



**Town of Hampton  
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May 16, 2019

Ms. Debra A. Howland, Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301

NHPUC 17MAY19-11:08

Re: Docket No. DW19-065, Complaint of the Town of Hampton against Aquarion Water Company of New Hampshire

Dear Director Howland:

On April 16, 2019, the owner (Eversource Energy Service Company) of Aquarion Water Company of New Hampshire, Inc. filed a response to the Town of Hampton's Complaint that was filed on March 27, 2019. Because the Town of Hampton is dissatisfied with the response of the utility, this letter is sent to the Commission under Rule PUC 204.04(a).

Attorney Bersak's representation of Aquarion

Attorney Bersak is the "Chief Regulatory Counsel" for Eversource but claims in his letter on page 6 to represent Aquarion.

Eversource Energy did not become the owner of Aquarion Water Company of New Hampshire until 2017. See Commission's Secretarial Letter dated October 13, 2017 in Docket No. DW 17-114. The Complaint of the Town of Hampton, especially in Count I complains of overearnings by Aquarion, in violation of Order No. 25, 539 in DW 12-085 going back to the year 2013. The problem of Aquarion's negligent maintenance of its fire hydrants by not clearing snow therefrom as addressed in Count II also predates Eversource's acquisition of Aquarion.

Attorney Bersak's preliminary objections

On the first page of Attorney Bersak's letter, he claims that the Town's Complaint does not set forth any act claimed to be done in violation of any order of the Commission. This claim by Attorney Bersak is patently inaccurate. In Count I of the Town's Complaint it is cited in paragraph 1 that the Commission, after a contested hearing where competing experts testified, set a rate of return on equity in Order No. 25, 539 in DW 12-085. Count I goes on to complain that the rate of return on equity set in that Order has been violated by earnings that exceed the rates of return on equity and allowed rate of return ordered by the Commission in DW 12-085. See prayer A under Count I on page 3 of 8. In addition, in paragraphs 9 and 10, the Town complains that the return on equity achieved by Aquarion exceeds the 9.6% return on equity allowed by the

Commission and in paragraph 10 that the excessive earnings ought to be returned and rebated to Aquarion customers in order for the Commission's rulings in DW 12-085 to have any real meaning. If these allegations are deemed insufficient to claim that there has been a violation of Order No. 25, 539 in DW 12-085 as cited in paragraph 1, the Town of Hampton asks that the Commission allow it to amend its Complaint to so claim.

As for its Count II, the Town does allege that a "provision of law" is being violated in paragraph 5 on page 4, where this ancient rule is cited, as confirmed in Clapp v. Jaffrey, 97 N.H. 456, 459 (1952), that tax monies cannot be used for the advantage of private individuals, in this case the clearing of snow from Aquarion owned fire hydrants using Town personnel.

### Count I

Beginning on page 2 of Aquarion's Response per Attorney Bersak, the Utility complains that the Town does not allege that Aquarion has violated the rates set forth in the approved tariff. RSA 365:1 "Complaint Against Public Utilities" speaks in terms of violations of "any order of the commission," not mentioning the word "tariff". Likewise, the word "tariff" does not appear in N.H. RSA 365:29 Orders for Reparation, under which statutory remedy the Town of Hampton is seeking a rebate for earnings exceeding the rates of return on equity and allowed rate of return ordered by the Commission in Order No. 25, 539 after the contested hearing in DW 12-085.

Attorney Bersak goes on in page 3 to claim that the Town of Hampton in this Complaint is seeking to have the Commission adjust Aquarion's rates, which would violate a "longstanding policy against single-issue rate making."

The Town of Hampton is not seeking to have the Commission adjust Aquarion's rates. Indeed, the Town of Hampton is instead seeking to have Aquarion abide by and adhere to the rate of return on equity and allowed rate of return ordered by the Commission in Order No. 25, 539 after the contested hearing in DW 12-085. The Town of Hampton is thus not seeking an amendment of that Order but rather, compliance with it. The Town of Hampton is also not seeking a rate adjustment retroactive to 2013, but rather a rebate for the company's having exceeded the allowed return on equity and rate of return since 2013. This is not "retroactive rate making", as claimed by Attorney Bersak. Rather, it is a remedy consistent with the statutory provision for reparations under RSA 365:29. The Town certainly could not complain that there had been excessive earnings before those excessive earnings were achieved.

Nothing in the comments of the Commission Chairman at the December 3, 2018 pre-hearing conference necessitates that a new rate case be the only remedy for this excessive earnings. Indeed, it is not clear that a rate case in 2020 would afford a remedy for the past overearnings but rather that it would set a new rate of return on equity going forward based on the 2019 test year. These remarks do not constitute a ruling by the Commission that the sole remedy for Hampton would be another rate case. Instead, these comments addressed the Town's request of the Commission that it issue an order in Aquarion's 2019 WICA surcharge case (DW 18-161) to



compel Aquarion to respond to certain of the Town's data requests that Aquarion refused to respond to. See Transcript at pages 21-22.

Attorney Bersak's letter suggests that the recent settlement of the 2019 WICA surcharge is violated by the Town's pursuit of its Complaint now, rather than in the course of the rate case. However, Attorney Bersak ignores the fact that in the last substantive paragraph of the Settlement Agreement, the Town of Hampton reserved the right to pursue any complaint made at the December 3, 2018 pre-hearing conference in cases DW 18-054 and DW 18-161 not only in the 2020 rate case to be filed, but also in this current Complaint, citing its docket number.

Attorney Bersak's position that Part I, Article 23 of our State Constitution would be violated by the relief sought by the Town under RSA 365:29 is essentially a claim that this statute itself is unconstitutional. That is hardly the case as this is remedial legislation and is in place to provide a remedy for past collection of charges that result in violations of orders of the Commission. See Granite State Gas Transmission, Inc. v. State, 105 N.H. 454 (1964)(upholding the Commission's authority to order refunds).

At the prehearing conference on December 3, 2018 in DW 18-161, Attorney Marcia Brown for the Company began to explain (transcript at pages 29-30) why the Company's earnings were higher than what was allowed. If Attorney Bersak's position were upheld, the merits of the Company explanations would not be explored or investigated, which would be an unjust result.

## Count II

With regard to issue number 2, the fire hydrants, it should be noted that the Town of Hampton's complaint is grounded in the "ancient rule that tax monies cannot be used for the advantage of private individuals, especially where such individuals do not pay a fee for such service." [Paragraph 5 of Count II]. Clapp vs. Jaffrey, 97 N.H. 456 (1952). This claim is grounded in the New Hampshire Constitution, Pt. II, Article 5, as discussed in the cases of Opinion of the Justices, 103 N.H. 281, 283 (1961) and Opinion of the Justices, 102 N.H. 189, 190 (1959). N.H. Const., Pt. II, Art. 5<sup>th</sup> is a constitutional provision against taxation for the aid of private parties. The use of public funds –paying public employees, to clear snow from the private property of Aquarion, violates this Constitutional maxim.

The New Hampshire Constitution certainly trumps any "tariff provision or lack thereof." The claim under Count II is thus a claim of violation of a "provision of law" under RSA 365:1 – namely, the New Hampshire Constitution and the ancient rule cited in Clapp v. Jaffrey, *supra*.

On page 6 of Aquarion's submission, Attorney Bersak claims that the Town of Hampton entered into a settlement with Aquarion referencing Exhibit C in the Town's Petition to Intervene in Docket No. DW 17-114. The record of the Commission in DW 05-119, from which that Exhibit comes, will reveal that the particular issue addressed in Exhibit C was an issue settled

with the North Hampton Water Commissioners and not with the Town of Hampton. Again, however, the fact that this particular settlement did not address the issue of removal of snow from hydrants does not preclude that aspect of Aquarion's operation from being addressed via this Complaint for violation of the New Hampshire Constitution.

Respectfully submitted,  
Town of Hampton  
By: its Town Attorney

A handwritten signature in dark ink, appearing to read "Mark S. Gearreald", written in a cursive style.

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Mark S. Gearreald, Esq.

cc. Service List (via e-mail)  
Town Manager  
Board of Selectmen