



**NORTH CAROLINA  
PUBLIC STAFF  
UTILITIES COMMISSION**

June 16, 2020

Kimberley A. Campbell, Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4300

Re: Docket No. W-218, Sub 526 – Joint Response of the Public Staff and the Attorney General’s Office to Aqua’s Petition for Approval of an Order Allowing Deferral of Revenues in Lieu of Rates Under Bond or, Alternatively, Notice of Intent to Place Temporary Rates in Effect Subject to an Undertaking to Refund Pursuant to G.S. 62-135

Dear Ms. Campbell:

In connection with the above-captioned docket, I transmit herewith for filing on behalf of the Public Staff and the Attorney General’s Office this Joint Response of the Public Staff and the Attorney General’s Office to Aqua’s Petition for Approval of an Order Allowing Deferral of Revenues in Lieu of Rates Under Bond or, Alternatively, Notice of Intent to Place Temporary Rates in Effect Subject to an Undertaking to Refund Pursuant to G.S. 62-135.

By copy of this letter, I am serving all parties of record.

Sincerely,

/s/ Megan Jost  
Staff Attorney  
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MJ/cia

Enclosure

<b>Executive Director</b> (919) 733-2435	<b>Communications</b> (919) 733-5610	<b>Economic Research</b> (919) 733-2267	<b>Legal</b> (919) 733-6110	<b>Transportation</b> (919) 733-7766
<b>Accounting</b> (919) 733-4279	<b>Consumer Services</b> (919) 733-9277	<b>Electric</b> (919) 733-2267	<b>Natural Gas</b> (919) 733-4326	<b>Water</b> (919) 733-5610

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(Application). In its Application, Aqua also requested that the Notices to Customers attached to the Commission's scheduling order issued in the docket "include a specific provision which notifies customers that the Company intends to implement temporary rates under bond effective for service rendered on and after six months from January 30, 2020" (footnote omitted).

2. On January 21, 2020, the Commission issued its Order Establishing General Rate Case and Suspending Rates. By that Order, the declared the proceeding a general rate case pursuant to N.C. Gen. Stat. § 62-137 and suspended the proposed rates for up to 270 days pursuant to N.C.G.S. § 62-134.

3. On February 14, 2020, the Commission issued its Order Scheduling Hearings, Establishing Discovery Guidelines, and Requiring Customer Notice (Scheduling Order). As requested by Aqua in its Application, the Notices to Customers appended to the Scheduling Order included the following specific provision notifying customers of Aqua's intent to implement temporary rates under bond:

**RATES UNDER BOND**

Pursuant to N.C.G.S. § 62-134, Aqua has requested a final order be issued within six months from January 30, 2020, the proposed effective date of new rates. Otherwise, pursuant to N.C.G.S. § 62-135, Aqua intends to implement its proposed rates under bond on a temporary, interim basis subject to refund, effective for service rendered on and after six months from January 30, 2020, or July 31, 2020.

4. On March 19, 2020, in Docket No. M-100, Sub 158, the Commission issued its Order Suspending Utility Disconnections for Non-Payment, Allowing Reconnection, and Waiving Certain Fees (March 19, 2020 Order). The March 19, 2020 Order provides that, until the end of the State of Emergency declared by Governor Roy Cooper on March 10, 2020, due to coronavirus, or until further order of the Commission, public utilities, including water and wastewater utilities, must cease customer disconnections due to non-payment of utility bills, with limited exceptions, and waive the application of late fees incurred during the State of Emergency.

5. On March 31, 2020, Governor Cooper issued Executive Order 124. Section 1 of Executive Order 124 prohibits utilities, including public water and wastewater utilities, from terminating service of a residential customer for nonpayment, with limited exceptions. Section 1 further prohibits utilities from billing or collecting fees or interest for the late payment of bills becoming due after March 31, 2020.

6. On April 29, 2020, the AGO gave notice of intervention in the above-captioned docket on behalf of the using and consuming public pursuant to N.C.G.S. § 62-20.

7. On May 30, 2020, Governor Cooper issued Executive Order 142 which, among other things, extends the provisions contained in Section 1 of Executive Order 124 through July 29, 2020. Executive Order 124 further provides that utilities subject to the Commission's March 19, 2020 Order shall remain

subject to the terms of an order of the Commission that remains in effect following the expiration of Executive Order 124.

8. On June 11, 2020, Aqua filed its Petition for Approval of an Order Allowing Deferral of Revenues in Lieu of Rates Under Bond or, Alternatively, Notice of Intent to Place Temporary Rates in Effect Subject to an Undertaking to Refund Pursuant to G.S. 62-135. Aqua's Petition sets forth the following alternative requests for recovery of rates from July 30, 2020, and until the issuance of the Commission's final order in this docket: 1) recovery as a regulatory asset following the Commission's issuance of its final order of the revenue the Company would otherwise collect if it implemented rates under bond (deferred revenue procedure), or 2) implementation of temporary rates under bond pursuant to N.C.G.S. § 62-135.

9. Aqua describes its proposed deferred revenue procedure, which is its preferred alternative, as a "request [for] recovery for a regulatory asset which . . . is effectively the build-up of revenue that the Company would otherwise collect if it initiates its right to install rates under bond."

10. Aqua contends that its proposed deferred revenue procedure offers the benefits including a delay in the rate increase until a later point in time at which economic conditions will hopefully have improved, and "a reasonable opportunity for the Company to avoid a significant, unrecoverable revenue loss between July 30<sup>th</sup> and the date of the Commission's Final Rate Case Order."

11. As explained in further detail below, the Public Staff and the AGO assert that the Commission should deny Aqua's petition for its proposed deferred

revenue procedure. There is no statutory basis for the requested procedure; N.C.G.S. § 62-135 provides a remedy to address any financial hardship perceived by Aqua; it would violate the fundamental principle of utility ratemaking that customers be provided notice and a description of forthcoming rate changes; and it constitutes unlawful, retroactive ratemaking. Furthermore, the Public Staff and the AGO disagree with Aqua's assertion that its proposed deferred revenue procedure is a more beneficial alternative for ratepayers than temporary rates pursuant to N.C.G.S. § 62-135.

12. While Aqua asserts in its Petition that the Commission has a "longstanding practice concerning the use of deferral methodologies" and has approved the use of a regulatory asset "repeatedly over time," Aqua has provided no example analogous to its request, concedes that there is no precedent for the deferred revenue procedure, and fails to cite a legal authority in support of its request. Furthermore, the Company does not provide supporting financial information or request an accounting order, both of which are integral parts of a deferral request. The Commission should not approve a rate recovery method for which the Company has provided no authority or precedent, especially when the North Carolina General Assembly has provided a mechanism for temporarily adjusting rates during a general rate case proceeding via N.C.G.S. § 62-135.

13. N.C.G.S. § 62-135 allows a utility to place temporary rates into effect under bond upon the expiration of six months after the date such rates would have become effective if not suspended by the Commission pursuant to N.C.G.S. § 62-134. Unlike the Company's proposed deferred revenue procedure,

N.C.G.S. § 62-135 provides safeguards for ratepayers and procedural steps that a utility must take in order to implement temporary rates under bond. For example, N.C.G.S. § 62-135 requires notice to customers of a utility's intent to implement temporary rates under bond before the rates go into effect. In contrast, Aqua asserts in a footnote appearing on page 6 of its Petition that its "alternative [deferred revenue] proposal, if approved by the Commission, would not require notice to customers at this time. Notice of any approved customer surcharges would be given in the Commission-required Notice to Customers which will be attached to the Commission's Final Rate Case Order." The Company's recommendation would deprive customers of meaningful notice and the opportunity to be heard regarding its deferred revenue proposal. By the time the Commission issues its final rate case order, the customer and expert witness hearings will have already taken place and there will be no further opportunity for public comment. Moreover, because the rate differential produced by a surcharge to recover the regulatory asset will not be known until the Commission issues its final order, any notice customers receive of the Company's deferred revenue proposal before then would be illusory and, therefore, wholly inadequate.

14. In addition to notice to customers and opportunity to be heard, N.C.G.S. § 62-135 prescribes a procedure that must be taken by a utility before it is authorized to implement temporary rates that require the utility to weigh the benefits and risks of implementing temporary rates. These steps include the requirement to file a bond or undertaking associated with the rate change and the requirement to refund, with interest, any temporary rates later determined by the

Commission to be excessive. The Public Staff and the AGO assert that these requirements were put in place by the General Assembly to compel utilities to weigh the benefits and risks of implementing temporary rates and are indicative of the General Assembly's intent that the mechanism not merely hold utilities harmless if the Commission's final order is not issued within six months of the date new rates would have become effective. The Commission should not grant Aqua's request to implement a rate recovery mechanism that would shift all of the risk away from the utility and hold Aqua harmless.

15. The Commission should not give any weight to the Company's assertion that a delay in the Commission's issuance of a final order beyond July 30, 2020, constitutes a unique circumstance justifying a deferral mechanism. The Commission has issued final orders in rate cases more than six months after the date when new rates would have become effective notwithstanding an order of suspension. In the last general rate case filed by Aqua, in Docket No. W-218, Sub 497, the Commission issued its final order on December 18, 2018, 8 months and 12 days after April 6, 2018, the date new rates would have gone into effect if not suspended by the Commission.

16. The Commission should similarly give no weight to the Company's assertion that the deferred revenue procedure it requests is needed to address regulatory lag. As explained above, in N.C.G.S. § 62-135 the North Carolina General Assembly provided a mechanism for utilities wishing to adjust rates prior to the Commission's issuance of a final order. As the North Carolina Supreme Court stated in State ex rel. Utilities Com. v. Virginia Electric & Power Co., 206

S.E.2d 283, 291, 285 N.C. 398, 407, N.C.G.S. § 62-135 “was enacted for the purpose of minimizing the effect of the unavoidable time lag between the filing of an application by a utility company for an increase in its rates for service and the entry of an order of the Commission finding such increase proper.” To any extent the Company seeks to avoid rate lag, it can avail itself of the temporary rates under bond procedure set out in N.C.G.S. § 62-135 as it indicated it would in its Application.

17. The Company does not indicate in its Petition that it is experiencing cash flow or other circumstances that necessitate the implementation of new rates before the Commission issues a final order. Moreover, the Company’s deferred revenue proposal would not minimize the effect of the time lag between the filing of its application and the issuance of the Commission’s final order because the Company does not seek to recover new rates until after that time. Rather, the Company’s proposal would permit it to retroactively collect additional revenue over a time period predating the Commission’s final order, a practice for which the Company has not provided any statutory or other legal authority, and which the Public Staff and the AGO contend constitutes impermissible retroactive ratemaking. The North Carolina Supreme Court stated in Utilities Commission v. Edmisten, Atty. General, 291 N.C. 451, 468, 232 S.E. 2d 184, 194 (1977), that retroactive ratemaking “occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use,” and is generally improper. In its Petition, Aqua proposes a surcharge to recover the “incremental water and sewer

rate increases which are ultimately found reasonable by the Commission” between July 30, 2020, and the effective date of the rate increase granted by the Commission in its final order. Aqua has failed to explain why its proposed surcharge does not constitute “an additional charge [ ] made for past use of utility service . . .” and, thus, impermissible retroactive ratemaking. Id.

18. Aqua asserts several times in its Petition that delaying rate increases pursuant to its deferred revenue proposal is “clearly a more beneficial option for ratepayers,” among other reasons, because it would allow additional time for recovery from the economic impacts of coronavirus. The Public Staff and the AGO are sensitive to the likelihood that many of the Company’s customers are experiencing financial difficulties as a result of coronavirus that will probably persist for many months, if not longer. However, the Public Staff and the AGO believe that, instead of benefiting customers, Aqua’s proposal to delay the collection of revenue, combined with its decision to forego incremental rate increases through the WSIC/SSIC and temporary rates under bond procedure, will undoubtedly result in an unexpected, larger increase for customers at a future date when the current protections from termination of service and from the charging of fees and interest for the late payment of bills may have expired.

19. The coronavirus pandemic has resulted in high unemployment and extreme economic hardship for the citizens of North Carolina. In April, the seasonally adjusted unemployment rate increased to 12.2 percent statewide, up from 4.3

percent in March.<sup>1</sup> According to the reports provided by the Commission to the Governor, 3,658 Aqua residential accounts that became eligible to be disconnected in the month ending April 30 were not disconnected.<sup>2</sup> Despite economic conditions and the obvious difficulty some of Aqua's customers are experiencing with paying their bills under current rates, Aqua seeks increased rate revenue in the interim period between now and when rates go into effect, which in no way benefits customers, however it is structured. While the Public Staff and the AGO acknowledge that Aqua is legally entitled to implement temporary rates subject to an undertaking to refund pursuant to N.C.G.S. § 62-135, the Public Staff and the AGO believe all utilities should avoid increasing their rates during this time in which many of their customers are suffering financial hardships as a result of coronavirus that render them unable to pay their bills at current rates. Furthermore, given these circumstances, any refunds ordered by the Commission should include interest at a rate that the Commission determines to be just and reasonable, up to ten percent per annum, as allowed by N.C.G.S. § 62-130(e).

WHEREFORE, the Public Staff and the AGO respectfully request:

1. That the Commission deny the Company's request for approval of the deferred revenue procedure described in its Petition.

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<sup>1</sup> See <https://www.bizjournals.com/triangle/news/2020/05/22/north-carolina-unemployment-rate-april-2020.html>.

<sup>2</sup> See Executive Order 124 Monthly Data for April, 2020 Report to the Governor filed May 15, 2020, in Docket No. M-100, Sub 158.

2. That, in the event the Commission disagrees with the arguments of the Public Staff and the AGO with respect to the deferred revenue proposal, the Commission afford the Public Staff and the AGO the opportunity to provide recommendations on how the proposal should be implemented.

3. That, should the Company implement temporary rates subject to an undertaking to refund pursuant to N.C.G.S. § 62-135, the Commission require any refunds include interest at a just and reasonable rate of up to ten percent per annum.

4. That the Commission grant such other and further relief as it may deem just and proper.

This the 16th day of June, 2020.

PUBLIC STAFF  
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Executive Director

Dianna W. Downey  
Acting Chief Counsel

Electronically submitted  
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## **CERTIFICATE OF SERVICE**

I certify that I have served a copy of the foregoing Joint Response on all parties of record in accordance with Commission Rule R1-39, by United States mail, postage prepaid, first class; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 16th day of June, 2020.

Electronically submitted  
/s/ Megan Jost