak demand during summer vacation.

⁸ See *Appendix*, Pages 81 & 82. Unmetered systems have only a base charge.

⁹ *Lakes Region's Motion for Rehearing*, Pages 7 – 8; *Appendix*, Pages 123 – 124.

¹⁰ See *Certified Record beginning at Page 387, Transcript beginning at Page 180.*

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).

Lakes Region and the Commission Staff had one interpretation of the Commission's water service rules. The customer had another. In such cases, it is critical for the Commission to make findings and determinations concerning the application of its rules in the record. The Commission failed in its duty to do so. Lakes Region therefore request that this Court vacate and remand the Commission's orders with instructions to interpret and apply the Commission's water service rules to the facts of this case.

III. CONCLUSION

For the foregoing reasons, Lakes Region requests that this Court remand the Commission's with instructions to interpret and apply Rule 606.04.

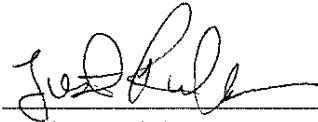
Respectfully submitted,

Lakes Region Water Company, Inc.,

By its Attorneys,

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Date: February 23, 2018



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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.



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